

COURT FILE NO.

2501-06120

COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANT(S)

**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
SUNTERRA FOOD CORPORATION,
TROCHU MEAT PROCESSORS LTD.,
SUNTERRA QUALITY FOOD MARKETS
INC., SUNTERRA FARMS LTD.,
SUNWOLD FARMS LIMITED,
SUNTERRA BEEF LTD., LARIAGRA
FARMS LTD., SUNTERRA FARM
ENTERPRISES LTD., SUNTERRA
ENTERPRISES INC.**

DOCUMENT

**BOOK OF AUTHORITIES TO THE
BENCH BRIEF OF THE APPLICANTS
FOR THE APPLICATION TO BE HEARD
ON OCTOBER 29, 2026 AT 2:00 P.M.**

ADDRESS FOR SERVICE
AND CONTACT
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Clerk's
Stamp

TABLE OF AUTHORITIES

TAB	STATUTE
1.	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36 , at Sections 11.02(2) , 11.02(3)
TAB	CASE LAW
2.	<i>U.S. Steel Canada Inc. (Re)</i> , 2016 ONSC 3106
3.	<i>Mantle Materials Group, Ltd (Re)</i> , 2024 ABKB 19
4.	<i>Delta 9 Cannabis Inc (Re)</i> , 2025 ABKB 52
5.	<i>Wallace & Carey Inc. (Re)</i> , 2025 ABKB 750
6.	<i>Bellatrix Exploration Ltd. (Re)</i> , 2020 ABQB 809
7.	<i>Canwest Global Communications Corp. (Re)</i> , 2009 CanLII 70508 (ONSC)
8.	<i>Canadian Airlines Corp. (Re)</i> , 2000 CanLII 28202 (AB QB)
9.	<i>Philip's Manufacturing Ltd. Estate</i> , 1991 CanLII 226 (BCSC)
10.	<i>Comstock Canada Ltd. (Re)</i> , 2013 ONSC 6043
11.	<i>Timminco Limited (Re)</i> , 2014 ONSC 3393

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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 February 4, 2026

À jour au 4 février 2026

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to February 4, 2026. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of February 4, 2026 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 4 février 2026. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 4 février 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

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, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(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.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

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.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, es qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

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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 A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Paul Steep* and *Stephen Fulton*, for the Applicant U.S. Steel Canada Inc.

Alan Mark and *Gale Rubenstein*, for the Province of Ontario

Lily Harmer and *Kris Borg-Olivier*, for the USW, Local 1005 and Local 8782

Andrew Hatnay, *James Sayce* and *Barbara Walancik*, Representative Counsel for the non-unionized active employees and retirees

Michael E. Barrack, *Jeff Galway*, *Kiran Patel* and *Max Shapiro*, for United States Steel Corporation

Robert Staley, for the Monitor Ernst & Young Inc.

Mike Kovacevic, for the City of Hamilton

Patrick Riesterer, for Brookfield Partners

HEARD: April 29, 2016

ENDORSEMENT

[1] The applicant, U.S. Steel Canada Inc. (the “applicant” or “USSC”), sought an extension of the stay of proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”) to July 28, 2016, as the previous stay expired on April 29, 2016. At the conclusion of the hearing, the Court advised that the extension would be granted for written reasons to follow. This Endorsement sets out the written reasons for the Court’s determination.

[2] Section 11.02(3) of the CCAA provides that a court shall not make an order of the nature sought unless the applicant satisfies the court that circumstances exist that make the order appropriate and that “the applicant has acted, and is acting, in good faith and with due diligence.”

[3] These requirements are satisfied in the present circumstances. A sales and investment process (the “SISP”) is underway in Phase II, with a deadline for binding offers of May 13, 2016. There is reason to expect that one or more offers for the applicant to continue on a going-concern basis will be received. There is little doubt that the applicant is acting in good faith and with due diligence.

[4] The request for an extension of the stay under the CCAA to July 28, 2016 is supported by the chief restructuring officer of the applicant, the Monitor and the principal stakeholders of the applicant, save for United States Steel Corporation (“USS”) which seeks a shorter extension on conditions described below. Accordingly, there is no objection before the Court to an extension of the stay. The only issue is whether the extension should be to July 28 or May 26, as USS argues, and whether it should be on the terms sought by USS.

[5] USS argues that the stay should not be extended beyond a reasonable period for evaluation of the bids received on Phase II of the SISP. In addition, USS argues that the Court should mandate disclosure of the Phase II bids to all stakeholders, including USS, upon receipt. It also seeks an order that USSC prepare an updated liquidation analysis, based on the Phase II bids, to enable a comparison of the options available to the applicant after receipt of any offers under the SISP.

[6] The applicant has indicated that it proposes to develop a plan for disclosure of the bids received in the Phase II process of the SISP after the deadline. Clearly, such a plan will be necessary to reach a restructuring plan, given that the successful bidder will need to address the positions of the major stakeholders. It will also be necessary to address stakeholder concerns, including USS, regarding the impact of continuation of the SISP process on their positions. However, USSC opposes the imposition at this time of any requirement to provide USS with summaries, or copies, of any bids received on Phase II of the SISP, or of any requirement to prepare an updated liquidation analysis based on such bids.

[7] The Court’s determination to grant the extension of the stay requested by USSC to July 28, 2016 was based on the following considerations.

[8] First, in USSC’s estimation, the SISP currently underway will require a more extended period of time than is proposed by USS to complete negotiations with any successful bidder and to permit satisfaction of any conditions, including negotiations between such bidder and other affected stakeholders. This view is shared by the Union, the Province of Ontario and Representative Counsel. The applicant is proceeding under the CCAA. It is entitled to manage the restructuring process without restrictions which could jeopardize the prospects for a successful outcome.

[9] Second, there can be little doubt that a longer stay extension also furthers the prospect of a successful, going-concern restructuring, insofar as it provides greater certainty to USSC’s suppliers, its customers and its employees regarding the continued operations of the applicant.

[10] Third, as the Monitor points out, even if a going-concern restructuring were not feasible, a longer stay would be required to implement other arrangements to satisfy the claims of the creditors of the applicant, whether under the CCAA or otherwise.

[11] Fourth, USS submits that the Court should impose a shorter extension period to enable the Court to monitor the potential for value destruction to the detriment of the applicant's creditors during the extension period. In particular, USS suggests that there is a serious, ongoing material deterioration in its position both as a secured creditor as well as an unsecured creditor of USSC. I am not persuaded, however, that the evidence before the Court on this issue is sufficient to require a shorter extension period for the following three reasons.

[12] First, USS places considerable emphasis on EBITDA losses of the applicant since October 1, 2015 as evidence of the deterioration of its secured position. However, the evidence before the Court – in the form of the current liquidation analysis, which has been provided to the parties on a confidential basis – evidences a fully secured position to the extent of USS' secured claim.

[13] Second, USS argues that such historical EBITDA losses are suggestive of further losses that should be projected during the extension period. However, the Monitor's Twenty-Fifth Report, dated April 22, 2016, addresses the EBITDA situation in two respects which indicate a reasonable possibility that there will be no material adverse change in that position over the period of the proposed extension. In paragraph 34 of that Report, the Monitor indicates that the preliminary forecast EBITDA is estimated to be positive for Q2 2016. It also states that cumulative EBITDA at the end of Q2 2016 is estimated to be consistent with, or slightly exceed, the Independent Business Plan the applicant implemented in October 2015 and substantially better by the end of fiscal 2016.

[14] Third, while USS is also a substantial unsecured creditor, it will not be the only significant unsecured creditor affected by the applicant's failure to achieve a successful restructuring if that were to occur. The other significant unsecured creditors in such event – principally, the Province of Ontario, the Union and the non-unionized employees and retirees – will have very substantial claims as well. As noted above, these creditors support the extension and oppose the additional relief sought by USS. Moreover, in the event of an unsuccessful restructuring, it is not realistic to expect that there will be an expeditious process for satisfying the claims of the applicant's creditors given the issues of quantum and priority of security that will be disputed.

[15] For the foregoing reasons, I conclude that a stay to July 28, 2016 is appropriate in the circumstances. I also conclude that it is not appropriate to impose the conditions sought by USS requiring the delivery of information by USSC for the following four principal reasons.

[16] First, and most important, at the present time, as mentioned, there is no clarity regarding the nature and number of bids for USSC or its assets that may be received under the SISP. That information will drive a determination not only of the manner in which USSC proceeds with respect to a restructuring plan, but also of the appropriate involvement of the other stakeholders, including USS, and the nature of disclosure that should be made to those stakeholders. It is therefore premature and unwise to mandate any particular disclosure at this time without being able to assess the consequences of such disclosure for the applicant's prospects for a successful restructuring

[17] Second, as mentioned above, the applicant has indicated that it proposes to develop a plan for disclosure of the bids received in the Phase II process of the SISP that is consistent with

furthering the prospects for a successful restructuring. Given that intention, I think it is more appropriate to address disclosure issues after the parties have reviewed, and if possible informally negotiated, a proposed USSC plan for the involvement of stakeholders that USSC has developed based on the actual results of the SISP rather than to impose conditions based on speculation as to the likely outcome of the SISP.

[18] Third, for the reasons set out above, the USS concern for the potential for value destruction during the stay extension period is not a sufficient basis for ordering the immediate preparation of a new liquidation analysis.

[19] Fourth, USS is effectively seeking to amend the SISP order of the Court, dated January 12, 2016 (the “SISP Order”), to mandate disclosure of the Phase II bids that was not provided for in that Order. Instead, the SISP Order effectively left it to the applicant to fashion appropriate disclosure based on the results of the Phase II process, as the applicant’s obligations are limited to consultation with the stakeholders. In particular, there is no obligation on USSC to disclose offers received under Phase II, unlike the obligation to disclose letters of interest received under Phase I of the SISP. Any motion to amend the SISP Order should be brought on a basis that is informed by changed circumstances from those contemplated at the time of the SISP Order. At a minimum, that requires completion of Phase II of the SISP.

[20] Based on the foregoing, the relief sought by USS in its Notice of Objection dated April 15, 2016, in particular the relief sought in paragraph 24 thereof, is denied.

Wilton-Siegel J.

Date: May 10, 2016

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Court of King's Bench of Alberta

Citation: Mantle Materials Group, Ltd (Re), 2024 ABKB 19

Date: 20240110
Docket: B201 965622; 2301 16114
Registry: Calgary

In the Matter of the Bankruptcy and Insolvency Act,
RSC 1985 c B-3, as Amended

-and-

In the Matter of the Bankruptcy of
Mantle Materials Group Ltd

In the Matter of the Companies' Creditors Arrangement Act,
RSC 1985, c C-36, as Amended

-and-

In the Matter of the Compromise or Arrangement
of Mantle Materials Group, Ltd and RLF Canada Holdings Ltd

Reasons for Decision
of the
Associate Chief Justice
D.B. Nixon

I. Introduction

[1] This is an application by Mantle Materials Group, Ltd. ("**Mantle**") to convert their action under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") to a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"). The conversion

itself is not opposed, however, Travelers Capital Corp. (“**Travelers**”) has made applications both to compel responses to certain undertakings and questions as well as an application to enhance the powers of the proposed monitor FTI Consulting Canada Inc (“**FTI**”).

[2] In the following reasons I will first address the conversion application by Mantle before turning to the applications brought by Travelers.

II. Background

[3] Mantle is a wholly owned subsidiary of RLF Canada Holdings Limited (“**RLF Canada**”). RLF Canada itself is a wholly owned subsidiary of Resource Land Fund V, LP (“**RLF V**”), a Delaware limited partnership. RLF V is private equity fund managed by RLH LLP.

[4] Mantle was incorporated in British Columbia on July 17, 2020, and was continued in Alberta under the *Business Corporations Act*, RSA 2000, c B-9, as amended on April 30, 2021. It was amalgamated on May 1, 2021, with JMB Crushing Systems Inc (“**JMB**”) and its wholly owned subsidiary 2161889 Alberta Ltd (“**216Co**”).

[5] RLF Canada is a Colorado corporation incorporated on July 8, 2020, under Title 7, Corporations and Associations of the 2022 *Colorado Code*. The sole activity of RLF Canada is to hold all the shares in the capital of Mantle.

[6] Mantle’s business involves the extraction, processing and selling of gravel and other aggregates (“**Aggregate**”) from pits in Alberta (“**Aggregate Pits**”). It supplied Aggregate to service companies in the oil and gas sector, construction firms and municipalities. Mantle operates 14 Aggregate Pits on public land pursuant to surface material leases issued by Alberta Environment and Protected Areas (“**AEPA**”).

[7] Following the acquisition of its business and property from the CCAA proceedings involving JMB and 216Co, Mantle was responsible for the environment protection orders (“**EPOs**”) issued by the AEPA on the Aggregate Pits. These EPOs addressed the end-of-life reclamation steps to be taken.

[8] Mantle experienced operational problems and was burdened with excessive debt inherited from the JMB CCAA proceedings and incurred in the period following the acquisition of the gravel-producing properties. Mantle’s difficulties were compounded by the significant reclamation obligations it was required to complete to satisfy the EPOs. On July 14, 2023, Mantle filed a notice of intention (“**NOI**”) to make a proposal under s 50.4(1) of the *BIA* naming FTI as the proposal trustee.

[9] Mantle now seeks to convert the proposal proceedings under the *BIA* into a CCAA proceeding because the statutory time periods provided for under the *BIA* are not flexible enough to address its reclamation liabilities.

III. Issues

[10] In the present application I must decide the following:

A. Should Mantle’s application to convert from the *BIA* to the CCAA be approved?

i. Is Mantle a company under the definition of the CCAA?

- ii. Is a conversion allowable under section 11.6(a) of the *CCAA*?
- B. Should the proposed extension to the stay of proceedings be granted?
- C. Should the charges be approved?
- D. Should the stay be extended to RLF Canada?
- E. Should FTI be appointed as monitor?
- F. Should the monitor's powers be enhanced?
- G. Should Mantle be compelled to respond to certain undertakings and questions posed by Travelers?

IV. Analysis

A. Should Mantle's application to convert from the *BIA* to the *CCAA* be approved?

[11] Given the nature of this application, this question engages the following inquiries.

i. Is Mantle a debtor company under the definition of the *CCAA*?

[12] Under the *CCAA* section 2(1), a company is defined as:

[...] any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

[13] Given this definition, it is clear that Mantle is a company for the purposes of the *CCAA*.

[14] Further, under section 3(1), the *CCAA* applies to a debtor company. A debtor company has a few definitions under section 2(1), including that it is "any company that (a) is bankrupt or insolvent".

[15] Although the *CCAA* does not define what is meant by insolvent, this can be derived from the definition of "insolvent person" under section 2(1) of the *BIA* which states:

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[16] A more lenient definition of insolvent for the purposes of the CCAA has also been developed in *Stelco Inc (Re)*, 2004 CanLII 24933 (ONSC) at para 26 wherein Justice Farley noted:

[...] a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

[17] Mantle has acknowledged its insolvency because it filed the NOI to commence the proposal proceedings. Further, based on its books and records, as at June 20, 2023, Mantle's liabilities to its creditors amounted to approximately \$16,046,272.21 whereas its aggregate book value of its assets amounted to approximately \$7,452,838. Given that there is no evidence before the Court to suggest that the fair market value of the assets exceeds the book value, I accept the book value for purposes of the solvency test. I do so because I have no other facts on which to rely.

[18] Based on the evidence and my analysis of the law, I find that Mantle is a debtor company for the purposes of the CCAA.

ii. Is a conversion allowable under section 11.6(a) of the CCAA?

[19] Section 11.6 of the CCAA sets out the process by which a court may convert matters from the BIA to the CCAA:

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part;

[20] The factors that a court should consider in determining whether it is appropriate to continue a BIA matter are set out in *Clothing for Modern Times*, 2011 ONSC 7522 ("*Modern*") at paragraph 9:

(a) The company has satisfied the sole statutory condition set out in section 11.6(a) of the CCAA that it has not filed a proposal under the BIA;

(b) The proposed continuation would be consistent with the purposes of the CCAA; and,

(c) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the CCAA requires accompany any initial application under the Act.

[21] I will address each of these three factors in sequence. I have restated the factors as questions.

a. Has Mantle filed a proposal under the BIA (the "First Factor")?

[22] Mantle has not filed a proposal under the BIA. Based on the evidence and my analysis of the law, I find that Mantle has satisfied the First Factor.

b. Is the proposed continuation consistent with the purposes of the CCAA (the “Second Factor”)?

[23] An issue in the present case is whether the CCAA is an appropriate vehicle for Mantle. As acknowledged by its counsel, the goal in this instance is not restructuring. Rather, the underlying goal in this case is a liquidation of Mantle’s business with a focus on the reclamation of its liabilities.

[24] The notion of liquidation being permissible under the CCAA was considered by the Supreme Court in **9354-9186 Québec inc v Callidus Capital Corp**, 2020 SCC 10 [“*Callidus*”]. The discussion by the Court in *Callidus* is a helpful guide to determining whether the continuation is consistent with the purposes of the CCAA. The Court highlights the following (footnotes excluded):

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an “en bloc” sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, “Liquidating CCAAs: Discretion Gone Awry?”, in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 1998 CanLII 14907 (ON SC), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

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

[45] However, since s. 36 of the CCAA came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company’s assets outside the ordinary course of business. Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the CCAA, and that it may be a means to “raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business” (p. 147). Other commentators have observed that liquidation can be a “vehicle to restructure a business” by allowing the business to survive, albeit under a

different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the CCAA in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

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

[25] The above discussion is helpful particularly in relation to the reclamation obligations as set out in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*“Redwater”*]. These reclamation obligations are the remedial objectives of Mantle. Mantle has described its intentions if continued under the CCAA as follows:

- (a) complete the remaining Major Reclamation Work;
- (b) perform the Assessment Period Reclamation Work;
- (c) complete the collection of Mantle's accounts receivable;
- (d) complete the sale, if possible, of the Active Aggregate Pits to purchasers who assume the Reclamation Liabilities associated therewith, and if such sales are not possible, provide for such Reclamation Liabilities to be addressed;
- (e) complete the sale of the remaining assets of Mantle; and
- (f) once reasonable reserves are provided for, make distributions to Mantle's creditors.

[26] It bears repeating here that the continuation under the CCAA is not contested by any of the parties. Further, no other options for what to do with Mantle and its assets have been proposed.

[27] As noted by the proposed monitor (being FTI), proceeding under the CCAA would be the only available means by which the reclamation obligations and the sale of the active pits could be completed. I also note that FTI supports the continuation of the BIA proceedings under the CCAA.

[28] As noted above, one of the motivations underlying the conversion of the Mantle proceedings from the *BIA* to the *CCAA* concerns the inflexible timing issues legislated in the *BIA*. Under the current timelines stipulated in the *BIA*, Mantle would be adjudged bankrupt by the expiration of the period within which it may file a proposal, the ultimate deadline being January 13, 2024. As discussed in *Callidus*, the appropriateness of the *CCAA* for liquidation depends on the facts of each individual case, and these factors are particularly pertinent.

[29] Based on the evidence and my analysis of the law, I find that Mantle has satisfied the Second Factor. I make this determination because liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*: *Callidus* at para 45. This is particularly the case in these circumstances because the ultimate remedial objective of Mantle is to address its reclamation obligations.

c. Has Mantle filed evidence which serves as a reasonable surrogate for the information which section 10(2) of the CCAA requires accompany any initial application under the Act (the “Third Factor”)?

[30] Finally, under section 10(2) of the *CCAA*, Mantle must provide:

- (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.

[31] This material was provided as exhibits attached to the affidavit of Byron Levkulich, dated November 27, 2023. Mr. Levkulich is a director of Mantle. There are also cash-flow statements attached to the fourth report of the proposed monitor FTI.

[32] Based on the evidence and my analysis of the law, I find that Mantle has satisfied the Third Factor.

[33] Based on my review of the evidence and my analysis of the law, I find Mantle has satisfied the three factors forming the test in *Modern*. As a result, it is appropriate to continue this matter from the *BIA* to the *CCAA*.

B. Should the proposed extension to the stay of proceedings be granted?

[34] Under section 11.02(2) of the *CCAA*, on application from a debtor company other than during an initial application, a court may stay for any period considered necessary all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph 1(a) of section 11.02.

[35] On such an application, under section 11.02(3) of the *CCAA*, the burden of proof is on the applicant to satisfy the court that circumstances exist to make the order appropriate, and the applicant has acted, and is acting, in good faith and with due diligence.

[36] Based on my review of the evidence and my analysis of the law, I find it appropriate to grant the proposed extension to the stay of proceedings against Mantle until January 20, 2024. I make this determination because I find that this is the best method by which Mantle can

accomplish the liquidation while continuing its reclamation work and attempting to sell the Aggregate Pits.

[37] In making this determination, I also find that Mantle has been acting in good faith and with due diligence. This finding is supported by the evidence that the proposed monitor is also of the view that Mantle has been acting in good faith and with due diligence. Further, the proposed monitor supports this extension.

C. Should the charges be approved?

[38] Mantle seeks to take up and continue the restructuring charges including an administration charge, the interim financing charge, and the directors & officers (“D&O”) charge that were granted on August 15 and August 28 from this Court by Justice Feasby (collectively, the “**Restructuring Charges**”): see *Re Mantle Materials Group, Ltd*, 2023 ABKB 488 [“**Mantle ABKB #1**”]. That decision was upheld by the Alberta Court of Appeal in *Mantle Materials Group, Ltd v Travelers Capital Corp*, 2023 ABCA 302 [“**Mantle ABCA #1**”] and *Mantle Materials Group, Ltd v Travelers Capital Corp*, 2023 ABCA 339 [“**Mantle ABCA #2**”].

[39] Section 11.52 of the CCAA provides the Court with jurisdiction to make an order as follows:

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, 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

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor’s duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[40] A non exhaustive list of factors to consider in determining the appropriateness of such charges is set out at paragraph 54 of *Canwest Publishing Inc (Re)*, 2010 ONSC 222:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

[41] I reiterate that the Restructuring Charges were initially approved by Justice Feasby under the BIA. Mantle has asserted that these charges should be taken up and continued under the

CCAA proceeding. It makes that assertion because the Restructuring Charges have already been approved by Justice Feasby. Further, Mantle asserts that it is warranted in this case because: (i) the proceedings will require the extensive involvement of professional advisors; (ii) the beneficiaries of the administrative charge will provide essential legal and financial advice throughout the CCAA proceedings; (iii) there is no unwarranted duplication of roles; (iv) the proposed administrative charge ranks in priority to the interests of the secured creditors who had received prior notice of Mantle's application for the charge and an opportunity to make submissions regarding same; and (v) the proposed monitor has indicated that the quantum of the proposed administrative charge is reasonable in the circumstances. In my view, these are all valid points, and I accept them for purposes of this analysis.

[42] Based on my review of the evidence and my analysis of the law, I find that it is appropriate for Mantle, in the context of the CCAA proceedings, to take up and continue the administration charge under section 11.52 of the CCAA.

[43] The authority to grant an interim financing charge is provided by section 11.2 of the CCAA and the factors are set out as follows:

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

[44] Mantle argues this interim financing charge is necessary because: (i) it allows the entity to continue operating in the ordinary course of business and to service associated professional fees in the period up to the week of March 1, 2024, (which date is based on how long the interim lending charge was estimated to be required for interim operational purposes); (ii) it provides the ability to draw on the interim financing facility which will allow Mantle to fund the reclamation work during the CCAA proceedings; and (iii) the interim financing charge will preserve the value and going concern operations of Mantle and enhance the probability of maximizing the amounts that will be available for distribution to the secured creditors, after the reclamation liabilities have been addressed. I also note that FTI supports the interim financing agreement and interim financing charge because it views it as being appropriate and limited to what is reasonably necessary in the circumstances. In my view, these are all valid points, and I accept them for purposes of this analysis.

[45] Based on my review of the evidence and my analysis of the law, I find that it is appropriate under 11.2 of the CCAA for Mantle to take up and continue the interim financing charge in the context of the CCAA proceeding.

[46] Finally, section 11.51 of the CCAA provides the Court with the jurisdiction to grant the D&O charge:

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

[47] The factors to be considered here are set out in *Jaguar Mining Inc (Re)*, 2014 ONSC 494:

[45] With respect to the Director's Charge, the court must be satisfied that:

- (i) notice has been given to the secured creditors likely to be affected by the charge;
- (ii) the amount is appropriate;
- (iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
- (iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

[48] Mantle argues that it would be appropriate in this case to take up and continue the D&O charge because: (i) the secured creditors have been notified of this application; (ii) the proposed monitor is of the view that D&O charge is reasonable and appropriate in the circumstances; (iii) the D&O charge will not provide protection in the event of a Mantle director or officer commits gross negligence or wilful misconduct; and (iv) it is proposed that the D&O charge will only be engaged if the D&O insurance fails to respond to a claim. In my view, these are all valid points, and I accept them for purposes of this analysis.

[49] Based on my review of the evidence and my analysis of the law, I find that it is appropriate under section 11.51 of the CCAA for Mantle, in the context of the CCAA proceedings, to take and continue the D&O charge.

[50] In summary, based on my review of evidence and my analysis of the law, I find that the Restructuring Charges granted by Justice Feasby in the August 15 and 28 orders be taken up and continued by Mantle in the context of the CCAA proceedings.

D. Should the stay be extended to RLF Canada?

[51] Mantle is a wholly owned subsidiary of RLF Canada. Notwithstanding its name, RLF Canada was incorporated in Colorado.

[52] Mantle submitted that the stay of proceedings should also be extended to RLF Canada. Mantle argues that this is necessary because the management of RLF Canada is the same as the management of Mantle.

[53] Pathward National Association (“**Pathward**”) is a secured creditor of Mantle. Pathward has filed court proceedings against RLF Canada.

[54] Mantle asserts that if Pathward is able to exercise remedies against the shares of Mantle, it would divert time and attention of Mantle’s management to respond to those remedies. Furthermore, Mantle argues that this would undermine Mantle’s ability to address its reclamation obligations. As a result, Mantle argues the extension of the stay of proceedings to RLF Canada is appropriate in the circumstances.

[55] This is opposed by Travelers and Pathward. To support their position they highlight the wording of section 11.04 of the CCAA, which reads as follows:

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

[56] To further support their position, Travelers and Pathward reference the decision of Justice Dario in *Northern Transportation Company Limited (Re)* [“**Northern Transportation**”] and James D. Gage and Trevor Curtis’s “Staying Guarantees by Non-Debtors and Section 11.04 of the CCAA”, 2022 20th Annual Review of Insolvency Law [“**2022 ARIL Paper**”] to argue it would be inappropriate in the present case to extend the stay of proceedings to RLF Canada.

[57] The 2022 ARIL Paper acknowledges that the proper interpretation of section 11.04 of the CCAA has been the subject of varying interpretive approaches, from the narrow to the broad, for what is implied by the exception. I note that in *Northern Transportation* at paragraph 101, the decision leaves open that in certain exceptional circumstances it would be appropriate to grant a stay of proceedings that might appear contrary to section 11.04 of the CCAA.

[58] Of particular note is the conclusion in the 2022 ARIL Paper (at page 64) that:

On balance, the factors seem to weigh in favour of a narrow interpretation of section 11.04 that would maintain the CCAA court’s flexibility to grant stays of proceedings that are necessary to facilitate the restructuring of the debtor company while preserving the court’s discretion to refuse to extend stays to issuers of letters of credit and guarantors if it is not appropriate to do so in the circumstances of a particular case. It that regard, it would be reasonable to expect that courts may draw a distinction between the treatment of letters of credit and guarantees in light of different policy and other considerations relating to them depending on their terms.

[59] The critical fact in this case are the existing reclamation obligations. Given the judicial direction issued in *Redwater*, the outstanding work associated with those reclamation obligations must be given priority. That environmental responsibility constitutes an exception which must be recognized in these circumstances.

[60] Based on my review of evidence and my analysis of the law, I find it is appropriate to extend the stay of proceedings to RLF Canada. I make this determination because, as highlighted

at paragraph 13 of *Mantle ABCA #2*, it is necessary to ensure that there is not further delay occurring for Mantle to complete its reclamation work.

E. Should FTI be appointed as monitor?

[61] Under section 11.7(1), the CCAA requires that the Court appoint a person to monitor the business and financial affairs of the company. This person must be a trustee within the meaning of subsection 2(1) of the *BIA*.

[62] FTI has been proposed as the monitor for these proceedings and this has not been opposed by any of the parties. Nor do any of the restrictions set out in section 11.7(2) of the CCAA apply in the present circumstances. Further, FTI is quite familiar with Mantle's financial records and business model as noted in FTI's reports.

[63] Based on my review of evidence and analysis of the law, I find that FTI should be appointed as monitor. I make this determination because of the supporting evidence in the preceding paragraph. I also take judicial notice of the fact that FTI has often been appointed a monitor by this Court in many proceedings that are analogous to the circumstances of this case.

F. Should the monitor's powers be enhanced?

[64] Travelers has made an application to enhance the monitor's powers for these CCAA proceedings. Travelers' argument is that Mantle has essentially finished most of the reclamation work and what remains is largely minor.

[65] Mantle opposes this application arguing that its management is the best fit to conduct the reclamation work and address its remaining reclamation liabilities. FTI, correctly in my view, takes no position on this question.

[66] The jurisdiction to enhance FTI's powers as a proposed monitor is derived from section 11 of the CCAA. That provision provides broad discretionary powers that allow this Court to "make any order that it considers appropriate in the circumstances". Similarly, section 23(k) of the CCAA allows this Court to direct the monitor to "carry out any other functions in relation to the company...".

[67] Travelers submits that there is a limited amount of work left to be done in the reclamation work, and that allowing Mantle's management to proceed with this work would be more costly than FTI if controlled the process. Travelers is of the view that FTI can handle these issues on its own.

[68] Travelers further argues that the Mantle management have a personal interest in this matter and that this might put them into conflict with their obligations throughout the CCAA proceedings.

[69] In contrast, Mantle argues that its management is best suited to this task and that there remain several unknown factors that might require more expertise. It also argues that the reclamation work left to accomplish is not as limited as suggested by Travelers.

[70] Mantle asserts that by the time FTI would hire the professionals needed to finish the reclamation work and to deal with other issues that may arise, it could well be as expensive if not more so. It also argues that it could take more time to accomplish.

[71] Mantle highlights that a member of its management team, Mr. Cory Pichota, has significant industry knowledge and experience in managing the reclamation of gravel and

aggregate pits. It also asserts that he has specific knowledge of Mantle's business, particularly in respect of its active and inactive Aggregate Pits. Mr. Pichota is noted as being key to the negotiations that have been ongoing, and this was agreed to by Mantle, Travelers and FTI.

[72] In his supplemental affidavit, Mr. Levkulich stated that Mr. Pichota is not prepared to work with FTI. Whether this will be the case is a matter of speculation because this assertion by Mr. Levkulich does not equate to evidence. I make this comment because we do not have sworn evidence from Mr. Pichota himself concerning the issue of whether he would work with FTI if the monitor's powers were enhanced.

[73] It was clear during oral submissions that everyone involved was of the view that Mr. Pichota is critical to the efficient progression of the reclamation efforts. To emphasize the point, FTI was clear in its oral submissions that the reclamation work would be much more efficient if Mr. Pichota is involved.

[74] Based on my review of the evidence and analysis of the law, I dismiss Travelers application to enhance the monitor's powers. I make this determination because the burden is on Travelers to establish that this will be a more effective approach. Given the evidence, I am of the view that the current management of Mantle would be best suited to dealing with the reclamation liabilities at issue here and to continue under the CCAA proceedings. I make this determination because the evidence supports the fact that Mr. Pichota is key to the reclamation work required in this case and Travelers has provided no evidence: (i) that FTI would be able to retain him if the enhanced powers were granted; or (ii) that FTI would be able to retain any other person who could effectively and efficiently advise on reclamation matters if the enhanced powers were granted.

[75] As a final comment, I acknowledge the comment during argument from Travelers to the effect that "[w]e have not attempted to sidestep the effect of **Redwater**. We don't think that decision has any relevance." I also acknowledge the further assertions of Travelers that it "... has not sidestepped or tried to avoid that decision in **Redwater**." While we can debate that point, I will simply highlight the careful reasoning of Justice Feasby in **Mantle ABKB #1** concerning the importance of end-of-life environmental obligations in this context as set out by **Redwater**, **Manitok Energy Inc (Re)**, 2022 ABCA 117 and **Orphan Well Association v Trident Exploration Corp**, 2022 ABKB 839. This was confirmed in the reasoning of **Mantle ABKA #1**. Given the development in the law, I am of the view that **Redwater** is relevant in this case concerning Mantle. The boundaries of the **Redwater** decision continue to be defined by the developing case law. In conclusion, to ensure that these environmental obligations are dealt with properly, I find that Mantle remains best suited to be in charge of the CCAA proceedings.

G. Should Mantle be compelled to respond to certain undertakings and questions posed by Travelers?

[76] Travelers has made an application to compel answers to certain undertakings and questions. *Rule 5.25 of the Alberta Rules of Court* addresses this issue. That *Rule* reads as follows:

- 5.25 (1) During questioning, a person is required to answer only
- (a) relevant and material questions, and
 - (b) questions in respect of which an objection is not upheld under subrule

(2) A party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons:

- (a) privilege;
- (b) the question is not relevant and material;
- (c) the question is unreasonable or unnecessary;
- (d) any other ground recognized at law.

[77] What is relevant and material is defined in *Rule* 5.2 as follows:

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

- (a) to significantly help determine one or more of the issues raised in the pleadings, or
- (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

(2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

[78] For reference, I am referring to the questions as set out in Schedule A of Travelers Application to Compel Answers filed on December 14, 2023.

[79] I find that questions m); n); u); v); and bb) are material and relevant and should be answered by Mantle. I make this determination because they are appropriately focused on questions of the liabilities and indemnities related to Mantle.

[80] I find that questions w) and x) should be answered by Mantle but only in regards to whether there is an ability to be indemnified from personal liability under the EPOs from Mantle, and not in regards to whether that ability exists regarding RLF Canada Lender, RLF V or RLH LLC.

[81] I find that the other questions do not have to be answered by Mantle. I make this determination because I am not satisfied that the questioning surrounding the other companies which are not parties to this application are relevant to these proceedings.

[82] I also find that Undertaking 30 must be answered by Mantle because it is relevant and material. However, it is stated in Mantle's responding brief to the Application to Compel Answers, filed on December 17, 2023, at paragraph 17 that this draft document was circulated to Travelers on December 8, 2023. If this is the case, then Mantle has already answered the undertaking.

[83] I find that Undertakings 1 and 2 need not be answered. I make this determination because I am not satisfied that the undertakings requiring copies of reporting on loans between RLF Canada Lender and RLF V are relevant to these proceedings because these bodies are not parties to the present application.

V. Conclusions

[84] In conclusion, I turn to address the issues that were frame above. Based on the evidence before me and my analysis of the law, I direct as follows.

- a. Mantle's proposal under the *BIA* can be converted into a *CCAA* proceeding.
- b. The stay of proceedings is extended until January 20, 2024.
- c. The restructuring charges set out in Justice Feasby's August 15, 2023 and August 28, 2023 orders are to be taken up and continued by Mantle in the context of the *CCAA* proceedings.
- d. The stay of proceedings is extended to RLF Canada.
- e. FTI is appointed as monitor.
- f. Travelers' application to enhance the monitor's powers is dismissed.
- g. Mantle is compelled to answer m); n); u); v); and bb). Mantle is also compelled to answer questions w) and x) insofar as it relates to Mantle's ability to indemnify Mr. Levkulich and Mr. Aaron Patsch for personal liabilities under the EPOs. Mantle is not required to answer the remaining questions. As a final matter, Mantle is compelled to answer Undertaking 30 insofar as that has not already been answered by the draft document circulated on December 8, 2023.

Heard on the 18th day of December 2023.

Dated at the City of Calgary, Alberta this 10th day of January 2024.

D.B. Nixon
A.C.J.C.K.B.A.

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Court of King's Bench of Alberta

Citation: Delta 9 Cannabis Inc (Re), 2025 ABKB 52

Date: 20250129
Docket: 2401 09688
Registry: Calgary

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

In the Matter of the Compromise or Arrangement of Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc., and Delta 9 Cannabis Store Inc.

Corrected judgment: A corrigendum was issued on March 6, 2026, the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction and Background

[1] “**Delta 9**”, comprised of Delta 9 Cannabis Inc (**Delta 9 Parent**), Delta 9 Logistics Inc, Delta 9 Lifestyle Cannabis Clinic Inc, Delta 9 Cannabis Store Inc and Delta 9 Bio-Tech Inc (**Bio-Tech**), is a vertically integrated group of companies in the business of cannabis cultivation, processing, extraction, wholesale distribution, retail sales and business to business sales.

[2] In recent years, Delta 9 has suffered losses due to a number of factors, including intense competition; over-supply of cannabis products leading to significant price compression; illicit supply of cannabis; burdensome regulatory costs; significant capital required for new product development; increased financing costs due to changing capital market investor sentiment driving investment away from the cannabis sector; and higher interest rates. By March 2024, Delta 9 was in breach of covenants owed to its secured creditor and, in May 2024, it received a demand and notice of intention to enforce security under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[3] Delta 9 then sought relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (CCAA). On July 15, 2024, the Court granted an initial order (**Initial Order**) under the CCAA providing, among other things, a stay of proceedings against Delta 9 (**Stay**).

[4] On July 24, 2024, on the “comeback” application with respect to the Initial Order, the Court granted an Amended and Restated Initial Order (**ARIO**), a Claims Procedure Order and an order approving a sale and investment solicitation process (**SISP**) with respect to Bio-Tech (**Bio-Tech SISP Order**). The ARIO approved, among other things, the appointment of a Chief Restructuring Officer, Delta 9 group borrowing funds from 2759054 Ontario Inc operating as Fika Herbal Goods (**Fika** or **Plan Sponsor**) subject to an approved interim financing term sheet, among other things.

[5] On September 11, 2024, the Court granted an order, among other things, extending the Stay period under the ARIO to November 1, 2024 and approving an amendment to the Interim Financing Term Sheet between the Delta 9 group and Fika.

[6] On November 1, 2024, I granted a further extension order extending the Stay to January 31, 2025, approving a further amendment to the interim financing, increasing the financing charge, and amending a claims procedure order to allow the court-appointed monitor (**Monitor**) to accept late claims.

[7] On November 8, 2024, I dismissed Fika’s application seeking, among other things, a creditors’ meeting for a proposed plan of arrangement: *Delta 9 Cannabis Inc (Re)*, 2024 ABKB 657.

[8] On November 21, 2024, Fika’s counsel notified the Court that January 10, 2025 had been scheduled for two separate applications in this matter: determining the amount owing under a credit facility between SNDL Inc and Delta 9 (**SNDL Dispute**) and an application for approval of an amended plan of arrangement (**Plan**).

[9] On December 2, 2024, the Court granted an order (**Meeting Order**) for, among other things, a creditor’s meeting (**Meeting**) for the Plan.

[10] On December 20, 2024, the Meeting was held in accordance with the Meeting Order. The single class of unsecured affected creditors (**Affected Creditors**) overwhelmingly approved the Plan.

[11] On December 30, 2024, Delta 9’s counsel served unfiled applications (**Applications**) to the service list in this matter, which included:

- (a) an application for a Sanction Order and Stay Extension (**Sanction Application**) relating to the Plan for defined “Plan Entities”, extending the Stay, and approving the fees and disbursements of the Monitor and its legal counsel; and
- (b) an application for a “Sale Approval and Vesting Order” (**SAVO**) and an “Approval and Reverse Vesting Order” (**ARVO**), for two proposed transactions:
 - (i) first, approving a sale and vesting of certain assets to 6599362 Canada Ltd (**659**) contemplated in a December 28, 2024 asset purchase agreement (**APA**), including in particular a 95,000 square-foot cannabis cultivation

and processing facility in Winnipeg, Manitoba (**Bio-Tech Facility**) (the **659 Transaction**); and

- (ii) second, approving a December 28, 2024 share purchase agreement (**SPA**) between Delta 9 Parent, Bio-Tech and Simply Solventless Concentrates Ltd (**SSCL**) by which Delta 9 Parent would sell its shares of Bio-Tech to SSCL pursuant to a reverse vesting order (**RVO**) structure (the **SSCL Transaction**).

[12] At the same time, Delta 9's counsel served a sixth affidavit of John Arbuthnot IV (**Arbuthnot**) dated December 30, 2024 (**Sixth Affidavit**) and a seventh Arbuthnot affidavit dated December 30, 2024 (**Seventh Affidavit**).

[13] On January 3, 2025, the Monitor's counsel provided the Court with the sixth report of the Monitor dated January 4, 2025 (**Sixth Monitor's Report**).

[14] On January 4, 2025, Delta 9's counsel advised the Court that the SNDL Dispute application had been adjourned by consent to be heard by another Justice on February 11, 2025. On January 6, 2025, Delta 9's counsel served filed copies of the Applications, the Sixth Affidavit, the Seventh Affidavit, and briefs supporting the Applications.

[15] On January 9, 2025, Delta 9's counsel provided the Court updated proposed forms of orders and an affidavit of service. Counsel also advised that they had recently been told that the Canada Revenue Agency (**CRA**) may oppose aspects of the Applications and provided the Court additional case authorities and evidence filed earlier in the action that Delta 9 might rely on.

[16] On January 9, 2025, the Monitor's counsel provided the Court with a supplement to the Sixth Monitor's Report (**Monitor's Supplement**).

[17] There was no questioning on any of the evidence filed in respect of or relied on at the Hearing.

[18] On January 10, 2025, I heard the Applications (**Hearing**).

[19] During the Hearing, CRA objected to certain aspects of the Applications, particularly the releases contemplated in the AVRO for the SSCL Transaction. I understand that CRA raised its opposition only shortly before the Hearing. During oral argument at the Hearing, CRA provided me a written brief, which seeks (among other things) a lifting of the Stay to allow it to issue director's liability assessments against Bio-Tech's director (Arbuthnot) and former directors for Bio-Tech's unremitted excise duties. CRA filed no application or evidence in support of its position. It referred to, among other things, an SSCL press release that was not in evidence and upon which I have not relied in making my decision.

[20] No party sought an adjournment of the Hearing, or the opportunity to file any further evidence. The Applications proceeded on the record before me.

[21] Ultimately, only CRA had any opposition to the Applications.

[22] On January 10, 2025, I granted uncontested aspects of the Applications, for a restricted court access and sealing order, and approving the Monitor and its counsel's fees and disbursements. I reserved on the core aspects of the Applications.

II. Issues

[23] The issues raised in the Applications are:

- (a) Should the Court sanction the Plan?
- (b) Should the Court extend the Stay?
- (c) Should the Court approve the 659 Transaction on the terms proposed?
- (d) Should the Court approve the SSCL Transaction on the terms proposed?

III. Analysis

A. Sanction Application

1. Legal Framework for Plan Sanction under the CCAA

[24] The Court may sanction a compromise or plan of arrangement if a majority in number representing two thirds in value of the creditors (or class of creditors), at a creditors' meeting, vote in agreement to a compromise or arrangement as proposed (or altered or modified at the meeting): CCAA, section 6(1); **9354-9186 Québec inc v Callidus Capital Corp**, 2020 SCC 10 [**Callidus**] at para 57; Once sanctioned, the plan is binding on each class of creditors that participated in the vote: CCAA, section 6(1); **Callidus** at para 57.

[25] The general test courts apply when considering whether to sanction a plan is well established. It requires: (i) strict compliance with all statutory requirements; (ii) all materials filed and procedures carried out must be authorized by the CCAA; and (iii) a fair and reasonable plan: **Target Canada Co (Re)**, 2016 ONSC 316 [**Target Canada 2016**] at para 70; **Re Northland Properties Ltd**, 1988 CanLII 3250 aff'd 1989 CanLII 2672 (BC CA); **Canadian Airlines Corp (Re)**, 2000 ABQB 442 at para 60 leave to appeal refused 2000 ABCA 238; **Lutheran Church Canada (Re)**, 2016 ABQB 419 at para 114; **Re: Canwest Global Communications Corp**, 2010 ONSC 4209 at para 14; **Laurentian University of Sudbury**, 2022 ONSC 5645 at para 23.

[26] In considering whether the applicant has complied with all statutory requirements under the CCAA, the Court will typically consider the following, as described in **Laurentian University** at para 24 (citing **Canwest Global** at para 15):

- (a) if the applicant comes within the definition of a "debtor company" under section 2(1) of the CCAA;
- (b) if the applicant has total claims in excess of \$5 million;
- (c) if the creditors were properly classified;
- (d) if the notice of meeting was sent in accordance with the meeting order;

- (e) if the meeting was properly constituted;
- (f) if the voting was properly carried out; and
- (g) if the plan was approved by the requisite majorities.

[27] The assessment of whether a plan is fair and reasonable engages the Court's discretion: **Canadian Airlines** at para 95. In considering whether a plan is fair and reasonable, perfection is not required: **Laurentian University** at para 31; **AbitibiBowater Inc (Re)**, 2010 QCCS 4450 at para 33. The Court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a fair balancing of interests in light of other options: **Laurentian University** at para 31; **Canadian Airlines** at para 3.

[28] Accordingly, the Court will consider the following, as set out in **Laurentian University** at para 32 (citing **Canwest Global** at para 21), and recently confirmed in **Nordstrom Canada Retail, Inc**, 2024 ONSC 1622:

- (a) whether the claims were properly classified and whether the requisite majorities of creditors approved the plan;
- (b) what creditors would receive on bankruptcy or liquidation as compared to the plan;
- (c) alternatives available to the plan and bankruptcy;
- (d) oppression of the rights of creditors;
- (e) unfairness to shareholders; and
- (f) the public interest.

[29] The CCAA specifically allows for releases of directors for pre-filing claims that relate to the obligations of the company where the directors are by law liable in their capacity as directors for payment of such obligations: CCAA, section 5.1. However, the Court's power to sanction a plan goes further to include plans that contain other third-party releases: **Canadian Airlines** at para 92; **Wiebe v Weinrich Contracting Ltd**, 2020 ABCA 396 at para 32; **Metcalf & Mansfield Alternative Investments II Corp, (Re)**, 2008 ONCA 587 at paras 43, 78; **Lutheran Church Canada** at para 171; **Canwest Global** at paras 28-30; **Laurentian University** at para 39.

[30] While no single factor will be determinative, the jurisprudence about releases of third parties has developed over time and currently reflects the consideration of the following key factors summarized in **Laurentian University** at para 40 and **Green Relief Inc**, 2020 ONSC 6837 at para 27 (both citing **Lydian International Limited (Re)**, 2020 ONSC 4006 at para 54):

- (a) whether the released claims are rationally connected to the purpose of the plan;
- (b) whether the plan can succeed without the releases;
- (c) whether the parties being released contributed to the plan;
- (d) whether the releases benefit the debtors as well as the creditors generally;

- (e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
- (f) whether the releases are fair, reasonable and not overly broad.

[31] Some factors may assume greater weight in one case than in another. Where releases are objected-to, the Court may also analyze the quality of the claims the objecting party wishes to maintain: **Green Relief** at paras 28-29.

[32] Finally, in considering whether a plan is fair and reasonable, courts are also mindful of the CCAA's remedial purpose: **Canadian Airlines** at para 95; **Canwest Global** at para 20.

[33] A modern summary of the CCAA's remedial purpose is set out in **Callidus** at paras 40-42. In summary: among Canada's insolvency statutes' objectives (providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company), the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" and has "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally": **Callidus** at paras 40-41, citing (among others): **Century Services Inc v Canada (Attorney General)**, 2010 SCC 60 at para 70 [**Century Services**]; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp 4-5 and 14; **Ernst & Young Inc v Essar Global Fund Ltd**, 2017 ONCA 1014 at para 103.

2. Should the Court Sanction the Plan?

[34] The Plan affects the Affected Creditors but not persons holding unaffected claims (as defined). It contemplates certain "convenience" Affected Creditors with small claims to elect to receive the lesser of \$4,000 and the value of their allowed affected claim. It also provides for the establishment by the Plan Sponsor of a \$750,000 cash creditor pool and a creditor equity pool of Fika shares worth \$4,000,000 (and the entitlement of each eligible voting non-convenience Affected Creditor with a proven claim to receive a *pro rata* cash and equity payment from those pools on Plan implementation in satisfaction of their claims). SNDL will ultimately be paid in full as part of Plan implementation (subject to confirmation of the total amount as affected by resolution of the adjourned SNDL Dispute). Upon sanctioning, the Plan shall constitute the full, final and absolute settlement of all rights by Affected Creditors.

[35] The Plan provides for releases (**Plan Releases**) of the Plan Entities, past and current employees, legal and financial advisors, other Plan Entities' representatives, directors and officers, the Monitor (and its legal advisors), and the Plan Sponsor.

[36] I accept the unchallenged evidence and find that there has been compliance with the CCAA statutory requirements and that all materials filed, and procedures carried out, including the Meeting, were CCAA-authorized and compliant. The Plan was overwhelmingly approved by the required special majority of properly classified and unsecured Affected Creditors.

[37] With respect to whether the Plan is fair and reasonable, I accept the unchallenged evidence and find that:

- (a) the Plan Entities and the Plan Sponsor made considerable efforts to prepare the Plan in a manner that addresses, to the extent possible, the various stakeholder concerns;
- (b) there are no other viable restructuring options available other than the Plan, the alternative to which would be formal liquidation. Under a formal liquidation, the Affected Creditors would likely receive no recovery, while under the Plan they receive significant and material recovery and a potential upside through the receipt of Plan Sponsor shares. In a liquidation scenario, there would be increased professional fees and bankruptcy costs;
- (c) there is no prejudice to the Affected Creditors, who voted overwhelmingly in favour of the Plan. A high degree of creditor support creates an inference that a plan is fair, reasonable and economically feasible, and a court should be reluctant to second guess creditors' business assessment of a plan: **Canadian Airlines** at para 97; **Kerr Interior Systems Ltd (Re)**, 2008 ABQB 286 at para 106;
- (d) the Plan provides the Plan Entities with the greatest opportunity to repay the outstanding debts to SNDL and continue with a stronger owner. It allows for the continuation of the retail cannabis operations to continue as normal without disruption or further store closures following the Plan, with continuing employment of employees and contractors;
- (e) the Monitor's opinion, pursuant to section 23(1)(i) of the CCAA, is that "the Plan is fair and reasonable and provides the best available return"; and
- (f) there are challenges to restructuring cannabis companies at an operational level. To the Monitor's knowledge, since January 2022 there have been 66 companies in the cannabis industry that have entered insolvency proceedings in Canada and, of those, only five have successfully restructured their operations, with the rest resulting in liquidation.

[38] There was no opposition to the sanctioning of the Plan. CRA raised a concern about ongoing tax remittances between the date of plan sanctioning and implementation, but was satisfied by Delta 9's counsel's explanation that CRA's post-filing claims were unaffected by the Plan and for which the Plan Entities would remain responsible.

[39] I have considered the Plan Releases. I find that the Plan is fair and reasonable with the Plan Releases included, for these reasons:

- (a) I am advised they are typical forms of releases in CCAA proceedings (although that alone does not justify their inclusion);
- (b) the inclusion of the Plan Releases was not opposed by any party (although that alone does not justify their inclusion);

- (c) the Plan Releases are rationally connected to the Plan and its purposes. For example, they release claims of the Affected Creditors as part of the consideration for Affected Creditors obtaining partial recovery of their claims under the Plan;
- (d) the Plan could not succeed without the releases as Plan implementation relies on the continued participation and involvement of the releasees;
- (e) I accept the unchallenged evidence that the proposed releasees contributed to the Plan in precarious circumstances. It is obvious from the cumulative evidence in this matter that the negotiation of the terms of the Plan and the Delta 9 restructuring has been complex, protracted and difficult, involving significant work by Delta 9 Parent, the Chief Restructuring Officer, the Plan Sponsor, SNDL, CRA and the Monitor (and their various consultants, advisors, counsel and representatives);
- (f) the Plan Releases are a key component of the Plan, and a condition of Plan implementation which (as discussed above) benefits the debtors and the Affected Creditors and other stakeholders. The Plan Releases ensure that all stakeholders have certainty and finality about their liabilities at the conclusion of the Plan Entities' restructuring;
- (g) the terms of the Plan Releases were expressly included in Article 9 of the Plan which was provided to the Affected Creditors; and
- (h) the Plan Releases are fair, reasonable and not overly broad. The Plan confirms that the Plan Releases do not apply to (1) unaffected claims (as defined in the Plan); (2) obligations to Affected Creditors under the Plan or under any court order made in these CCAA proceedings; (3) SNDL's claim related to the SNDL Dispute; (4) claims finally determined to be based on breach of trust (whether common law or statutory), fraud, wilful misconduct or gross negligence; or (5) claims against directors referred to in section 5.1(2) of the CCAA.

[40] For the above reasons, I find that Plan is fair, reasonable and consistent with the CCAA's remedial purpose.

B. Stay Extension Application

1. Legal Framework for Stay Extension Application

[41] The Court may make an order extending a stay, restraint and prohibition of proceedings for any period the Court considers necessary, provided the applicant satisfies the Court that circumstances exist that make the order appropriate, and the applicant has acted (and is acting) in good faith and with due diligence: CCAA, sections 11.02(2) and (3). The burden of proof is on the applicant: *Mantle Materials Group, Ltd (Re)*, 2024 ABKB 19 at para 35. Appropriateness of an extension is assessed by inquiring into whether the order sought advances the policy objectives underlying the CCAA: *Re Canada North Group Inc*, 2017 ABQB 508 at para 34, citing *Century Services* at paras 15, 70, 71.

2. Should the Court Grant the Stay Extension?

[42] No party opposed the further Stay extension application. I am satisfied that Delta 9 and the Plan Sponsor have, since my last extension order, acted in good faith and with due diligence. This finding is supported by the Monitor's reports. Further, having found that the Plan is fair, reasonable and consistent with the CCAA's remedial purposes, I find that an extension is necessary in the circumstances to allow for Plan implementation and the determination of the SNDL Dispute in February 2025, among other things.

[43] The form of proposed stay extension order, extending the Stay until February 28, 2025, is granted.

C. Application to Approve the 659 Transaction

1. Legal Framework for Approval of Asset Sale

[44] A debtor company under CCAA protection may not sell or dispose of assets outside the ordinary course of business without court authorization: CCAA, section 36(1).

[45] Whether to grant authorization to sell assets is a matter of judicial discretion. It is not a rubber-stamp exercise; it involves the balancing of the interests of stakeholders: **Bellatrix Exploration Ltd (Re)**, 2020 ABQB 332 at para 30.

[46] The non-exhaustive statutory factors in sections 36(3)-(5) of the CCAA that the Court must consider, as well as additional or overlapping factors developed in the common law, do not form a rigid checklist of factors that must be present in every transaction: **Target Canada Co (Re)**, 2015 ONSC 1487 at paras 14-17; **Royal Bank v Soundair Corp**, 1991 CanLII 2727 (ON CA), 1991 CarswellOnt 205 [**Soundair**]; **Long Run Exploration Ltd (Re)**, 2024 ABKB 710 at paras 11-12; **Sanjel Corporation (Re)**, 2016 ABQB 257 at paras 54-55; **Acerus Pharmaceuticals Corporation (Re)**, 2023 ONSC 3314 at paras 10-11.

[47] The statutory factors under section 36(3) of the CCAA, as augmented by recognized common law factors, are:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances. Common law factors include whether there was sufficient effort made to get the price at issue, whether the debtor or court-appointed officer acted improvidently, whether the process had integrity and was fair, reasonable, transparent and efficient; and whether the interests of all parties were considered: **Sanjel Corporation (Re)** at para 56; **Soundair** at para 16;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed 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. Common law factors include the weight to be given to the recommendation of the monitor and the business judgment rule, in that the Court will not lightly interfere with the exercise of the commercial and business judgment

of the debtor company and a monitor where the process was fair, reasonable, transparent and efficient: ***Sanjel Corporation (Re)*** at para 57; ***Re AbitibiBowater*** at paras 70-72;

- (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, accounting for their market value.

[48] I consider the 659 Transaction under this framework.

2. Should the Court Approve the 659 Transaction?

[49] The 659 Transaction involves the sale of the Bio-Tech Facility to 659, an arm's length party. It is conditional upon court approval of the proposed SAVO and the execution of a lease for the Facility between 659 (as landlord), SSCL (as tenant) and the Plan sponsor (as indemnifier).

[50] No party opposed the authorization of the 659 Transaction.

[51] Based on the evidence and the factors outlined above, I find it is appropriate to authorize the 659 Transaction, for these reasons:

- (a) Sales Process. The sales process followed the court-approved Bio-Tech SISP Order. There was an extensive marketing process, assisted by a professional sales advisor, in which the Monitor solicited offers from many prospective bidders. There was interest from several parties, but only 659 (an arm's length party and previous owner of the land) made an offer. The APA was the result of good faith arm's length negotiations;
- (b) Monitor's Recommendation. The Monitor is of the view that the 659 APA is commercially reasonable;
- (c) Creditor Consultation. Creditors were provided notice of the application to approve the Bio-Tech SISP;
- (d) Effect of the Sale. The effect of the 659 Transaction and the proposed SAVO is, among other things, to vest the Bio-Tech Facility in 659 and replace it with the proceeds for sale, preserving claims and their priority in the proceeds. Under the proposed SAVO, the Monitor shall not make distributions of the net proceeds without further court order;

The Plan Sponsor is the fulcrum creditor in respect of the priority of charges against the Bio-Tech Facility and it supports the sale. Bio-Tech owes significant amounts to CRA for unremitted GST (\$657,056 as of July 12, 2024) and unremitted excise tax (\$7,831,515 as of July 12, 2024) (together, **Arrears**) – CRA does not oppose authorization of the APA or the proposed SAVO; and

- (e) Consideration. The only evidence of the value of the Bio-Tech Facility is the amount in the APA, which followed the extensive marketing process noted above.

[52] I am concerned with the definition of “Excluded Liabilities” and “Liabilities” in the APA as potentially overreaching and affecting future reclamation or remediation obligations which Manitoba Ministry of the Environment and Climate Change (**Ministry**) may later seek to enforce under *The Environment Act*, CCSM c E125 in respect of the Bio-Tech Facility. The Ministry was not served with or provided notice of the Applications. In response to that concern, Delta 9 (with the concurrence of the Plan Sponsor, the Monitor and 659) proposed that the SAVO be amended to give the Ministry the right to file a comeback application to vary the terms of the SAVO in respect of environmental obligations. That is appropriate in the circumstances.

[53] For these reasons, I grant the proposed form of SAVO (as amended).

D. Application to Approve the SSCL Transaction

[54] The application for authorization of the SPA involves the same general legal framework under section 36 of the CCAA as discussed above. However, its RVO structure warrants further discussion and analysis.

1. Legal Framework for Reverse Vesting Orders (RVO)

[55] The general structure of RVOs has been explained in J. Sarra, “Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions”, 2022 CanLIIDocs 43 as follows (footnotes omitted) [*Sarra - RVO*]:

RVO usually involve the sale of an insolvent debtor company’s shares to a purchaser in a transaction where unwanted assets and liabilities are excluded in the purchase transaction and are transferred, assigned and vested in a newly-incorporated company (‘newco’) as part of a pre-closing reorganization, allowing the debtor company to shed liabilities and retain the most valuable assets.

The result of an RVO is to expunge the existing corporate structure of the debtor company of anything the purchaser does not want. The newco is added to the insolvency proceeding and continues in that process while the debtor company exits the insolvency proceeding with broad liability releases; then the newco is liquidated or placed in bankruptcy to be liquidated. The transaction takes place outside of a negotiated and court-approved plan of arrangement or compromise.

[56] See also: *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at para 27.

[57] While not expressly contemplated in the CCAA, it is now well established that courts have discretionary jurisdiction to authorize transactions involving RVOs, including pursuant to sections 11 and 36 of the CCAA: *Long Run Exploration* at para 17; *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214 at para 18; *Southern Star Developments Ltd v Quest University Canada*, 2020 BCCA 364 at para 11; *Just Energy* at para 29; *Fresh City Farms and Mama Earth Organics*, 2024 ONSC 2016 at para 35; *Harte Gold Corp (Re)*, 2022

ONSC 653 at paras 24-37; **Rambler Metals and Mining Limited, Re CCAA**, 2023 NLSC 134 at paras 39-61;

[58] Concerns arise because RVOs lack the claims and creditor voting process contemplated by the CCAA, and releases included as part of the transaction may be overly broad, both of which may negatively impact negotiations which could otherwise lead to a more favourable compromise or arrangement: *Sarra-RVO* at 17; 24; **Invico Diversified** at para 19.

[59] Therefore, in the CCAA context, RVOs should not be routinely granted, must be justified by “compelling”, “extraordinary” or “exceptional” circumstances, and should invite “close scrutiny” because they can lead to unfairness or prejudice to creditors or other stakeholders: **Long Run** at para 18; **Harte Gold** at para 38; **Invico Diversified** at para 19; *Sarra-RVO* at 25-31; **Atlas Global Brands Inc**, 2024 ONSC 5570 at para 35; **MCAP Financial Corporation v QRD (Willoughby) Holdings Inc**, 2024 BCSC 1654 at para 11; **Arrangement relatif à Blackrock Metals Inc**, 2022 QCCS 2828 at para 96 [**Blackrock Metals**].

[60] An RVO is not granted merely because it may be more convenient or beneficial for the purchaser; there must be an evidence-based rationale for value in the proposed RVO transaction: **MCAP Financial** at paras 11, 18; **Harte Gold** at para 38; **Blackrock Metals** at paras 114-116; **Just Energy** at para 33.

[61] Interrelated, non-exhaustive relevant factors to consider in approving a transaction involving an RVO include:

- (a) the statutory basis for an RVO, which in my view includes consideration of whether the RVO furthers the CCAA’s remedial purposes (as set out **Callidus** at paras 40-42 and **Century Services** at para 59);
- (b) the factors outlined in section 36(3) of the CCAA (as noted above), as adjusted for the unique aspects of a reverse vesting transaction, including:
 - (i) the reasonableness of the sales process / sales effort;
 - (ii) any monitor recommendation;
 - (iii) creditor consultation;
 - (iv) the effect of the transaction on creditors and other stakeholders; and
 - (v) the consideration for the transaction;
- (c) the reason why an RVO is necessary;
- (d) whether the reverse vesting structure produces an economic result at least as favourable as any other viable alternative;
- (e) the interests of all stakeholders, including whether any stakeholders are worse off under the reverse vesting structure than they would have been under any other viable alternative; and

- (f) whether the consideration being paid reflects the value of the assets preserved under the reverse vesting structure.

See: *Harte Gold* at paras 23, 38; *Long Run Exploration* at paras 17-19; *Fresh City Farms* at paras 35-39; *Rambler Metals* at para 62; *PricewaterhouseCoopers Inc v Canada Fluorspar (NL) Inc*, 2023 NLSC 88 at para 60; *Blackrock Metals* at paras 87-95; *MCAP Financial* at paras 11-12; *Atlas Global* at paras 50-53.

[62] Where releases are part of an RVO, then the factors noted above are also relevant (as adjusted for this context), namely:

- (a) whether the released claims are rationally connected to the purpose of the plan / transaction;
- (b) whether the plan / transaction can succeed without the releases;
- (c) whether the parties being released contributed to the plan / transaction;
- (d) whether the releases benefit the debtors as well as the creditors generally;
- (e) whether the creditors have knowledge of the nature and the effect of the releases; and
- (f) whether the releases are fair, reasonable and not overly broad. In my view, as illustrated by this case, when considering whether releases are fair it may be appropriate for the Court to consider the conduct of proposed releasees and any potential benefit a proposed releasee may obtain from the restructuring or transaction as a whole. I also find it is appropriate to consider the timelines and nature of the objection to the proposed release, and the effect on stakeholders if the RVO structure (with the proposed releases) is not approved.

[63] I now consider the SSCL Transaction under this framework.

2. Should the Court Approve the SSCL Transaction?

a. The SSCL Transaction

[64] The SSCL Transaction encompasses the SPA and the ARVO, which together involve (among other things):

- (a) SSCL acquiring all the shares of Bio-Tech;
- (b) the cancellation of any other securities in the capital of Bio-Tech, without consideration;
- (c) the payment by SSCL of a deposit and the balance of the purchase price, which will be held by the Monitor for the benefit of Bio-Tech's stakeholders pending further court order;

- (d) the potential termination (without compensation) of some Bio-Tech employees that SSCL may identify it does not wish to continue to employ;
- (e) the creation of a residual company (**ResidualCo**) to which certain “Excluded Assets”, “Excluded Contracts” and “Excluded Liabilities” will be transferred. Among other things, all taxes owing or accrued due by BioTech for the period prior to the CCAA filing date will be transferred to or vested in or assumed by ResidualCo;
- (f) the release (**RVO Releases**) in favour of releasees (**RVO Releasees**), including Bio-Tech and its current and former directors and officers, legal counsel and advisors; the Monitor and its legal counsel; SSCL and its legal counsel, directors, officers, partners, employees, consultants, advisors and assignees; and any directors or officers of ResidualCo; and
- (g) Bio-Tech’s retention of all its other assets other than the Excluded Assets and Bio-Tech’s cessation as applicant in the CCAA proceedings under the court’s purview (other than the ARVO).

[65] Although the SSCL Transaction is distinct and requires its own separate authorization and approval, it must be considered in proper context. It is interrelated with the Plan and the 659 Transaction, the sanction, authorization and approval of which were sought at the same time as the SSCL Transaction as part of the overall restructuring of the Delta 9 group.

[66] Only CRA expressed any concern with the SSCL Transaction. Specifically, as noted above, it objects to the release of Bio-Tech’s directors, with specific focus on Arbuthnot, from being assessed for personal liability for Bio-Tech’s Arrears under the *Excise Tax Act*, RSC 1985 c E-15 and the *Excise Act, 2001*, SC 2002 c 22 (*Excise Act, 2001*). In my view, the RVO Releases must be viewed in context of their role in the SSCL Transaction and, in turn, the overall restructuring of the Delta 9 group.

[67] I turn to relevant factors below, with special attention paid to CRA’s objection to the release of Bio-Tech’s directors.

b. The Need for an RVO

[68] Reverse vesting transactions have been recognized as appropriate in cases where there are valuable assets which cannot be transferred to a purchaser, including where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to transfer to a purchaser: *Harte Gold* at para 71; *Just Energy* at para 34; *Xplore Inc (Re)*, 2024 ONSC 5250 at para 59; *PaySlate Inc (Re)*, 2023 BCSC 608 at para 80; *Peakhill Capital Inc v Southview Gardens Limited Partnership*, 2023 BCSC 1476 at para 39 aff’d 2024 BCCA 246; *Atlas Global* at para 51.

[69] The cannabis industry is one such environment. The Court was advised of numerous examples where RVOs have been approved by courts in cannabis restructurings.¹ As noted in *Atlas Global* at para 36:

It is fair to observe that the setbacks besetting the cannabis industry have in fact in large measure provided the impetus for the recently increased use of the reverse vesting structure. That is because in a highly regulated industry, like the cannabis industry, there are significant implications, for the transfer of a business, if a purchaser would have to start “from scratch” to obtain regulatory approval to operate the business in question rather than assuming the relevant licenses as part of the transaction.

[70] The Monitor’s view is that an RVO structure is necessary to maximize value in this case due to the highly regulated nature of the cannabis business, the value of which is dependant on maintaining two non-transferrable licences: a licence with Health Canada under the *Cannabis Act*, SC 2018, c16 that permits BioTech to cultivate, process and sell cannabis and a licence with CRA requiring it to apply cannabis excise stamps to its cannabis products in accordance with the *Excise Act, 2001*.

[71] No party suggested that an RVO was unnecessary in this case or that the justification for an RVO was unreasonable.

[72] I find that there is a legitimate need for an RVO structure for Bio-Tech.

c. The Bio-Tech SISP Process

[73] As noted above, the Bio-Tech SISP process was court-approved in the July 24, 2024 Bio-Tech SISP Order, on notice to interested stakeholders including CRA.

[74] The approved Bio-Tech SISP process provided potential interested purchasers an opportunity to propose a wide range of transaction structures, including “one or more of a restructuring, recapitalization or other form of reorganization of the business and affairs of [Bio-Tech] as a going concern, or a sale of all, substantially all, or one or more component’s of [Bio-Tech]’s assets ... and business operations ... as a going concern or otherwise”.²

[75] Despite the extensive marketing process, SSCL (an arm’s length cannabis producer) made the only offer for Bio-Tech’s business or shares (whether by a reverse vesting structure or otherwise).

¹ Delta 9’s Brief cited the following, not all of which have reported decisions: *Atlas Global Approval and Reverse Vesting Order* granted on October 29, 2024, Court File No. CV-24-00722386-00CL (ONSC); *Indiva Limited, et al, Approval and Reverse Vesting Order* granted October 21, 2024, Court File No. CV-24-00722044-00CL (ONSC); *BZAM Ltd, et al, Approval and Vesting Order*, granted October 15, 2024, Court File No. CV-24-00715773-00CL (ONSC); *Phoena Holdings Inc, et al, Reverse Vesting Order* granted March 21, 2024, Court File No.: CV-23-0069728500CL (ONSC); *Fire & Flower, Reverse Vesting Order* granted August 29, 2023, Court File No.: CV-23-0070058100CL (ONSC); *Aleafia Health Inc., Reverse Vesting Order* granted October 30, 2023, Court File No.: CV-2300703350-00CL (ONSC); *Trees Corporation, Reverse Vesting Order* granted April 5, 2024, Court File No.: CV-2300711935-00CL (ONSC); *Eve & Co et al, Reverse Vesting Order* granted October 7, 2022, Court File No.: CV-2200678884-00CL (ONSC).

² Bio-Tech SISP Order, Schedule A (clause 7).

[76] I find the Bio-Tech SISP process was fair and reasonable.

d. Monitor Recommendation

[77] The Monitor's view is that an RVO is necessary to maximize value in this case. It is of the view that the ARVO, including the proposed releases, is a condition precedent in the SPA which allows Bio-Tech to continue its operations as a going concern. With respect to the RVO Releases, the Monitor is of the view that their inclusion is an "important element to ensure the orderly transaction and transition of the business of Bio-Tech and is supported by the Monitor".

e. Creditor Consultation

[78] Creditors have been on notice about the potential need for an RVO transaction in respect of Bio-Tech, together with releases of Bio-Tech directors, since early in and throughout these CCAA proceedings.³

[79] In Arbuthnot's second affidavit sworn July 18, 2024, he deposed that Delta 9 had entered into a July 12, 2024 Restructuring Term Sheet with the Plan Sponsor, which provided:

The Plan Sponsor shall support any request of the Delta 9 Group for the Court to approve third party releases in favour of the board of directors of [Bio-Tech] as part of any approval and reverse vesting order sought in the CCAA Proceedings.

[80] In that same affidavit, Arbuthnot explained the terms of a proposed key employee retention plan (**KERP**) for which Delta 9 sought Court approval. Arbuthnot was one of the key employees. He stated (emphasis added):

The Key Employees also include directors and officers that are necessary and integral to the business and operations of Delta 9 continuing to operate in the normal course. **A key component, and part of the intended consideration under the KERP, is that releases be sought for the directors and officers as part of any sales transaction and in conjunction with any plan of arrangement that is approved.** I am Bio-Tech's only director and the only person with the necessary security clearance to allow Bio-Tech to operate in compliance with its Health Canada Licence. It would be very difficult, if not impossible, to successfully complete the SISP for Bio-Tech without my continued involvement in the operation of the business and in the SISP.

[81] The Monitor included the proposed KERP terms in its first report dated July 22, 2024 (**First Monitor's Report**). The Monitor noted that "certain Key Employees have indicated that they are considering alternative employment opportunities should the consideration in the KERP not be provided, including both the material retention payment amounts and the traditional director and officer releases in the specified circumstances".⁴ The KERP was developed to incentivize and retain the defined "Key Employees" including Arbuthnot.⁵

³ Arbuthnot's Seventh Affidavit, para 52.

⁴ First Monitor's Report, para 104(e).

⁵ First Monitor's Report, para 100.

[82] The proposed KERP was attached as Appendix E to the First Monitor Report. It provided (emphasis added):

As part of the enticement and compensation to the D&Os for continuing to provide services and maintain their roles as directors and officers of the D9 Group during their CCAA proceedings, the D9 Group agrees to seek and obtain a release of all **liability as a director and officer of any member of the D9 Group that is subject to a sale of its business and operations by way of a reverse vesting order** and/or a release of all liability as a director and officer of each member of D9 Group that is subject to a plan of arrangement or compromise in the CCAA Proceedings.⁶

[83] Schedule A of the KERP provided further specific references to releases as part of a reverse vesting order process with other specific key employee entitlements.

[84] On July 24, 2024, the Court granted the ARIO (which approved the KERP), and the Bio-Tech SISP. Nobody sought permission to appeal those orders.

[85] On October 22, 2024, the Plan Sponsor applied for an order for a creditor's meeting with respect to its then proposed plan. The evidence and Monitor's report at that time further contemplated the release of the Bio-Tech directors.⁷

[86] As noted above, on December 30, 2024, Delta 9 served unfiled copies of its Applications and Arbuthnot's Sixth and Seventh Affidavits on the parties in the service list, including CRA. These materials include a redacted copy of the SPA for the SSCL Transaction, the specific terms of the RVO Releases, and the form of ARVO for the SSCL Transaction.

[87] CRA argues that it only received relevant details of the benefit Arbuthnot is obtaining from the restructuring process when it received the Sixth Monitor's Report in early January 2025 and the Monitor's Supplement on January 9, 2025.

[88] CRA is correct that the Court is not necessarily bound by the previous disclosed intention of Delta 9 and the Plan Sponsor to seek releases for Bio-Tech directors, or the Court's approval of the KERP which expressly contemplated them. However, they are relevant and important factors. Creditor consultation is a two-way street. By necessity, CCAA processes often move quickly and require diligent engagement by the Court and all stakeholders, including creditors. CRA chose to wait and see "how the CCAA process unfolded". It never questioned Arbuthnot on any of his affidavits. CRA allowed significant effort and resources to be expended or invested, while awaiting the outcome of the Bio-Tech SISP process, without apparently making it known to all stakeholders that it might object to a director's release if CRA was later of the view the director obtained an unjustified personal benefit out of the restructuring process.

[89] I find that there was reasonable consultation with creditors in respect of the SSCL Transaction. The possibility of an RVO structure, coupled with a requested release for Bio-Tech directors, was flagged very early on in these proceedings. The specific SSCL Transaction could not be proposed until the Bio-Tech SISP process had run its course, and the overall terms of the

⁶ First Monitor's Report, Appendix E (clause 13).

⁷ Affidavit of Mark Townsend sworn October 21, 2024, paras 42-43; Third Report of the Monitor dated October 29, 2024 (filed October 30, 2024), para 47; Sixth Monitor's Report, para 64.

interrelated restructuring involving the Plan, the 659 Transaction, and the SSCL Transaction were finalized. Although time was compressed, as it often is in CCAA proceedings, there was sufficient time for creditors, including CRA, to respond.

f. Effect on Creditors and Other Stakeholders

i. General Effect on Creditors

[90] Bio-Tech creditors have not had the benefit of a creditor vote with respect to the proposed RVO structure, as contemplated by the CCAA.

[91] The proposed transactions, including the SSCL Transaction, will not provide sufficient proceeds to pay Bio-Tech's unsecured creditors, including CRA's significant claims against Bio-Tech for the Arrears. The Monitor noted that the lack of proceeds to pay CRA "is a function of the value of Bio-Tech's business, as fully tested under the SISF, and the priority of the CRA claims relative to the claims of the priority creditors".⁸ Delta 9 pointed to other cannabis restructurings where releases were approved notwithstanding significant amounts owing to CRA for excise tax and/or GST/HST.

[92] Zero recovery for unsecured creditors is often a function of the financial state of the debtor, not the RVO process: *Long Run Exploration* at para 19, citing *Acerus Pharmaceuticals* at para 32; *Just Energy* at para 57, *Blackrock Metals* at para 109; *CCAA Plan of Arrangement – Clearbeach and Forbes*, 2021 ONSC 5564 at para 27(k). Further, there is no requirement that creditors be treated equally: *Clearbeach and Forbes* at para 27(k), citing *Grafton-Fraser v Cadillac*, 2017 ONSC 2496 at paras 23-24.

[93] The Monitor is not aware of any stakeholder in the CCAA proceedings that would be worse off under the RVO structure.

[94] On the other hand, approval of the SSCL Transaction (which includes the RVO Releases) will allow the Bio-Tech business to continue as a going concern under the new ownership of SSCL, for the future benefit of all stakeholders including CRA.

ii. Effect on Future Application of the Income Tax Act

[95] CRA raised an issue with the potential effect of approving clause 4.3 of the SPA, which provides (with the language of concern emphasized):

Pursuant to the Implementation Steps and the Approval and Vesting Order, at the Closing Time, all Taxes owed or owing or accrued due by Bio-Tech in respect of the period prior to the Filing Date shall be transferred to, vested in and assumed by ResidualCo, **including any Taxes related to debt forgiveness arising from or in connection with the consummation of the Transaction and the transfer of the Excluded Assets and Excluded Liabilities to ResidualCo**; provided, however, that the foregoing shall not: (a) relieve the Purchaser from Liability for Taxes arising during and in respect of the period from and after the Filing Date and relating to Retained Liabilities, or arising from audits or reassessments that relate

⁸ Sixth Monitor's Report, para 54.

to Retained Liabilities; or (b) relieve the Purchaser from any obligation to pay Taxes exigible by a purchaser in respect of a transaction like the Transaction in the same or similar circumstances. Any and all obligations and Liabilities arising from any audits or reassessments with respect to any Taxes that relate to a time period occurring, or facts arising, prior to the Closing Date, regardless of when such audit was commenced or completed, shall be transferred to and vest in ResidualCo.

[96] CRA argued that, if applicable, section 80 of the *Income Tax Act*, RSC 1985 c 1 (5th Supp) (*ITA*) operates to include certain forgiven debt amounts as income in the future and the Court cannot approve a provision in a transaction contract that requires the Minister not to apply the *ITA*. CRA relies on **R v Beach**, 2001 BCCA 7 and **Proposal of Sail Plein Air inc**, 2024 QCCS 1689 (under appeal) to say that such a court approval would be illegal. Such a provision prohibiting the Minister from including income would be unenforceable: **Canadian Red Cross Society, Re**, 2006 CanLII 22141 (ON SC) at para 45.

[97] Counsel for the Plan Sponsor provided some proposed language to include in the ARVO to attempt to address CRA's concern, as CRA made it clear it did not intend this "technical issue" (as CRA's counsel described it) to derail the Delta 9 restructuring process. The proposed language, in my view, assists by ensuring that CRA's position is not intended to bind the Minister. However, the proposed language effectively defers the matter in the same way that was rejected as inappropriate by the British Columbia Court of Appeal in **Beach**. In **Beach**, at para 18, the Court held that a court could not sanction a bankruptcy proposal that exempts a debtor from section 80 of the *ITA* and imposes that exemption on Revenue Canada. In my view, I must consider whether the SPA can be approved in its current form.

[98] An important rule of contractual interpretation is that if there are two apparently viable interpretations and one of them would result in illegality, the other interpretation should be preferred: **Calgary (City) v International Association of Fire Fighters (Local 255)**, 2008 ABCA 77 at para 32. I interpret clause 4.3 of the SPA such that it was not objectively intended by the parties to the SPA to include a provision that would be illegal for the Court to approve.

[99] Accordingly, and based on the specific wording used by the parties to the SPA, I do not interpret any inclusion of *income* based on the operation of section 80 of the *ITA* to be part of "Taxes related to debt forgiveness arising from or in connection with the consummation of the Transaction" which are transferred to and vest in ResidualCo, under clause 4.3. At this time, it is unknown exactly how or whether section 80 of the *ITA* may be engaged or, if it is engaged, whether it would necessarily lead to taxes payable in any event.

[100] The proposed ARVO must be amended to include the language proposed by the Plan Sponsor in argument, as well as language that makes it clear that clause 4.3 does not apply to any future inclusion of income to Bio-Tech pursuant to section 80 of the *ITA*. As this matter was only briefly argued at the Hearing, I leave it to counsel to draft appropriate agreeable language based on these reasons. If issues arise in doing so, or if my decision has unintended consequences not raised in argument, counsel may seek my further direction.

iii. Effect on Future Environmental Obligations

[101] Although it was not raised by any party, it is incumbent on the Court to be vigilant about attempts to shed environmental remediation and reclamation obligations in an RVO: *Sarra-RVO* at para 24. RVO structures that retain environmental remediation and reclamation obligations, and which avoid attempting to usurp the regulatory enforcement of environment remediation and reclamation obligations, are factors cited in support of (or required for) the approval of RVOs: *Long Run Exploration* at para 23; *Re Mantle Materials Group, Ltd*, 2023 ABKB 488 at paras 10-11; *Rambler Metals* at para 105; *Harte Gold* at para 83.

[102] It is also incumbent for applicants seeking approval of RVOs to ensure that all parties interested in or affected by the RVO are served and given notice: *Validus Power Corp et al and Macquarie Equipment Finance Limited*, 2023 ONSC 6367 at para 119. Whenever real property is involved in a transaction, it is best practice to ensure that the applicable Crown office or environmental regulatory agency is given notice.

[103] I raised a concern with the definition of “Excluded Liabilities” in the SPA as potentially overreaching and affecting future reclamation or remediation obligations the Ministry may seek to enforce in the future in respect of the Bio-Tech Facility. Section 2.2 of the SPA provides (emphasis added):

2.2 Excluded Liabilities

- (a) Pursuant to the Approval and Vesting Order, save and except for the Retained Liabilities, **all debts, obligations, Liabilities, Encumbrances, indebtedness, Excluded Contracts, leases, agreements, undertakings, Claims, rights and entitlements of any kind or nature whatsoever** (whether direct or indirect, **known or unknown, absolute or contingent, accrued or unaccrued**, liquidated or unliquidated, **matured or unmatured or due or not yet due, in law or in equity and whether based in statute or otherwise**) **of or against Bio-Tech**, the Bio-Tech Shares, or against, **relating to or affecting any of the Retained Assets**, or any Excluded Assets or Excluded Contracts, including, *inter alia*, the non-exhaustive list of Liabilities set forth in Schedule “C” (collectively, the “**Excluded Liabilities**”) **shall be excluded and will no longer be binding on Bio-Tech**, the Bio-Tech Shares (or the holders thereof), Retained Assets, Employees, Permits and Licenses or Books and Records following the Closing Time.

[104] In argument, I was advised that there are no known environmental concerns with the Bio-Tech Facility, although that was not in evidence. I understood the position of Delta 9 to be that the definition of Excluded Liabilities was not intended to include the Ministry’s right to take steps to protect the environment (including to issue environmental protection orders) in the future (which I took to mean whether any adverse environmental conditions arose before or after the CCAA filing). SSCL did not participate in the Hearing.

[105] As it did with the SAVO, following the Hearing, Delta 9 (with the concurrence of the Plan Sponsor, the Monitor and SSCL) proposed an additional term to the ARVO which would provide

the Ministry 21 days upon service of a granted ARVO to apply to come back to vary its terms in respect of environmental liabilities. That is appropriate in the circumstances, if necessary, to allow appropriate language to be included to ensure that the ARVO does not have unintended consequences related to the future statutory discretion of the Ministry.

g. Viable Alternatives and Recovery Under Liquidation

[106] I find that there are no viable alternatives to the SSCL Transaction. According to the Monitor, if the SSCL Transaction were not to close and the ARVO is not granted, this would result in an immediate shut-down and liquidation of Bio-Tech. The Monitor is not aware of any viable alternative that would produce a more favourable result in the proceedings.⁹ I accept the Monitor's unchallenged evidence.

[107] CRA is potentially worse off if the RVO Releases are included in the ARVO. CRA has not adduced evidence of what, if any, likely recovery it might obtain from Arbuthnot or former Bio-Tech directors if the RVO Releases are not approved.

[108] There is no specific evidence of what the liquidation of Bio-Tech alone would likely generate, however, given that the only interest in the Bio-Tech business was from SSCL based on the assumption that required licences would be available and operations would continue, it can be inferred that recovery for creditors overall would be materially less.

[109] Further, as noted elsewhere in these Reasons, the SSCL Transaction is intertwined with the 659 Transaction and the Plan (both of which CRA agrees with or did not oppose). A liquidation of the Delta 9 businesses would result in Affected Creditors receiving no recovery, reduced recovery for the priority secured creditor SNDL, the shut-down of retail outlets and the Bio-Tech manufacturing business, the loss of jobs, and increased fees and bankruptcy costs.

[110] Based on the evidence before me, I find that the proposed RVO structure produces an overall economic result better than liquidation.

h. Consideration

[111] The consideration to be paid by SSCL in the SSCL Transaction is the only evidence of value of the assets preserved under the RVO structure. SSCL negotiated at arm's length pursuant to the Bio-Tech SISP. There is no evidence that the consideration is unreasonable. CRA appears to acknowledge that "the market has spoken".

i. The RVO Releases

[112] As noted, CRA's objection is not to the SSCL Transaction, *per se*, but the Bio-Tech directors or former directors being included in the RVO Releasees relating to the Arrears.

[113] I consider relevant factors below.

⁹ Sixth Monitor's Report, paras 49-52.

i. Rational Connection?

[114] I find that the RVO Releases, including the release of Arbuthnot, are rationally connected to the SSCL Transaction. Arbuthnot will be involved in the implementation of the SSCL Transaction and is the only person with the necessary security clearance to allow Bio-Tech to operate in compliance with its Health Canada Licence. Releasing Arbuthnot is part of the *quid pro quo* for his continued participation in the implementation of the SSCL Transaction, the 659 Transaction and the Plan. Further, the releases may avoid director indemnity claims or future litigation about director indemnity claims.

[115] CRA's argument that the release of Arbuthnot and former Bio-Tech directors in respect of the Arrears is not rationally connected to the SSCL Transaction or the Plan is based, at least in part, on its premise that their release is not necessary to the SSCL Transaction. I address that argument below.

ii. Can the SSCL Transaction or the Plan Succeed without the Releases?

[116] CRA stated that "mere assessing of directors does not impact the plan going forward". Unfortunately, CRA's statement is based on speculation and not evidence and I must base my decision on evidence. CRA has not contradicted the evidence filed by Delta 9, including Arbuthnot's affidavits, or the opinion and advice of the Monitor.

[117] I find that, based on the undisputed evidence, the release of Arbuthnot is integral to the success of the SSCL Transaction. CRA acknowledged that he was the "lynchpin" for the Health Canada licence. If that licence is not available to Bio-Tech, its business would be immediately disrupted and would likely result in an immediate shut-down and liquidation of Bio-Tech, which would garner a lower purchaser price.¹⁰

[118] As noted above, in the early phases of these proceedings, Arbuthnot and other directors were considering their options and the KERP, which contemplated their later release, was approved by the Court to incentivize their retention. It can be reasonably inferred that the contemplated releases, now coming to fruition, were important for Arbuthnot to continue to be involved.

[119] Without approval of the RVO Releases, one of the conditions to the SSCL Transaction would not be fulfilled. I agree with CRA that the Court should not accept releases simply because they have been packaged together as a condition precedent to a transaction or restructuring, and that "strong-arm tactics" of incumbent directors should be resisted: **Green Relief** at para 52. Success of the transaction or plan should be assessed with regard to factors other than potential strong-arming: **Green Relief** at para 53.

[120] However, in my view, the Court's assessment of whether requiring releases even constitutes director "strong-arming" in the CCAA process must be based on the evidence available. In this case, the concept of proposed releases was in the Restructuring Term Sheet and supported by the Plan Sponsor before the CCAA process even began.

¹⁰ Sixth Monitor's Report, para 50.

[121] CRA speculates that, without the releases, SSCL would nonetheless proceed with the transaction. In my view, without the protection of the RVO Releases, there would be considerable uncertainty for SSCL as to whether Arbuthnot would agree to stay involved or on what terms. Without Arbuthnot's involvement, the entire nature of the SPA would be different and whether SSCL would waive the release condition or renegotiate another transaction is unknown. For example, if SSCL had to indemnify Arbuthnot or former Bio-Tech directors for their potential personal liability for the Arrears, it would materially change the economics of the SSCL Transaction. The best evidence I have is that the RVO Releases were made a condition of the SPA and the RVO structure because they were required and important, and that without them the closing of the SSCL Transaction would be at serious risk.

[122] If the SSCL Transaction were not to close, I find there would likely be a harmful ripple impact on the overall Delta 9 restructuring. In that event, the lease required for the 659 Transaction to close would not be signed, and the conditions of the 659 Transaction would be unfulfilled. It is unlikely that 659 would close the 659 Transaction at the same price, if at all, without a locked-in and operating tenant. In turn, then, conditions of the Plan would be unfulfilled, and the implementation of the Plan would be at risk. The Plan Sponsor may withdraw the Plan if the Plan's conditions, including the approval of the SSCL Transaction, are not met.¹¹ The Plan Sponsor explained that the SSCL Transaction, with the RVO Releases, is critical to the Plan Sponsor because it is legally unable to acquire Bio-Tech due to its own regulatory restrictions.

[123] The best evidence before me is that the loss of Arbuthnot's cooperation and involvement could potentially cause the entire restructuring of Delta 9 to fail, or to have to restart the process over again, all of which would likely lead to less recovery, increased costs, and the loss of time and expense incurred to date by the Plan Sponsor and other stakeholders.

[124] It is fully open to creditors, like CRA, to argue that director's releases, that are made a condition precedent to transactions in restructurings, are not actually necessary for the transaction or plan to succeed, but they must provide the Court the evidentiary foundation to support those arguments. CRA did not do that, and, on balance, I find that the evidentiary record does not support CRA's position.

iii. Releasee Contribution

[125] The undisputed evidence is that the RVO Releasees, including Arbuthnot, contributed significantly to the SSCL Transaction, and they will continue to do so until the transaction closes and is implemented as part of the overall Delta 9 restructuring. CRA's argument that Arbuthnot was not the only one that contributed is true but is not a persuasive reason to reject the RVO Releases in this case.

iv. Benefit to Debtors and Creditors

[126] CRA argues that the RVO Releases do not benefit the creditors, but rather simply prevent CRA from potentially collecting against Bio-Tech's directors for amounts that Bio-Tech misappropriated when it failed to pay for excise duties and GST.

¹¹ Fifth Monitor's Report dated November 26, 2024, paras 36-37.

[127] CRA's position is again based on the premise that the RVO Releases are not necessary for the success of the SSCL Transaction or the Plan. For the reasons above, I find that premise to be unsupported and find that the RVO Releases benefit Bio-Tech and creditors generally.

v. Creditor Knowledge of the Nature and Effect of the Releases

[128] For the reasons above, including under the heading "creditor consultation", the creditors (including CRA) have had knowledge of the nature and effect of the proposed RVO Releases.

vi. Fair, Reasonable and Not Overly Broad?

[129] The proposed ARVO provides the RVO Releasees a broad release of all present future claims, liabilities and other matters based on any act, omission transaction, dealing or other occurrence existing or taking place prior to the "Closing Time" or arising in connection with or relating in any manner whatsoever to the SPA, the SSCL Transaction, or the conduct of these CCAA proceedings.

[130] However, there are exceptions: the RVO Releases as treated under the proposed ARVO:

- (a) do not release any claim not permitted to be released pursuant to section 5.1(2) of the CCAA, namely claims that relate to contractual rights of creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors;
- (b) do not release any claim or liability arising out of any gross negligence or wilful misconduct on the part of the released directors and officers of Bio-Tech and ResidualCo;
- (c) do not apply to or prevent any person from commencing or continuing actions for an "Insured Claim" under any insurance policy maintained by Bio-Tech, which can be a mitigating factor to the loss of claims: *Atlas Global* at paras 92-93;
- (d) do not apply to performance of obligations under the SSCL Transaction; and
- (e) do not affect certain CRA set-off rights against Bio-Tech for pre and post CCAA filing amounts owed.

[131] Other than CRA, no creditor or stakeholder opposed the releases as being unfair or overly broad.

[132] CRA's core position is that the release of Arbuthnot from assessment for the Arrears renders the RVO Releases unfair. CRA appears to suggest that Arbuthnot has intentionally and by design orchestrated the Delta 9 restructuring to his personal benefit, and that Arbuthnot has already received benefits that more than compensate him for his involvement and continued involvement in the restructuring. CRA describes the further release related to assessment for Arrears as a "gratuitous benefit".

[133] CRA argues the following:

- (a) although Arbuthnot was integral to Bio-Tech due to his security clearance related to Health Canada licence, that should not excuse his mismanagement and his causing the effective misappropriation of funds owed to CRA for GST and Excise remittances;
- (b) Arbuthnot obtained the benefit of the KERP program. CRA argues that this already compensated him for remaining involved and assisting the restructuring process and that he does not need the further benefit of the RVO Release for staying involved;
- (c) Arbuthnot will remain employed by Bio-Tech moving forward, after SSCL becomes its owner;
- (d) Arbuthnot and his father (Bill Arbuthnot) created for themselves an employment agreement which provided them each a right to \$5,000,000 upon a change of control of Bio-Tech, for which they both filed claims in the CCAA proceedings in August 2024 (**Arbuthnot Claims**). CRA argues that the Arbuthnot Claims, which have been accepted as contingent claims, inflated the creditor pool which decreased potential recovery for other creditors and, further, gave those claims significant voting power on the Plan; and
- (e) Arbuthnot and Bill Arbuthnot assigned the Arbuthnot Claims to another creditor (Uncle Sam's Cannabis Ltd), in return for a release of their personal liabilities to that creditor. CRA argues that Arbuthnot should not be able to obtain the benefit of those releases and then also release from potentially liability for the Arrears.

[134] CRA asserts that many of these details were not previously available and, therefore, CRA did not have an opportunity to provide comments earlier. I reject that notion. The Arbuthnot proofs of claims based on their employment agreements were filed in August 2024 as part of the claims process. The proposed release of Bio-Tech directors was known before and since that time. The quantum of claims was reported in the Fifth Report of the Monitor's dated November 26, 2024. It was open to CRA to seek more information about the claims of directors, or to question Arbuthnot on his affidavits, if CRA wanted to know more information about their claims or how they are affected by Delta 9's financial situation or its restructuring.

[135] Arbuthnot's employment agreement was executed in 2021, by a different director on behalf of Delta 9, long before the CCAA proceedings. There is no evidentiary basis to suggest it was improper when executed. Delta 9 Parent is a public company and Arbuthnot and others owed fiduciary obligations to ensure they acted in the best interest of the corporations. Delta 9 Parent had public reporting obligations that likely disclosed terms of his employment agreement. In my view, without more, Arbuthnot cannot be blamed for advancing claims in the CCAA proceedings he is contractually entitled to claim, or from assigning those claims to another party.

[136] Further, Arbuthnot cannot be blamed for the creation or use of the regulatory regime which makes his participation integral to a restructuring.

[137] I agree with CRA that, in appropriate cases, as part of considering the fairness of a release, other benefits connected to a restructuring obtained by a proposed releasee, and the proposed releasee's circumstances and conduct in the context of a restructuring, may be relevant in

approving releases within an RVO structure. This could include whether the proposed releasee has acted in good faith: *CCAA*, section 18.6; *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 at para 105; *Razor Energy Corp, Razor Holdings Gp Corp, and Blade Energy Services Corp (Re)*, 2025 ABKB 30 at paras 49-51.

[138] In my view, however, a party seeking to oppose a release on these grounds should engage and advise of its position early in the process and build an evidentiary record to allow the Court to reasonably assess those factors. That might include (among other things) evidence about the alleged net benefits already received by the proposed releasee, the economic benefits of the transaction overall, the potential value of the release to the releasee, the potential economic impact of not approving the release, the actual prejudice to the creditor, and whether the proposed releasee is acting in good faith.

[139] CRA has not done these things. While it is true that Delta 9 misused funds owed to CRA for other purposes, it appears to have been to attempt to maintain the business as a going concern during tumultuous times in a new industry. This is not an excuse but is a relevant factor, particularly given that the Arrears appear to have accumulated over an extended period and CRA did not strictly enforce its rights. In the *CCAA* proceedings, CRA waited to see how things unfolded, including whether the Bio-Tech SISP process might garner a qualifying bid that would generate CRA better recovery. Then, at the last possible moment, CRA asked the Court to reject the Bio-Tech directors' release and lift the Stay in its favour without a filed application or supporting evidence. CRA has not proven, on this record, that Arbuthnot or former directors did not act in good faith contrary to section 18.6 of the *CCAA*. The evidence and arguments from other Hearing participants, including the Monitor as court officer, suggests Arbuthnot has been acting in good faith.

[140] A creditor's approach and timeliness in advancing its position against a proposed release is also a relevant factor in assessing whether to approve an RVO structure with releases. I find that if I were to accede to CRA's position and grant the relief it seeks, it would be inconsistent with this Court's supervisory role to ensure that the *CCAA* process unfolds in a fair and transparent manner: *Delta 9* at para 64, citing *Target Canada 2016* at para 72. It would be unfair to the other *CCAA* stakeholders, particularly the Plan Sponsor (who has provided significant funding to Delta 9 for this *CCAA* process), SNDL (the priority secured creditor that stands to lose its full recovery if the restructuring is frustrated), and Arbuthnot (whose personal intentions and conduct is the target of CRA's assertions).

[141] Ultimately, in addition to these concerns, CRA essentially asks the Court to deny the proposed release of Bio-Tech's directors as unfair, on the speculative assertion or hope that doing so will allow CRA to collect more of the Arrears while not destroying the hard-earned benefits of the overall complex Delta 9 restructuring (which CRA otherwise supports). I am not satisfied it is appropriate to take that risk on the evidentiary record before me.

[142] In the circumstances, I am unable to agree with CRA that RVO Releases are unfair based on Arbuthnot's conduct or due to other benefits he may or may not have received. I find that, based on the record before me, that the RVO Releases are fair, reasonable and not overly broad.

j. Effect of Not Approving the RVO

[143] As noted above, I find that the effect of not approving the RVO, with the RVO Releases, at this juncture puts the benefits of the SSCL Transaction, the 659 Transaction and the Plan at serious risk.

k. Remedial Purpose of CCAA

[144] The remedial purpose of the CCAA favours approving the SSCL Transaction for the benefit of allowing Bio-Tech to continue as a going concern for the general benefit of stakeholders, including the Plan Sponsor, SNDL, Bio-Tech employees and others (including CRA). This is not overridden in this case by CRA's position, or the fact that Arbuthnot and other Bio-Tech Directors are released from being assessed for the Arrears.

l. Conclusion re SSCL Transaction

[145] For the reasons set out above, I find that the approval of the SSCL Transaction, including the RVO Releases is appropriate. I grant the form of proposed ARVO with the noted amendments noted above.

IV. Conclusion

[146] I grant the proposed "Order – Sanction of Plan and Stay Extension", the proposed SAVO and the proposed ARVO, as amended as noted above.

Heard on the 10th day of January 2025.

Dated at the City of Calgary, Alberta this 29th day of January 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Ryan Zahara, Molly McIntosh and Chris Nyberg, MLT Aikins LLP
for Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc. and Delta 9 Cannabis Store Inc.

James Reid and Matthew Cressatti, Miller Thomson LLP
for 2759054 Ontario Inc. operating as Fika Herbal Goods

Ashley Bowron, McCarthy Tetrault LLP
for SNDL Inc.

David LeGeyt, Burnet, Duckworth & Palmer LLP
for the Monitor, Alvarez & Marsal Canada Inc.

Howard A. Gorman, K.C., Norton Rose Fulbright Canada LLP
for the directors and officers of Delta 9 and Bio-Tech

Daniel Segal and David Smith, Department of Justice Canada
for the Canada Revenue Agency

5

Court of King’s Bench of Alberta

Citation: Wallace & Carey Inc. (Re), 2025 ABKB 750

Date: 20251215
Docket: 2301 08305
Registry: Calgary

In the Matter of the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as Amended
In the Matter of the Compromise or Arrangement of Wallace & Carey Inc., Loudon Bros.
Limited and Carey Management Inc.

Reasons for Decision
of the
Honourable Justice M.A. Marion

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I. Introduction

[1] Wallace & Carey Inc. (**W&C**), Loudon Bros Limited (**Loudon**), and Carey Management Inc. (**CMI**) (collectively, **Companies**) are subject to protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (**CCAA**). The monitor is KSV Restructuring Inc. (**Monitor**).

[2] I have before me two applications:

- (a) an application (**Digiflex Application**) by Digiflex Information Systems Inc. (**Digiflex**) to:
 - (i) lift the stay of proceedings vis a vis Digiflex; and
 - (ii) declare that Digiflex has no obligations:

- (A) to provide 7-Eleven, Inc. (**7-Eleven**), 7-Eleven Canada, Inc. (**SEC**) or 7-11 Distribution Canada Corporation (**SEDCC**) access to Digiflex's enterprise resource planning (**ERP**) software (**Digiflex Software**), whether directly or indirectly through W&C/Loudon; and
 - (B) to provide any associated software services to 7-Eleven, SEC, SEDCC, W&C or Loudon;
- (b) an application by the Monitor (**Monitor Application**), on behalf of W&C/Loudon and at the request of SEC/SEDCC, to dismiss the Digiflex Application and approve the assignment (**Proposed Assignments**) of the interests of W&C and Loudon in and to certain software licence agreements between them and Digiflex (**Licence Agreements**)¹ to SEC or SEDCC, pursuant to section 11.3 of the CCAA.

[3] For the reasons set out below, Digiflex's Application is not granted as requested. However, the Court lifts the stay *vis a vis* Digiflex effective on February 15, 2026, to allow Digiflex to pursue whatever rights and remedies it may have as against W&C/Loudon at that time.

[4] The portion of the Monitor Application seeking the Proposed Assignments is adjourned to allow the parties to attempt to reach a commercial resolution for continued limited use and access to the Digiflex Software post-February 15, 2026, for the purposes of records retention, audit and tax purposes.

II. Background

[5] The Companies operated one of Canada's largest independent wholesale distribution and logistics businesses servicing more than 7,000 customers across Canada. The Companies' largest customer, by far, was SEC. The W&C distribution and logistics business for SEC was complex and ran on an almost just-in-time basis. The work for SEC involved over 450 employees involved in the daily picking, packing and delivery of over 5,000 products from approximately 240 suppliers to SEC's over 500 7-Eleven stores across Ontario and western Canada.

[6] In 2023, W&C and Loudon were facing a liquidity crisis caused by the COVID-19 global pandemic, supply chain disruptions and lockdowns, inflationary pressures, increasing interest rates, and the decline of tobacco sales, all of which put their business and continued employment of hundreds of employees at risk.

[7] On June 22, 2023, the Court granted an initial order under the CCAA with respect to the Companies. On June 30, 2023, the Court granted an Amended and Restated Initial Order (**ARIO**).

[8] Given the importance of W&C to SEC's retail business, SEC quickly became directly involved in the CCAA proceedings. It negotiated an agreement with the Companies and their secured creditor to provide cash collateral to increase W&C's liquidity, to provide a limited

¹ Defined as the "Digiflex Agreements" in the Monitor Application.

recourse guarantee of W&C's credit obligations to its secured creditor, and to provide SEC the right to be a stalking horse purchaser of W&C's assets when they were sold.

[9] On August 23, 2023, the Court granted an order approving a sale and investment and sales process (**SISP**) for the Companies' assets or business.

[10] Following the SISP, on November 17, 2023, the Court granted an Approval and Vesting Order (**AVO**) approving a transaction with SEC (**Transaction**), including among other things:

- (a) approving an asset purchase agreement (**APA**) by which SEC purchased certain specific assets (**Purchased Assets**) of W&C and Loudon (**Vendors**);
- (b) vesting the Purchased Assets, which included certain assigned contracts (**Assigned Contracts**), in or with SEC;
- (c) approving the assignment of the Assigned Contracts; and
- (d) approving a Transition Services Agreement (**TSA**) between W&C, CMI, SEC and the Monitor.

[11] One of the commercial purposes of the TSA was to maintain W&C's services to SEC to facilitate the transition of the Purchased Assets and the SEC-related logistics operations from W&C to SEC. It also provided SEC time to decide whether there were additional assets it wanted to purchase, and how it was going to structure its Canadian distribution and logistics needs.

[12] Under the TSA, among other things:

- (a) W&C and CMI (**Debtors**) were obligated to SEC to continue to provide certain services (**Services**), which included certain "**Ongoing Services**" and "**Transition Services**", and to maintain and preserve certain contracts (**Transition Contracts**) required for the operation of the Debtor's business that were not part of the Purchased Assets;
- (b) the Debtors would use certain employees to perform the Services, but SEC would have the right to offer employment to those employees as SEC may deem appropriate;
- (c) SEC would fund W&C's operations and would be entitled to W&C's revenue during the term of the TSA;
- (d) the Debtors and the Monitor would use best efforts to wind-down all business activities of the Debtors for its non-SEC customers within 60 days, subject to any extensions SEC may agree to for some non-SEC customers in its sole discretion; and
- (e) the TSA's term was to end by August 2024 for business east of Alberta (**Eastern Business**) and by February 2025 for business in Alberta and British Columbia (**Western Business**), subject to SEC's right to extend those dates twice by 90 days

each time (that is, until approximately February 2025 for the Eastern Business and August 2025 for the Western Business).

[13] The AVO authorized and approved any amendments to the TSA agreed to between the Companies and SEC with the consent of the Monitor, and authorized and approved the Companies' performance of the obligations under the TSA.

[14] Under a long-standing business relationship with Digiflex, W&C and Loudon used the Digiflex Software, including a number of modules and software programs, which handled (among other things), purchasing, inbound control and receiving, warehouse management and inventory control, order processing and billing, logistics, shipping control, and consolidated reporting.

[15] For that purpose, W&C and Loudon had several agreements with Digiflex related to the Digiflex Software, including the Licence Agreements and associated maintenance agreements (**Maintenance Agreements**). The Licence Agreements are non-exclusive and perpetual licences to use the Software - the licence fees were paid when the Licence Agreements were first entered into. The Maintenance Agreements are automatically renewed annually unless a written notice of termination was given at least 30 days before the end of the term; they contemplated the provision of "**Maintenance Services**" including the provision of software updates and a 7 day by 24 hour "hotline service" for the software. In 2021, the Companies had decided to wind-down their use of the Digiflex Software and to transition to a new ERP software with another provider. However, at the time the Companies entered CCAA protection, W&C/Loudon continued to use the Digiflex Software under the Licence Agreements and continued to receive Maintenance Services under the Maintenance Agreements.

[16] It is acknowledged by all parties that the Licence Agreements were not purported to be part of, and were not part of, the Purchased Assets or Assigned Contracts acquired by SEC in the Transaction, and that they are not expressly referenced in the TSA.

[17] The Transaction closed in November 2023. For much of the first post-closing year, SEC worked on integrating financial information into SEC's database management system. During this process, it became apparent to SEC that the Digiflex Software used by W&C was outdated. SEC began exploring long term and short term ERP software options.

[18] Eventually, SEC also decided that it would incorporate a new company, SEDCC, to provide SEC with distribution and logistics services.

[19] In July 2024, W&C sought a quote from Digiflex for the development, test and go-live support, together with ongoing maintenance and support, for a separate ERP system to operate temporarily from January 1, 2025, to March 31, 2025 (with a possible extension until June 30, 2025). After receiving Digiflex's quote information, which included licence fees ranging from about \$485,000 to \$3,875,000 and with annual maintenance fees from \$169,400 to \$968,750, W&C advised Digiflex that it intended to continue using its existing Digiflex Software system with only a name change. Digiflex advised that a new company would require a new software licence.

[20] By September 2024, Digiflex was aware of SEC's plans to set up SEDCC for SEC's distribution and logistics needs. It had discussions with W&C and reiterated the need for a new licence if SEDCC intended to use the Digiflex Software.

[21] In October 2024, a senior manager of 7-Eleven in Ohio contacted Digiflex about renewing the Maintenance Agreements. She confirmed that only W&C transactions would be carried on the Digiflex Software. Digiflex advised a new licence agreement may be required to renew the Maintenance Agreement, but Digiflex could renew its annual general helpdesk² services (**General Helpdesk Services**) because that agreement was not directly related to the Software Licence Agreement. It provided an invoice for General Helpdesk Services, that was significantly more than the previous year.

[22] On October 15, 2024, 7-Eleven confirmed that it did not intend to buy a new licence agreement with Digiflex, there was no immediate intent or capacity to move to Digiflex's new ERP system, and that the W&C contracts (including the Licence Agreements) "will be in full force and effect" on their current terms. Later, 7-Eleven confirmed that the Digiflex Software was being used by W&C and that until W&C winds down Digiflex invoices should continue being issued to W&C.

[23] A dispute then arose. Digiflex took the position that SEC/SEDCC had been using Digiflex's Software since November 2023 (upon closing of the Transaction). It sent a new licence agreement to SEDCC, which SEDCC did not sign. Digiflex issued invoices to SEDCC, which SEC/SEDCC refused to pay until they were re-issued in the name of W&C.

[24] On December 3, 2024, Digiflex wrote to 7-Eleven, noted the lack of payment of the invoices or response, stated that "we can only assume that your Epicor implementation project has finally been completed and you no longer need our system or services". It asked 7-Eleven to inform W&C of this change and to initiate destruction of the Digiflex Software and documentation.

[25] That day, the Monitor's counsel wrote to Digiflex. It confirmed that, while SEC is funding W&C's business, W&C has not assigned (and remained party to) its agreements with Digiflex, that the agreements with Digiflex were not assigned to SEC, and that W&C was a separate legal entity from SEC. The Monitor informed Digiflex of the stay and stay period (**Stay Period**) under the ARIO, and that Digiflex's attempt to terminate agreements and increase prices was in breach of the ARIO.

[26] Digiflex's position was that "all indications are 7-Eleven has effectively taken over operations for more than a year now" that "7-Eleven decided to hide behind CCAA and [W&C], and now they seem to be trying to set up the 7-Eleven Distribution Canada business inside the existing [W&C] ERP databases", and that "they now want to pretend they are [W&C] to avoid paying licensing and maintenance fees". Digiflex confirmed it would not provide services beyond January 1, 2025.

² Referred to as Helpdesk Level 2 Support. I understand that the General Helpdesk Services are different than the Maintenance Services and, in particular, are different than the hotline service under the Maintenance Services Agreements.

[27] The Monitor immediately filed and scheduled an urgent court application. In Digiflex's December 11, 2024 response, it provided "formal notice that we will stop our support, maintenance and helpdesk services on January 1, 2025 ... regardless of the court outcome". Further correspondence and negotiations ensued.

[28] The parties reached a resolution. On December 17, 2024, Digiflex, W&C and the Monitor agreed to the terms of a consent order (**Digiflex Consent Order**), which (paraphrased) provided (among other things):

- (a) Digiflex shall continue to provide Maintenance Services to W&C until the later of (1) the expiration of the Stay Period (as may be extended by court order) and (2) the expiration of the term for the Western Business under the TSA (subject to further extensions as permitted under the TSA or court order);
- (b) Digiflex shall continue to provide General Helpdesk Services to W&C until January 31, 2025, after which W&C shall have the option to extend such services for one year to January 31, 2026, at a cost of \$192,000;
- (c) Digiflex, and its sole director and voting shareholder, Mr. Mohamed Mardukhi (**Mardukhi**), are restrained from discontinuing, altering, interfering with, suspending or terminating the supply of services as required by the Companies, or from exercising any other remedy provided under any agreements between Digiflex and the Companies;
- (d) the Companies shall be entitled to the continued use of the Digiflex Software and services provided by Digiflex under those agreements, and Digiflex shall support the services provided to W&C under those agreements on the same basis as they did prior to the Digiflex Consent Order; and
- (e) Digiflex and Mardukhi shall not accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by the Companies except with written consent of the Companies and the Monitor or leave of the Court.

[29] At the time of the Digiflex Consent Order, the CCAA stay period was set to expire on April 30, 2025 and, as noted above, the TSA's term for its Western Business could potentially be extended to August 2025.

[30] On February 7, 2025, SEC, the Debtors and the Monitor agreed to a written amendment to the TSA which provided that the TSA's term for the Western Business and the Eastern Business could be extended to August 2025.

[31] On February 21, 2025, the Court approved an extension of the Stay Period to August 20, 2025. By this time, W&C's employees had been hired by SEC or SEDCC, at least some of them had been seconded back to W&C to conclude the transition, and W&C continued to provide

logistics and other services to SEC in connection with W&C's business and the TSA.³ Digiflex was on the service list by this time but did not attend or take any position with respect to this order.

[32] On March 18, 2025, SEC exercised its right to extend the TSA to August 20, 2025.

[33] In late-May 2025, SEC advised the Monitor that SEC required the continued use of the Digiflex Software past August 20, 2025, to complete the transition of the logistics business to SEDCC.

[34] In June 2025, the Monitor's counsel advised W&C's counsel that SEDCC required extension of the CCAA and the TSA past the August 20, 2025, expiry date: the "work they are doing on the replacement IT work is progressing but it is not clear they are going to be finished by August. They are therefore asking for a TSA amendment and stay extension to December 31, 2025".⁴

[35] On August 5, 2025, the Monitor requested that W&C apply for an approval for a further amendment to the TSA to extend its term to February 15, 2026.

[36] In August 2025:

- (a) W&C applied to extend the Stay Period and the TSA to September 30, 2025, to give W&C time to review and consult with stakeholders about a further extension to the TSA. It was the understanding of Patrick Carey (**Carey**), W&C's CEO until December 31, 2024, and consultant until April 30, 2025, and its then director, that the extension of the TSA to February 15, 2026, was necessary "for SEC's and SEDCC's continued use" of the Digiflex Software. Carey also deposed that since the closing of the Transaction, W&C "has been providing services to SEC pursuant to TSA", that W&C continued to conduct business in most provinces and territories in Canada, and that "SEC, through SEDCC, carries on the logistics business of [W&C] under the TSA";
- (b) SEC applied for an order granting the Monitor enhanced powers. In its August 13, 2025, application, SEC confirmed that, "in order to have the continued use of the Digiflex software and services as it completes the transition under the TSA, SEC requires that the TSA be extended for a further six-month period, such that it would expire on February 15, 2026". Its application also stated that "the business of the [Companies] has been transferred to SEC"; and
- (c) the Monitor applied to approve certain of its activities and its fees.

[37] The matter came before me on August 18, 2025. By that time, some aspects of the relief requested were adjourned until August 26, 2025. W&C, after further consultation with the Monitor and SEC, sought the extension of the TSA to February 15, 2026, instead of only to September 30,

³ Affidavit No. 7 of Patrick Carey sworn February 10, 2025 at paras 20 and 34. Monitor's 15th Report dated February 13, 2025 at para 3.

⁴ Affidavit No. 8 of Patrick Carey sworn August 15, 2025, at para 30 and Exhibit D.

2025. Although Digiflex had not filed any evidence, Mardukhi appeared and expressed Digiflex's concern and belief that SEC was abusing the CCAA process to continue to use Digiflex's Software.

[38] I granted the requested Stay Period extension to September 30, 2025 only, not February 15, 2026, as requested, for these reasons (emphasis added):

My concern about this part of the application relates more to the lack of evidence about why a further extension of the TSA to February, of 2026 is needed. I didn't note any particular reasons given other than it seems obvious from the totality of the evidence before me that the reason for needing to extend the TSA relates to the ongoing need for certain software and services, related services being provided by [Digiflex]. There may be other reasons, but that is the only one that stood out as material to me. This CCAA has been ongoing for quite some time, and the orders approving the transaction with 7-Eleven and the transition services were all predicated on negotiated agreements that had a certain end date for the TSA process, or TSA agreement which, at least at the time the orders were granted, was thought obviously and held to be enough time to complete this part of this restructuring.

The Court needs more evidence about why a further number of months is needed, and the concern is made worse by the order of December 17th, 2024, which effectively requires [Digiflex] to continue providing services. **So in my mind, there is an issue about whether or not the continued provision of the services is really part of the restructuring any longer, or is it just something that 7-Eleven would like.** So there is just not enough evidence before me to make a determination on that point. I do note it does appear, from what I see in the evidence, that [Digiflex], although clearly affected by a continuation of the TSA, does not appear to have been involved in recent negotiations relating to the extension of the TSA, based on the record I have. So I don't have evidence about why the extension is needed specifically, what efforts have been made to resolve the transition in a timely fashion. I am not saying there aren't reasons. They are just not before me.

I don't have evidence about what will happen to the restructuring process as a whole if the TSA is not continued or extended and the requirement that goes hand in hand with that for [Digiflex] to continue to provide service and for those reasons, I am not prepared to grant the order that has been requested, but I do believe and accept what I have been told that there will be an impact on [7-Eleven's] transition to some extent if the software services are not continued to be provided.

So I will take Mr. Reid up on his alternative argument, which was his original application of the companies, was to keep the TSA date aligned with the stay. I don't want to, just because there is not sufficient evidence right now, cause an unnecessary disruption if there is good reason for a continued extension of the TSA. I do note [Digiflex] had at least some notice of this, didn't file any evidence and if it has a real concern, it might consider filing evidence or seeking to ask some questions on an affidavit or so forth. It has not engaged in those processes.

So I am satisfied that the TSA can continue to the same period of time as the stay, which is September 30th, so that more information can be provided if [...] they continue to want to pursue that extension.

[39] On August 25, 2025, Digiflex issued invoices to W&C/Loudon to continue providing Maintenance Services under the Maintenance Agreements until September 30, 2025. W&C paid those invoices.

[40] On August 26, 2025, the Court granted the Monitor enhanced powers with respect to the Companies. Carey subsequently resigned as W&C's only director.

[41] On September 9, 2025, the Monitor applied to extend the Stay Period, and to approve the extension of the term of the TSA, to February 15, 2026. The Monitor advised the Court⁵ that it was the Monitor's understanding that Digiflex's Software was run on servers located in the Debtor's offices, and was critical for W&C's logistics business that was transferred to SEC under the Transaction. The Monitor advised that SEDCC has been developing its own integration software to enable data to be moved from the Debtor's systems to SEC/SEDCC systems, which the Monitor understood would be fully operational by February 15, 2026.

[42] On September 19, 2025, the matter came before Justice Feasby. Digiflex did not file an application or evidence, but made several written submissions to the Court. Digiflex sought a declaration that W&C's Digiflex software licence agreement⁶ was terminated, to block SEC/SEDCC from using Digiflex's Software, and damages. Much (but not all) of what it relied on pre-dated the Digiflex Consent Order, and it made some of the same arguments it had made to the Monitor before the Digiflex Consent Order. In essence, Digiflex asserted that SEC was abusing the CCAA process by attempting to hide the fact that business was being carried on as SEC/SEDCC and not W&C, and that SEDCC/SEC were infringing Digiflex's copyright (among other things) by using the Digiflex Software without authorization. In oral submissions, Digiflex asked the Court to "make a judgment that [SEC] has been using our software without the licence since they finalized the purchase of [W&C]", to "make SEDCC pay our licence and maintenance invoices from November 1, 2024, plus interest, so they can legally use our ERP software for as long as needed". Digiflex advised that, if that was done, Digiflex would have no objection to the TSA extension.

[43] SEC/SEDCC confirmed to Justice Feasby that they were committed to completing the transition away from the Digiflex Software by February 15, 2026, if the extension was granted.

[44] On September 19, 2025, Justice Feasby granted an order (**Feasby Order**) extending the Stay Period, and approving the extension of the TSA, to February 15, 2026, but did so without prejudice to Digiflex's right to seek the termination of the TSA or otherwise commence proceedings against SEC.

[45] Following the Feasby Order, Digiflex invoiced W&C/Loudon for Maintenance Services to end February 15, 2026, and W&C/Loudon paid those invoices.

⁵ Second Supplement to the Monitor's 17th Report dated September 11, 2025.

⁶ Which is one of the Licence Agreements.

[46] On October 3, 2025, Digiflex confirmed a November 27, 2025 booking on the commercial list. On November 13, 2025, it filed the Digiflex Application. On November 21, 2025, the Monitor requested leave to bring the Monitor Application at the same time as the Digiflex Application, which was consented to by Digiflex and which I permitted.

[47] I heard the applications on November 27, 2025, and reserved my decision.

III. Issues

[48] The issues are:

- (a) Should the Digiflex Application be Granted?
- (b) Should the Monitor Application be Granted?

IV. Analysis

A. Should the Digiflex Application be Granted?

1. The Positions of the Parties

[49] Digiflex wants the stay lifted so that it can immediately terminate the Licence Agreements between W&C and Digiflex, and obtain a declaration that it has no further obligation to make its software available to SEC/SEDCC (directly or through W&C), or to provide services to SEC/SEDCC or W&C/Loudon. If SEC/SEDCC still requires the Digiflex Software, Digiflex's position is that SEC/SEDCC must have a new software licence agreement and maintenance agreement, and must pay a significant licence fee in the invoiced amount as outlined earlier. At the same time, in oral argument, Digiflex advised the Court that it does not really take issue with its licences with Loudon.

[50] Digiflex asserts (among other things) that:

- (a) the Digiflex Software is protected by copyright under the *Copyright Act*, RSC 1985, c C-42;
- (b) there are no orders or agreements which require Digiflex to provide access to the Digiflex Software, or to provide associated services, to SEC/SEDCC;
- (c) the Licence Agreements are perpetual and not transferable;
- (d) access to the Digiflex Software was not included or contemplated in the Transaction or the TSA;
- (e) SEC/SEDCC is using Digiflex's Software in breach of the Licence Agreement and Digiflex's copyright, and SEC/SEDCC is stealing from Digiflex; and
- (f) the continued compulsion of Digiflex to provide access to the Digiflex Software and associated services is akin to a granting a mandatory injunction against Digiflex that has caused and will continue to cause it prejudice.

[51] The Monitor's asserts (among other things) that Digiflex's position ignores the fact that W&C, through SEC/SEDCC seconded employees, continues to operate and provide services to SEC/SEDCC pursuant to the TSA, including by using the Digiflex Software. The Monitor advises that W&C will remain in business until all its obligations under the TSA are satisfied. The Monitor's position is that the provision of those services under the TSA was a fundamental component of the court-approved Transaction. It argues that granting the Digiflex Application would undermine that approval and the sanctity of the bargain with SEC, which greatly benefited the Companies' stakeholders, would cause harm to SEC/SEDCC because it continues to rely on W&C's access to the Digiflex Software (and will continue to do so until February 15, 2026), and would put W&C in a position of being unable to honour its obligations under the TSA.

[52] SEC/SEDCC's position is that it would be impossible for SEC/SEDCC to continue logistics operations required for SEC's retail stores if the Digiflex Software is not useable. It requires the *status quo* to be maintained until February 15, 2026, to allow it to transition to a different ERP platform. It notes that Digiflex has been paid for Maintenance Services for W&C/Loudon up until February 15, 2026, and that SEC/SEDCC do not need Maintenance Services or General Helpdesk Services beyond that date. It asserts it requires the assignment of the Licence Agreements after February 15, 2026, solely for the purposes of being able to access historical data for records retention, audit and tax purposes.

[53] No other party took a position with respect to the Digiflex Application.

2. Legal Framework for Application to Lift CCAA Stay

[54] The Court has the discretion to lift or vary a stay of proceedings under the CCAA in accordance with the procedure set out in the court's stay order: **Montréal (City) v Deloitte Restructuring Inc**, 2021 SCC 53 at paras 50-51; **Canadian Airlines Corp (Re)**, 2000 CanLII 28202 (AB KB) at paras 14-21; **Yukon Zinc Corporation (Re)**, 2015 BCSC 1961 at para 26(a); **Canwest Global Communications Corp**, 2011 ONSC 2215 at paras 19, 27 [**Canwest 2011**].

[55] The onus is on the party seeking to lift the stay, which has been described as a "heavy" onus, because lifting a stay is not routine: **Bellatrix Exploration Ltd (Re)**, 2020 ABQB 809 at para 67, leave to appeal dismissed 2021 ABCA 85; **Alignvest Private Debt Ltd v Surefire Industries Ltd**, 2015 ABQB 148 at para 42, appeal dismissed 2015 ABCA 355; **Canwest 2011** at para 27; **Canwest Global Communications Corp (Re)**, 2009 CanLII 70508 (ON SC) [**Canwest 2009**] at para 32; **Timminco Limited (Re)**, 2012 ONSC 2515 [**Timminco 2012**] at para 16; **Yukon Zinc** at para 26(b).

[56] In **Canadian Airlines**, at paras 15-19, Justice Paperny (as she then was) noted that in considering whether to lift a stay under the CCAA, the Court must consider the particular facts, the balancing of various interests, and the purpose of the CCAA. Over the years since that decision, courts have described various non-exhaustive factors in different ways. Based on these decisions, I find that a summary of non-exhaustive factors includes:

- (a) whether the applicant has "serious grounds" or "sound reasons" or lifting the stay. Non-exhaustive examples include when a CCAA plan is likely to fail or has not been put forward in a timely way, hardship or prejudice to the applicant caused by

- the stay, a necessity for payment, loss of security, the protection of a pre-stay right or a right which could be lost due to the passage of time (for example, limitations);
- (b) the merits of the proposed action or step, where relevant;
 - (c) whether the prejudice caused by the stay is material and unique to the applicant;
 - (d) the relative prejudice of affected parties;
 - (e) the balance of convenience;
 - (f) the status of the CCAA proceedings and the impact lifting the stay will have on them;
 - (g) whether the debtor company, the applicant seeking the stay, and any other relevant stakeholders have acted in good faith and with diligence: CCAA section 18.6; **Century Services Inc v Canada (Attorney General)**, 2010 SCC 60 at para 70 [**Century Services 2010**];
 - (h) whether lifting the stay is consistent with the remedial objectives of the CCAA. Like any discretionary decision under the CCAA, the court's discretion to lift a CCAA stay must be exercised in furtherance of the CCAA's remedial purpose: **Canada v Canada North Group Inc**, 2021 SCC 30 at para 138, citing **Century Services 2010** at paras 58-61; **9354-9186 Québec inc v Callidus Capital Corp**, 2020 SCC 10 at para 50; and
 - (i) whether it is in the interests of justice, or would be equitable, to lift the stay.

See: **Bellatrix Exploration** at paras 66-68; **Accel Canada Holdings Limited (Re)**, 2020 ABQB 182 at para 66; **Alignvest** at paras 41-43; **Canadian Airlines** at paras 14-21; **Yukon Zinc** at para 26; **Azure Dynamics Corporation (Re)**, 2012 BCSC 781 at paras 5-7; **3S Printers Inc (Re)**, 2011 BCSC 630 at para 32; **BioSteel Sports Nutrition Inc, (Re)**, 2024 ONSC 2459 at paras 33-34; **Nuance Pharma Ltd v Antibe Therapeutics Inc**, 2024 ONSC 7210 at para 115; **Timminco Limited (Re)**, 2014 ONSC 3393 at paras 50-52; **Canwest 2011** at para 27; **Timminco 2012** at para 16; **Canwest 2009** at paras 32-33; **ICR Commercial Real Estate (Regina) Ltd v Bricore Land Group Ltd**, 2007 SKCA 72 at para 68; **D Vachon Investments inc c Ernst & Young inc**, 2025 QCCA 476 at paras 19-22; **Arrangement relating to 9304-7033 Québec inc**, 2025 QCCS 2425 at paras 46-47; **Arrangement relatif à NMX Residual Assets Inc**, 2024 QCCS 2599 at para 63; **Arrangement relatif à 9424-9356 Québec inc**, 2021 QCCS 5319 at para 10; **Pascan Aviation inc (Arrangement relatif à)**, 2016 QCCS 1444 at para 19.

3. Assessment and Decision

[57] I have considered all of these factors and the positions of the parties.

[58] For the reasons set out below, I decline to exercise my discretion to lift the stay as requested by Digiflex, but I do provide it some relief. Some key factors are expressly addressed below.

a. The Feasby Order

[59] Digiflex did not apply to terminate the TSA as contemplated by the Feasby Order. Although this was raised in argument, neither the Monitor nor SEC/SEDCC took a strong position that this nuance had any real impact on the Digiflex Application. I find it does not.

[60] A court order should be interpreted as a holistic document, by reading the language of the order as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context or circumstances in which the order was granted, and the intention of the court granting the order: *Lay v Lay*, 2024 ABCA 26 at para 10; *Kantor v Kantor*, 2023 ABCA 237 at para 23; *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at para 25.

[61] The Feasby Order expressly referenced certain steps that could be taken based on the submissions made by Digiflex at the time, and the Feasby Order would not prejudice those steps. The clear intention of the Feasby Order was to allow Digiflex to file an application to assert its positions without being prejudiced by the decision to extend the Stay Period and the TSA to February 15, 2026.

[62] In any event, the Feasby Order did not preclude other applications. Digiflex was entitled to apply to vary the stay under the terms of the ARIO (paragraph 56) and to seek leave of the Court to terminate or cease to perform obligations under the Digiflex Consent Order (paragraph 5(b)).

b. The Transaction and the TSA Contemplated W&C/Loudon's Continued Use of the Digiflex Software and Maintenance Services

[63] I disagree with one of Digiflex's key positions, namely its interpretation of the APA and the TSA to the effect that they did not contemplate the Debtors' continued use and maintenance of the Digiflex Software under the Licence Agreements and the Maintenance Agreements for the benefit of SEC/SEDCC. I find they did.

[64] The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 79; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 49; *Remington Development Corporation v Canadian Pacific Railway Company*, 2025 ABCA 244 at para 43.

[65] Provisions must be interpreted in light of 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 the formation of the contract: *Remington Development* at para 43; *Sattva* at paras 47, 49; *IFP* at para 79; *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 at para 64.

[66] Courts must consider the relevant surrounding circumstances, including the "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *IFP* at paras 82–83; *Sattva* at para 58; *Remington Development* at para 47.

[67] Relevant background facts can include the genesis, aim or purpose of the contract, the nature of the relationship created by the contract, the nature or custom in the industry in which the contract was executed, antecedent agreements leading up to the contract, and even negotiations if they shed light on the factual matrix: *IFP* at paras 83–85 and the cases cited therein; *Alberta Union of Provincial Employees v Alberta Health Services*, 2020 ABCA 4 at para 32.

[68] “Surrounding circumstances” does not include the parties’ subjective intentions and cannot be used to add to, detract from, vary, or otherwise overwhelm the written words: *Sattva* at paras 59-60; *IFP* at paras 81-82; *Talwandi Video Lab Inc v 1441419 Alberta Ltd*, 2024 ABCA 140 at para 11; *Alberta Union* at para 26; *Remington Development* at para 47; *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 at para 30; *Heritage Property Corporation v Triovest Inc*, 2025 ABCA 64 at para 14.

[69] Digiflex argues that it and its agreements are not mentioned anywhere in the APA or the TSA. Digiflex’s implication is that the Licence Agreements were missed or SEC/SEDCC made a strategic decision not to include them and SEC/SEDCC is now trying to manipulate the CCAA process to fix its mistake or strategic error in not dealing with the Licence Agreements at the time of the Transaction.

[70] As noted above, it is correct, and acknowledged by the Monitor and SEC/SEDCC, that the Licence Agreements are not part of the Purchased Assets under the APA, nor are they expressly referenced in the TSA. But that does not end the matter.

[71] The commercial context of the Transaction and the TSA included that SEC was not acquiring all the Companies’ assets, but rather a specific set of assets for the future logistics operations required for SEC’s retail store operations. To obtain the benefit of the purchase for the Companies’ and its stakeholders, the Debtors were to continue to provide services to SEC during the transition. The obvious commercial purpose of this was to ensure continuity of distribution and logistics operations necessary to minimize disruption to SEC’s retail 7-Eleven operations during the transition.

[72] Under the APA, among other things:

- (a) SEC acquired the “Purchased Assets” (APA, clause 2.1), but not the “Excluded Assets”, which were all assets not included in the definition of Purchased Assets (APA clause 2.2);
- (b) the Purchased Assets included, among other things, all furniture, fixtures, equipment, machinery and all other tangible personal property owned by the Companies in Alberta and British Columbia (APA clause 2.1(a));
- (c) the Purchased Assets included a list of defined Assigned Contracts which were to be assigned to SEC (APA clauses 2.1(b) and 2.4). SEC was entitled to add to or delete from the list of Assigned Contracts until Closing. It therefore had the option to include the Licence Agreements but did not do so. All contracts that were not Assigned Contracts were “Excluded Contracts”. Although some software licences were included as Assigned Contracts, the Digiflex Licence Agreements were not Assigned Contracts. Therefore, they were Excluded Contracts;

- (d) the TSA shall be entered into and shall set out the terms and conditions pursuant to which the Companies “will continue to provide logistics services to the Purchaser on a revenue neutral basis” and that the Companies “will continue to have access to the Purchased Assets for the purposes set out in the TSA” (APA, clause 5.6);
- (e) it was expressly contemplated that the Excluded Contracts would be retained by the Companies and disclaimed in the CCAA process “subject at all times to their obligations under the TSA” (APA clause 2.4(e)). It was, therefore, expressly contemplated that the Companies would have to maintain their interest in Excluded Contracts (including the Licence Agreements) to provide services under the TSA; and
- (f) the Companies were to commence an immediate orderly wind-down and termination of third-party customer business such that as soon as possible following Closing, other than residual wind-down activities, the Purchaser will be the only go-forward customer of the Companies, as contemplated by the TSA (APA, clause 5.10).

[73] Under the TSA, among other things:

- (a) the Debtors are to provide the Services, which are the Ongoing Services and the Transition Services, both of which are set out in schedules to the TSA;
- (b) the Ongoing Services include all services currently provided by the Debtors to the Purchaser under existing contracts between the parties, including executive, financial, sales management, purchasing, logistics and customs, information technology, employment, health safety and environment (**HSE**), and human resources (**HR**) services. This included a requirement to “operate all information technology systems and services in a manner consistent with the periods prior to Closing, unless otherwise directed by Purchaser”; and
- (c) the Transition Services include executive, nominee responsibilities, financial, sales management, purchasing, logistics and customs, information technology/data, HSE, HR, reporting and CCAA services. The information technology/data services expressly contemplated that the Companies would assist the Purchaser with integrating the “Debtor’s information technology systems” into the Purchaser’s environment, with data migration, and with maintaining “the Purchaser’s access to Debtor’s information technology systems”.

[74] Properly interpreted, I find that the Licence Agreements were Excluded Contracts and, although the Companies did not own the Digiflex Software, they had licences to access it and use it. I find that access to and use of the Digiflex Software formed a part of the Companies’ information technology systems which they were obligated to maintain access to and use to provide Services to the Purchaser during the term of the TSA.

[75] I disagree with Digiflex’s narrow interpretation of Services. In the commercial context of the APA and TSA, it was not objectively intended by the parties to exclude access to software required to operate the Companies’ logistics business when they all knew that business was

integral to avoid disruption to SEC's retail operations during the anticipated transition. The fact that the parties decided not to definitely list the Excluded Contracts in the APA, or not expressly reference the Licence Agreements in these agreements, does not change this interpretation.

c. No Lack of Good Faith in the Transaction

[76] CCAA section 18.6 provides that "any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings" and that, if a court finds a person has failed to do so, the court on application may "make any order it considers appropriate in the circumstances". Appropriateness, good faith and due diligence are baseline considerations the Court should always bear in mind: *Century Services 2010* at para 70.

[77] I find that there is no evidence of a lack of good faith on the part of the Companies, SEC or the Monitor in how the Transaction, the APA or the TSA were structured, papered and proposed for the Court's approval.

[78] The specific reason why the Licence Agreements were not included in the APA, and not dealt with at the time of the APA is not before me. The only parties who could provide that contextual evidence were the Companies, SEC or the Monitor. A court may exercise its discretion to draw an adverse inference against a party that fails or refuses to bring forward evidence on a key point, upon considering various factors: *Stikeman Elliott LLP v 2083878 Alberta Ltd*, 2019 ABCA 274 at para 87 (Slatter JA in dissent); *Greco v Calgary (City)*, 2025 ABKB 629 at paras 169-172.

[79] Affidavits from key witnesses from both the Companies and 7-Eleven were before me and Digiflex could have questioned on those affidavits under rule 6.7 to obtain more evidence. When Digiflex attended before me on August 18, 2025, I expressly invited it to consider questioning on affidavits. It chose not to do that.

[80] Digiflex also did not seek further evidence from the Monitor. Court-appointed officers, such as monitors, are not typically subject to cross-examination except in exceptional or unusual circumstances: *Canadian Western Bank v Goshen Professional Care Inc*, 2025 SKKB 5 at paras 47-48. However, monitors often voluntarily answer interrogatories. See, for example: *Accel Canada Holdings Limited (Re)*, 2020 ABQB 116 at para 1; *Re Plan of Compromise or arrangement*, 2024 ONSC 5416 at para 3; *Pride Group Holdings Inc et al*, 2024 ONSC 5902 at para 3; *Re Blue Lobster Capital Limited et al*, 2025 NSSC 243 at 6.

[81] In the circumstances, Digiflex has not proven that SEC/SEDCC or the Monitor did not act in good faith with respect to the Transaction, and I decline to draw an adverse inference against them.

d. The Agreements with Digiflex Should have Been Addressed Sooner

[82] Although I have found that the APA and the TSA contemplate the Companies' continued use of the Digiflex Software under the TSA during the transition, and I have not drawn an adverse inference against the parties to that transaction, this does not absolve these parties of any responsibility for the circumstances now before the Court.

[83] The Monitor gave notice to all known creditors of the Companies (including Digiflex)⁷ that the Companies were in CCAA protection in June 2023 (although Digiflex asserts it did not receive the letter).

[84] However, Digiflex was not given notice of the application to approve the Transaction, the APA and the TSA. It is unclear on the record before me when and if Digiflex was first served with the AVO (Mardukhi's evidence is that he first learned that W&C was winding down and a new distribution company taking over in July 2024).

[85] The Licence Agreements were not expressly referenced in the Transaction approval application materials. The risks associated with not providing Digiflex notice or expressly dealing with Digiflex contracts at the time of the Transaction approval were not addressed or explained. Yet the Digiflex Software is now acknowledged to be critical to ongoing operations and performance of the TSA Services. There is no evidence that the omission of Digiflex agreements in the Transaction was a mistake or oversight, which means it was likely a choice. The Monitor acknowledges the Digiflex contracts were likely available to SEC in the due diligence process under the SISP. That can be reasonably inferred.

[86] Digiflex was already restrained by the stay imposed by the ARIO. In that context, the formal approval of transactions that expressly required Digiflex's ongoing performance of services and access to its software, for a potentially indefinite time dependent on the diligence and resource allocation of a third-party purchaser in a major transition, clearly affected Digiflex. I disagree with the Monitor on this point and find that Digiflex should have been given notice of the Transaction approval. Third-party counterparties to agreements with debtors under CCAA protection must also be treated fairly and equitably: *In Re Hudson's Bay Company*, 2025 ONSC 5998 at paras 32; *Veris Gold Corp (Re)*, 2015 BCSC 1204 at para 58.

[87] Had notice to, and more complete information about, Digiflex been given at the time the Transaction and TSA were approved, the issues now before me would very likely have been raised earlier and a commercial or judicial resolution may have been achieved with less expense and risk, and with more go-forward certainty for all parties. As pointed out by Digiflex, this is similar to what happened in an analogous situation involving software used by a debtor company in *Re Nortel Networks Corporation et al*, 2016 ONSC 2732 at para 35. See also *Nexient Learning Inc (Re)*, 2009 CanLII 72037 (ON SC) at para 84.

e. The Digiflex Consent Order

[88] However, the Transaction parties' role in causing the current circumstances is not determinative. I disagree with Digiflex that the Digiflex Consent Order is irrelevant to the applications before me. To the contrary, it is both relevant and material.

[89] It is important to put into context Digiflex's state of knowledge and position at the time it agreed to the terms of the Digiflex Consent Order. Critically, at that time, Digiflex had already

⁷ Monitor's 18th Report dated November 20, 2025, para 2 and Appendix A (CCAA Notice to Creditors dated June 28, 2023). See also Monitor List of Creditors as at June 22, 2023) available at <https://www.ksvadvisory.com/experience/case/wallace-and-carey>.

taken the position that “7-Eleven has effectively taken over the operations for more than a year now”, that Digiflex’s software licence agreement with W&C should not have been in effect since the closing of the Transaction, that a new licence was required, and that 7-Eleven wanted to “pretend they are [W&C] to avoid paying licensing and maintenance fees.”⁸ Digiflex asserted:

Instead of acknowledging the need for a new license, 7-Eleven decided to hide behind CCAA and [W&C], and now they seem to be trying to set up the 7-Eleven Distribution Canada business inside the existing [W&C] ERP databases.⁹

[90] These are some of the very same positions that Digiflex now takes. In that context, rather than asserting its position to the Court or seeking to lift the stay of proceedings in December 2024, Digiflex decided to reach a commercial arrangement with the Monitor and the Companies as reflected in the Digiflex Consent Order. Parties should be expected to be held to their bargains in the insolvency context: *ATB Financial v Mayfield Investments Ltd*, 2024 ABKB 635 at para 40.

[91] In my view, by agreeing to the Digiflex Consent Order, Digiflex effectively acknowledged that, up to that time, its software was being used by W&C and Digiflex was providing Maintenance Services to W&C, under the agreements with Digiflex. This is clear by the reference to (emphasis added) “Digiflex shall **continue** to provide maintenance services ... to [W&C]”, and its consent that “the **Companies** shall be entitled to the **continued** use of the software and services provided by Digiflex pursuant to the terms of the Digiflex Agreements and Digiflex and Mardukhi shall support the services provided to [W&C] **on the same basis they did prior to the date of this Order**”. That is, notwithstanding its position that a new licence was already required for SEC based on what was actually happening post-Closing, Digiflex agreed to continue to provide *status quo* access to and maintenance of the Digiflex Software, and knew it was doing so, for the purposes of the TSA.

[92] Further, Digiflex agreed that it would continue to provide *status quo* access to and maintenance of its software, on the same basis, until the later of the CCAA stay being lifted or the end of the TSA term, which patently created a potentially indeterminate period. Therefore, Digiflex agreed to have the length of time the *status quo* would be maintained with respect to its software to be out of its control. I give Digiflex’s argument that it agreed to the Digiflex Consent Order on the assumption the Stay Period would end in April 2025 little weight.

[93] It is obvious that the Monitor, the Debtors, the Court and other stakeholders (including SEC) relied on the Digiflex Consent Order in the ongoing management and response to the CCAA proceedings, the performance of the TSA, and the continued transition of the Companies’ logistics business to SEC/SEDCC.

[94] In all these circumstances, Digiflex’s attempt before me to rely on events that predated the Digiflex Consent Order are viewed with special scrutiny and are given much less weight. I find it would be an abuse of the CCAA process for it, a year later, to now raise and rely on the state of affairs prior to the Digiflex Consent Order in these proceedings. Digiflex had an opportunity to raise its concerns and position in these CCAA proceedings in late 2024, and chose instead to agree to a consent court order. Part of the Court’s supervisory role in CCAA proceedings is to ensure that

⁸ Mardukhi November 14, 2025 Affidavit, Exhibit M (December 3, 2024 email from Digiflex to Monitor).

⁹ Mardukhi November 14, 2025 Affidavit, Exhibit P (December 6, 2024 email from Digiflex to Monitor).

the process unfolds in a fair and transparent manner. Digiflex's attempt to revive and rely on the allegations that pre-dated the Digiflex Consent Order, almost a year later, is not consistent with an orderly CCAA process. Digiflex did not act in a fair and transparent manner in this regard.

f. There is a Non-Frivolous Dispute About Whether the Digiflex Software is Being Used under or in Breach of the Licence Agreement, or in Breach of Copyright

[95] In addition to relying on matters that pre-date the Digiflex Consent Order, Digiflex also relies on matters after the Digiflex Consent Order. For example, Digiflex points to further steps that have been taken to wind-down W&C, including SEC/SEDCC hiring 450 W&C employees, SEC/SEDCC employees using its software, Digiflex receiving emails from SEC/SEDCC email addresses, the wind-down of the W&C website and sign-in for customers, and the replacement of W&C logos on documents generated using or in conjunction with the software.

[96] The reality is that Digiflex's Application is completely founded on its asserted position that W&C is no longer the one using the Digiflex Software, it is SEC/SEDCC. This is the foundation for its argument that there has been a breach of the Licence Agreement by W&C and a breach of copyright by SEC/SEDCC.

[97] The problem with Digiflex's position, on the record before me, is that the question of which entity has been using the Software, and whether W&C remains operational, is in dispute and the record is not sufficient for me to fairly determine that issue in a final way in this summary process. Digiflex's counsel, when asked, indicated it did not seek or require a finding of fact on this key issue.

[98] The Monitor, a court officer currently holding enhanced powers with respect to W&C's management, advises that W&C continues to operate under the TSA, and is legally the party using the Digiflex Software, through former W&C employees that are now SEC/SEDCC employees seconded back to W&C for that purpose. Again, I note that Digiflex did not question SEC/SEDCC, or seek an evidentiary process with the Monitor, to explore in a concrete way exactly where, by whom and how the Digiflex Software is being used.

[99] I find that the fact SEC/SEDCC employees seconded to W&C may be using the Digiflex Software to support SEDCC's business, that Digiflex is receiving emails from SEC/SEDCC email addresses, or that logos on documents have been changed, is insufficient to prove for the purposes of this summary process that W&C has breached the Licence Agreements or any copyright. The facts relied on by Digiflex are also consistent with W&C continuing to provide a portion of the logistics services to SEC as W&C has always done, as part of the continued provision of Services under the TSA (including as contemplated in the Digiflex Consent Order).

[100] I further understand that Digiflex has commenced an action in Federal Court against SEC and/or SEDCC for breach of Digiflex's copyright, which will raise this very same issue. My finding here is an interim finding based on a limited record, and is not intended to, and does not, create a binding decision on these disputed points. Based on the record before me, I find that Digiflex's assertions of Licence Agreement and copyright breaches are not frivolous.

[101] Whether the Companies and SEC/SEDCC have in fact operated beyond the scope of what was approved in the TSA, or in breach of the Licence Agreements or copyright, is a matter to be determined by settlement or a trial process, not this interim, summary CCAA application.

g. Digiflex Delay in Seeking Relief

[102] I find that Digiflex has not pursued relief from the Court expeditiously. I understand that it has been on the service list since December 2024. It was likely served with the February 2025 application materials for the extension of the Stay Period, together with the related Monitor's report. These materials disclosed the amendment to the TSA to extend its term to August 2025, that the Companies continued to wind down operations, that all remaining W&C employees were hired by SEC or SEDCC, and that some of those employees had been seconded back to W&C to facilitate the wind-down and transition of the companies' business.¹⁰ Digiflex waited almost eight months to formally pursue its rights. It only retained counsel when expressly directed to do so by Justice Feasby.

[103] Creditors in CCAA proceedings must advance their positions in a timely way, with an appropriate evidentiary foundation: *Delta 9 Cannabis Inc (Re)*, 2025 ABKB 52 at paras 139-140. Digiflex did not do that with appropriate diligence.

h. Digiflex's Stated Purpose May Not be Furthered by Lifting the Stay

[104] Digiflex's stated goal is to stop SEC/SEDCC and W&C from accessing or using the Digiflex Software moving forward. However, if the stay is lifted, it is not clear that Digiflex would be in a position to terminate the Licence Agreements. That would likely depend on the core disputed issue of whether W&C has breached them, as discussed above.

[105] Further, one of the licence agreements provides (emphasis added):¹¹

LICENCE TERMINATION. If Customer breaches any of its obligations hereunder, or if the Customer becomes insolvent, files a petition in bankruptcy, or has filed against it an involuntary petition in bankruptcy, or has a receiver appointed over all or substantially all of its assets, **then Digiflex may, at its option, if there are any amounts owing by Customer to Digiflex, immediately terminate the License To Use granted hereunder upon written notice to Customer.** In case of receivership or bankruptcy the License To Use shall be continued provided the Receiver or Trustee in Bankruptcy assumes all of the Customer's obligations under this agreement. If the License To Use is so terminated, all the Licence fees paid hereunder will be deemed to have been paid for the use of the Package during the time it was in Customer's possession and Customer shall not be entitled to a refund of any portion of the License To Use fee. In addition, in the event of a breach by Customer of any of its obligations hereunder, Digiflex shall be entitled to seek equitable relief, including by way of injunction, to protect its interests herein, it

¹⁰ Monitor's 15th Report dated February 13, 2025 at para 2-3; Affidavit No. 7 of Patrick Carey sworn February 10, 2025 at para 34.

¹¹ I was advised that the terms of the various Licence Agreements with W&C/Loudon are substantially the same.

being acknowledged by the Customer that Digiflex would suffer irreparable harm by any such breach and that damages would be an inadequate remedy. [...]

[106] This provision provides that if W&C/Loudon are in breach of the Licence Agreements, then they can terminate them “if there are amounts owing by Customer”, and may have a right to seek an injunction. However, there is no amount currently owing to Digiflex under the Licence Agreements (the licence fee was prepaid long ago), and it does not seem likely there will be any amounts owing in the near term given that Maintenance Services have already been paid for to February 15, 2026.

i. Overstated or Unproven Prejudice

[107] Digiflex asserts it and Mardukhi will suffer prejudice and hardship if it is not granted relief. I find this to be overstated. Digiflex was pre-paid for the Licence Agreements and so has not received further licence fees since the CCAA proceedings started. However, Digiflex has continued to be paid for its Maintenance Services and General Helpdesk Services.

[108] Digiflex’s assertion that Mardukhi wants to retire is also of limited weight. First, Digiflex is a corporation and the evidence is that it has contract workers available to assist in the event Mardukhi wishes to transition some of the required work to them. Further, by agreeing to the Digiflex Consent Order, Digiflex must be taken to have been aware that it might be required to provide services into 2026.

[109] Further, and in any event, the Monitor (on behalf of W&C) and SEC/SEDCC have advised that they will not require Maintenance Services after February 15, 2026, and do not seek to assign the Maintenance Agreements to SEC/SEDCC. So, Mardukhi and Digiflex’s continued active involvement will accordingly and effectively be wound down within two months.

[110] What Digiflex really laments is the potential loss of a new and significant licence fee that it would not have an entitlement to (if at all), but for the insolvency of the Companies. It is noted that the Companies had already advised Digiflex they were moving to another ERP software and Digiflex had already organized a wind-down in operations in anticipation of that move. In any event, for the reasons outlined earlier, Digiflex’s entitlement to a new licence fee is founded upon its position that the Licence Agreements have been breached, and it is SED/SEDCC using its software. As noted, that issue cannot be determined in this process.

[111] SEC/SEDCC’s alleged harm or prejudice is also overstated. In an affidavit from 7-Eleven, it is suggested that the termination of access to the Digiflex Software would “result in the immediate discontinuation of the SEDCC business, including the catastrophic disruption of the SEC retail business across Canada”. In SEC/SEDCC’s brief, they argue that if the Licence Agreements are not assigned and Digiflex is permitted to terminate them “there will be a loss of 540 7-Eleven retail locations in five provinces across Canada and yet another insolvent retailer”.¹²

[112] The Court must assume that sophisticated commercial businesses will behave rationally: **Cleo Energy Corp (Re)**, 2025 ABKB 621 at para 25. With respect, it is simply not believable that SEC/SEDCC and 7-Eleven would irrationally allow a catastrophic failure of its Canadian retail

¹² Bench Brief of SEC and SEDCC filed November 21, 2025.

chain over the need to enter into a new software licence agreement with Digiflex, especially given that Digiflex has made it very clear it is willing to give SEC/SEDCC unlimited access to the Digiflex Software for its invoiced licence fee. The rational response from SEC/SEDCC, if it has no other options, would be to pay Digiflex the licence fee. The prejudice or hardship for SEC/SEDCC is simply that it does not want to pay the fee. It perceives Digiflex as extracting a ransom.

[113] At a practical level, at its core the dispute between the parties on these applications is primarily about the licence fee, and the suggestions otherwise are not persuasive. One party wants it paid and the other doesn't want to pay it, and they each find the other's position abhorrent.

j. SEC/SEDCC's Delay in Transition to New ERP Software

[114] With respect, SEC/SEDCC's approach to the transition away from services requiring the Digiflex Software has been slow. The APA and TSA, as approved, contemplated transition by August 2025. 7-Eleven's evidence is that it takes 18 months to build out an ERP software system. SEC must be taken to have known of the existence of the Digiflex Software when the APA/TSA were entered into and approved in November 2023. 18 months from November 2023 would have been May 2025 (well within the originally anticipated term of the TSA).

[115] Further, by no later than July 2024, SEC knew work was required and there may be issues with Digiflex. 18 months from that time would have been December 2025. However, SEC says that it was "unable" to start working on a new ERP system until November 2024 because its financial and IT resources were busy. At the same time, however, it describes the Digiflex Software as of "mission critical importance".

[116] In my view, SEC/SEDCC's evidence reflects consequences of its resource allocation decisions or choices, or possibly lack of diligence, rather than an *inability* to start the ERP transition process earlier. SEC/SEDCC effectively caused or contributed to the need for the Digiflex Software longer than had originally been anticipated. SEC/SEDCC is responsible, at least in part, for the extended time the Digiflex Software and services have been required.

[117] Purchasers gaining the benefit of CCAA processes, in particular with ongoing stay requirements against third parties, are expected to earnestly and expeditiously dedicate resources to effect transitions of purchased assets or businesses as soon as reasonably possible. The resources required to accomplish this should be factored into their decision-making on price and transition planning. In this case, the need for expeditious and diligent transition was heightened by the terms of the Digiflex Consent Order, which bound Digiflex for a period outside Digiflex's control and at least partly within SEC/SEDCC's control.

[118] In hindsight, it does not appear to me that SEC/SEDCC gave the new ERP system the early and urgent attention it deserved and required in the circumstances.

k. The Impact on the CCAA Proceedings and the Companies' Stakeholders

[119] The Transaction closed in November 2023. The transition of the Purchased Assets to SEC/SEDCC is largely complete and cannot be unwound: see *Nexient* at para 83. Approximately

450 employee jobs were saved by the Transaction. These CCAA proceedings are almost complete (although I am aware that the Monitor has scheduled time with Justice Feasby on February 12, 2026, for another Stay Period extension application). The benefit of the Transaction has already largely been realized.

[120] The Monitor was unable to point to any specific negative impact to the Companies, their creditors, or other stakeholders if the Digiflex Application is granted. No other stakeholders took a position on the application. SEC/SEDCC did not suggest it would sue someone (or the basis upon which it would do that), if the Court grants the Digiflex Application.

[121] The Monitor argues that the Digiflex Application should be denied in order to protect the integrity of the Companies' CCAA process and the Court's orders, including the approval of the Transaction and the TSA. The Monitor highlights, and I find, that the Transaction benefited the Companies' stakeholders and appears to have avoided the loss of significant jobs and a potential damaging ripple impact on SEC/SEDCC's retail operations. Further, concerns have been raised about discouraging future purchasers in CCAA if post-closing transition is not facilitated.

[122] I agree that it is critical to uphold the fairness and transparency of the CCAA process, including to uphold the reasonable expectations of the court-approved Purchaser of a significant component of the Companies' assets. It is also often appropriate to reasonably facilitate transitions. However, in all the circumstances, I find it is unlikely that granting the Digiflex Application would put a chill on future CCAA restructurings. As noted, purchasers of assets or businesses under CCAA restructuring processes well know they must take reasonable steps to transition in a timely and efficient manner and cannot expect to impose unreasonably on other third parties.

[123] In my view, it is equally or more likely that allowing the CCAA to be used to protect a debtor and a purchaser of assets, for an indefinite or multi-year post-closing transition process when third party contracts are affected, would not be consistent with the CCAA's remedial objectives of "timely, efficient and impartial resolution" of a debtor's insolvency: *Callidus* at paras 40-42; *Delta 9* at para 33. This is particularly so when affected third party contractual counterparties are not provided notice of the approval process and those contracts were not specifically raised with, or addressed by, the Court at the time of the transaction approval (but could have been). Again, third parties must also be treated fairly and equitably: *Hudson's Bay* at para 32; *Veris Gold* at para 58.

[124] Allowing the stay and the Digiflex Consent Order to continue beyond February 15, 2026, *vis a vis* Digiflex, the Digiflex Software and the Licence Agreements, would serve to undermine the overall fairness and transparency of the CCAA process. On SEC/SEDCC's own evidence, by then the transition contemplated by the Transaction will be complete (at least as it relates to the Digiflex Software). To continue the stay and the Digiflex Consent Order *vis a vis* Digiflex beyond that time would no longer be for the purpose of facilitating CCAA restructuring but rather to use the Court's protection to unfairly benefit a purchaser in its ongoing post-restructuring business.

I. Conclusion

[125] For at least the above reasons, Digiflex has not met its burden to establish that it is appropriate to grant the Digiflex Application on the terms requested. I also do not grant the

declarations sought. The transition away from the Digiflex Software is to be completed in two months, and the balance of convenience, equity, and interests of justice support maintaining the *status quo* until February 15, 2026, to allow the Companies, the Monitor and SEC/SEDCC to complete the transition process by that date.

[126] However, the transition must then end as it relates to Digiflex. The balance of convenience, equity and interests of justice require SEC/SEDCC and the Monitor to dedicate the necessary resources to finish the transition away from the Digiflex Software within this time frame. After that, with respect to the Licence Agreements, the parties should be free to exercise their rights accordingly (acknowledging the dispute about whether there has been a breach of the Licence Agreements or copyright). To be clear, I make no findings and do not intend to bind any future court addressing the dispute about whether the Licence Agreements or copyright has been breached or infringed since the Digiflex Consent Order, on a more complete record or at trial.

[127] With respect to the Maintenance Services under the Maintenance Agreements, and the General Help Desk Services, SEC/SEDCC has expressed that they are not required or desired beyond February 15, 2026, and those agreements can likely be terminated in accordance with their terms or by agreement.

[128] Accordingly, I order that the stay shall be lifted *vis a vis* Digiflex at 11:59 p.m. on February 15, 2026. The ARIIO, the Digiflex Consent Order, and any other orders in these proceedings are varied to the extent necessary to implement this decision. The Monitor's counsel is directed to prepare the form of order with the proposed amendments to the orders in these proceedings as required. If any issues arise with respect to the specific terms of the order, the Monitor may contact my office, and I can settle the terms of the required variation order.

B. Should the Monitor Application be Granted?

[129] The primary relief sought in the Monitor Application is the dismissal of the Digiflex Application, which has already been addressed above.

[130] The secondary relief is the Proposed Assignments from W&C/Loudon to SEC/SEDCC under section 11.3 of the CCAA. SEC/SEDCC propose to pay W&C/Loudon \$80,000 for the assignment of the Licence Agreements.

[131] The Proposed Assignments relief was sought by the Monitor using its enhanced powers, at the request of SEC/SEDCC and in response to the Digiflex Application.

[132] In the SEC/SEDCC brief, SEC/SEDCC confirmed that, although the Licence Agreements "are perpetual, SEDCC does not anticipate requiring the use of such licences beyond February 2026". The Monitor Application was, not surprisingly, focussed on the need to ensure access to the Digiflex Software during the transition to February 15, 2026.

[133] Given that I have lifted the stay effective February 15, 2026, there no longer appears to be a need for the Proposed Assignments for the purposes of the transition, as applied for by the Monitor.

[134] However, immediately before these Applications, SEC/SEDCC wrote to the Monitor’s counsel and advised that, even if the Digiflex Application was not granted, SEC/SEDCC required future access to the Digiflex Software after February 15, 2026 to be able to access historical electronic records and documents that are only accessible through the software, for “multi-year record and document audit and [Canada Revenue Agency] retention obligations”. This was also briefly discussed at the hearing.

[135] During the hearing, Digiflex advised that the Digiflex Software could be configured to something referred to as “read-only”¹³ mode to facilitate access for document retention / access purposes and, if that was all that is required it is a possible solution and Digiflex is amenable to maintaining the licence or allowing that access. It is not clear to me if this is contemplated by the Licence Agreements or would require a limited new commercial arrangement. It is also unclear whether the perpetual nature of the Licence Agreements is actually needed or appropriate for this limited purpose. These nuances were not addressed by the parties in evidence or argument.

[136] Further, it was also not addressed in evidence whether W&C/Loudon or SEC/SEDCC may be able to export the historical records data to avoid the need to keep access to the software in read-only mode post February 15, 2026. I had understood from the Monitor’s 17th supplemental report, the Monitor’s 18th Report, 7-Eleven’s September 8, 2025 affidavit, and SEC/SEDCC’s November 21, 2025 brief, that part of the transition work included SEC/SEDCC developing its own “integration software” to move data from the Debtor’s systems. In the circumstances, notwithstanding counsel’s letters and submissions, it is unclear, factually, whether an assignment of the Licence Agreements is actually necessary for records retention, audit or tax purposes once the underlying data is moved to SEC/SEDCC’s systems.

[137] Rather than engaging in a detailed analysis under section 11.3 of the CCAA at this time, I find that it is appropriate to adjourn this aspect of the Monitor Application to allow the interested parties, with the benefit of these reasons, to see if they can work out an appropriate compromise or commercial arrangement to facilitate ongoing access to the Digiflex Software for SEC/SEDCC’s records retention and audit purposes (if that is in fact even necessary).

[138] The Court is hopeful that, with the guidance of these reasons, a reasonable and appropriate commercial arrangement can be reached with respect to any post-February 15, 2026, access to the Digiflex Software for records retention and audit purposes. If not, I seize myself of the Proposed Assignments application and the parties may contact the commercial coordinator to seek my directions on an appropriate procedure for further evidence (if required) and submissions. I am hopeful that will not be necessary.

V. Conclusion

[139] The Digiflex Application is not granted as requested but the stay is lifted *vis a vis* Digiflex effective February 15, 2026, at 11:59 p.m. to allow it to pursue whatever rights it might have (if any) in respect of its agreements with the Companies. The relief sought in paragraph 1(a)(i) of the Monitor Application is granted. The relief sought in paragraph 1(a)(ii) of the Monitor Application

¹³ This was also referenced at the hearing as “archive mode”.

is dismissed based on my decision in the Digiflex Application. The relief sought in paragraph 1(a)(iii) of the Monitor Application is adjourned on the terms above.

[140] The parties have had mixed success with respect to the Digiflex Application and paragraph (1)(a)(ii) of the Monitor Application. Based on that, and my findings herein, I find it appropriate and order that the parties shall bear their own costs of those applications. Costs related to the Proposed Assignments aspect of the Monitor Application is deferred pending agreement of the parties or my later decision, if required.

Heard on the 27th day of November, 2025. Supplemental submissions provided on December 1 and 2, 2025.

Dated at the City of Calgary, Alberta this 15th day of December, 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Jeffrey Oliver, Cassels Brock & Blackwell LLP
for the Monitor

Chelsea Nimmo and Bruna Kalinsoki, Burnet, Duckworth & Palmer LLP
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Carole J. Hunter and Edmond F.B. Lamek, DLA Piper LLP
for 7-Eleven Canada, Inc. and 7-Eleven Distribution Canada Corporation

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Court of Queen's Bench of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2020 ABQB 809

Date: 20201222
Docket: 1901 13767
Registry: Calgary

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

-and-

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

**Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine**

I Introduction

[1] The ultimate issue in this application is whether BP Canada Energy Group ULC or the First Lien Lenders to Bellatrix Exploration Ltd. have priority to certain funds held by the Monitor and by Bellatrix pending resolution of disputed claims. These claims include BP's breach of contract claim arising from Bellatrix's purported disclaimer of, and ongoing failure to perform under, a GasEDI agreement between Bellatrix and BP.

[2] Bellatrix has obtained protection from its creditors under the *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36, as amended. It holds approximately US\$14.2 million of the funds in issue and approximately US\$1.6 million is held by PricewaterhouseCoopers Inc. in its capacity as Court-appointed Monitor of Bellatrix.

II Relevant Facts

[3] Bellatrix and BP were parties to a GasEDI Base contract for the short-term sale and purchase of natural gas and a Special Provisions for GasEDI Base Contract, both dated as of March 1, 2010 (collectively, with transaction confirmations, the "GasEDI Agreement").

[4] Bellatrix and BP entered into two transaction confirmations pursuant to the terms of the GasEDI Agreement, dated as of December 12, 2017.

[5] Pursuant to the GasEDI Agreement, Bellatrix was required to deliver natural gas to an agreed delivery point in Alberta. BP would then purchase and take title to that natural gas. Pursuant to the transaction confirmations, BP agreed to pay for the natural gas in accordance with a pricing formula based on posted index prices at specific or designated downstream pricing hubs in the US and Ontario, on a month to month basis. The GasEDI Agreement does not provide BP with a security interest in respect of Bellatrix's obligations under the contract.

[6] Bellatrix was granted protection under the CCAA by an initial order dated October 2, 2019.

[7] On November 25, 2019, with the Monitor's approval, Bellatrix sent BP a Disclaimer Notice with respect to the GasEDI Agreement, pursuant to section 32(1) of the CCAA. The Disclaimer Notice provided that the disclaimer of the GasEDI Agreement, unless successfully objected to by BP, would not take effect until December 25, 2019, 30 days later.

[8] On November 25, 2019, BP responded to the Disclaimer Notice, advising Bellatrix of its view that the GasEDI Agreement constituted an eligible financial contract ("EFC") under the CCAA, and that therefore it could not be disclaimed.

[9] On November 26, 2019, Bellatrix stopped delivering gas to BP.

[10] On November 27, 2019, Bellatrix offered to resume delivery of natural gas under the GasEDI Agreement during the disclaimer period if BP would agree not to withhold revenues owed to Bellatrix. Bellatrix proposed that BP pay Bellatrix revenue without any set-off, reduction or deduction. On the same day BP responded, refusing to accept the terms of this proposal.

[11] On November 28 and November 29, 2019, BP sent letters reiterating its position that the GasEDI Agreement was an EFC and could not be disclaimed, and demanding that Bellatrix immediately resume performance under the contract. In its letters, BP stated that, even if the GasEDI Agreement was not an EFC, Bellatrix continued to be bound by the terms of the agreement until the expiry of the disclaimer notice period, and that Bellatrix's unilateral breach thereof constituted a post-filing breach.

[12] Bellatrix had delivered natural gas to BP in accordance with the GasEDI Agreement from November 1 to November 25, 2019. The amount payable to Bellatrix by BP for that natural gas was US\$1,583,859.38, subject to any valid rights of set-off. That amount would ordinarily have been paid on December 24, 2019.

[13] On December 6, 2019, Bellatrix, BP and the Monitor entered into an agreement pursuant to which BP paid the December payment to the Monitor in trust pending further resolution of matters relating to Bellatrix's disclaimer of the GasEDI Agreement. The agreement reserved all rights of BP in respect of the December payment, including the right, if applicable, to set-off or net the December payment against any obligations of Bellatrix to BP under the GasEDI Agreement.

[14] BP filed an application seeking a declaration that the GasEDI Agreement is an EFC within the meaning of the CCAA. BP sought additional relief in its application, including an order enjoining Bellatrix from unilaterally suspending deliveries of gas under the agreement, but due to time constraints, the parties agreed to limit submissions to the single issue of whether the GasEDI Agreement is an EFC. If BP had proceeded with the other relief it sought and been

successful, Bellatrix would have been required to deliver gas to BP, but not entitled to receive the proceeds of sale.

[15] On February 4, 2020, Jones, J. held that the agreement was an EFC: *Re Bellatrix Exploration Ltd.* [2020] AJ No 329 (the “EFC Decision”). This decision is under appeal, leave granted 2020 ABCA 178. The decision makes no reference to any obligation of Bellatrix with respect to continued performance of the agreement.

[16] On February 6, 2020, BP counsel wrote to Bellatrix counsel advising, among other things, that, as a result of the EFC Decision, BP expected Bellatrix to resume performance of the GasEDI Agreement.

[17] On February 11, 2020, counsel to Bellatrix responded noting that the EFC Decision did not address any of the other relief sought in BP’s application, including a requirement that Bellatrix perform its obligations under the GasEDI Agreement. The response reiterated Bellatrix’s position that BP has an unsecured claim in Bellatrix’s CCAA proceedings. The response also advised that Bellatrix did not expect any potential purchaser or credit bid party to assume the terms of the GasEDI Agreement.

[18] Counsel to BP filed an order with respect to the EFC Decision on March 5, 2020. The order, among other things, grants BP leave to apply to the Court for such further advice and direction as may be required with respect to the remainder of relief sought in the GasEDI Agreement application.

[19] BP brought no application to address the remainder of the relief sought in the EFC determination application until BP filed its cross-application on August 7, 2020 to the application filed by the Agent to the First Lien Lender, five months later.

[20] On March 20, 2020, Bellatrix applied for, among other things, an order extending the stay of proceedings under the CCAA to May 7, 2020. As a result of Court closures due to the COVID-19 pandemic, the application was made via desk application, subject to any interested party objecting to the application.

[21] There were no objections to the application, and on March 31, 2020, the Court granted an order extending the stay of proceedings to May 7, 2020. The order provided for a further automatic stay extension to June 8, 2020, subject to, among other things, any objections from interested parties.

[22] In a May 1, 2020 decision allowing leave to appeal the EFC Decision, Strekaf, J.A. directed that the determination of how the interests of BP and other parties to the CCAA proceedings could best be protected pending the hearing of the appeal of the EFC Decision should be determined by this Court. No party has sought a stay of the EFC Decision.

[23] There were no objections to the automatic stay extension on June 8, 2020 from any interested parties, and the stay has continued. Applications for the stay extension orders submit that Bellatrix has been acting in good faith and with due diligence in carrying out the terms of all orders of the Court and in respect of all matters relating to the CCAA proceedings.

[24] On May 8, 2020, Hollins, J. granted an Approval and Vesting Order approving the sale of substantially all of Bellatrix’s assets to Spartan Delta Corp. Bellatrix closed the sale on June 1, 2020. The GasEDI Agreement was not assumed by the purchaser.

[25] Pursuant to the Spartan transaction, the purchaser acquired substantially all of Bellatrix's assets and assumed all of Bellatrix's liabilities in respect of its wells, environmental obligations, pre-filing cure costs in respect of assumed contracts and certain other assumed liabilities. The Spartan transaction also permitted the purchaser to make offers of employment to Bellatrix's employees.

[26] The First Lien Lenders are secured creditors of Bellatrix pursuant to a credit agreement dated June 4, 2019 and certain security granted in relation to that agreement. In contrast to the GasEDI Agreement, the credit agreement and the security granted in relation thereto secure any indebtedness that may become owing by Bellatrix under any swap contracts or other derivative agreements with the First Lien Lenders. The Agent of the First Lien Lenders, on behalf of the lenders, has a registered, valid and enforceable first priority security interest in all of Bellatrix's present and after-acquired personal property and a first priority floating charge on all of Bellatrix's present and after-acquired real property.

[27] On May 22, 2020, the Court granted a Stay Extension and Distribution Order authorizing Bellatrix to distribute \$47.5 million, a portion of the net proceeds from the Spartan sale, to the Agent of the First Lien Lenders in partial satisfaction of their secured claim. Bellatrix held back certain funds from distribution, including funds for disputed claims such as the BP claim.

[28] Bellatrix remains indebted to the First Lien Lenders in excess of \$44.5 million. Bellatrix may not be able to pay the secured claim of the First Lien lenders in full given the results of the sale process. In the circumstances, a claims process has not been initiated in these CCAA proceedings.

[29] The First Lien Lenders seek a declaration that they have a first priority interest in all the property of Bellatrix, including funds held back in relation to the BP claim, a declaration that amounts owing to BP, if any, are an unsecured claim, and an order directing the Monitor to make a further distribution to the Agent in the amount of approximately \$28.9 million. Bellatrix supports this position and submits that the Agent for the First Lien Holders is entitled to distribution of the sale proceeds and the December payment of approximately \$1.6 million held in trust by the Monitor in priority to BP.

[30] In a cross application, BP seeks judgement for damages in an amount equivalent to US\$14.2 million, an order lifting the stay in the CCAA proceedings to permit BP to enforce the judgement, and an order directing the Monitor to pay BP the approximately US\$1.6 million December payment from the held-back funds, an order directing Bellatrix to pay the remainder of the claimed damages out of the sale of proceeds of its assets, or, in the alternate, granting BP a charge over the property of Bellatrix in the amount of the claimed damages with priority over the secured creditors and *pari passu* with the Interim Lenders Charge, or in the further alternative, an order declaring that any funds held by the Monitor and Bellatrix up to the amount of the claimed damages are held in trust for BP.

III Issues

[31] The main issue is whether the CCAA grants BP, as the non-insolvent counterpart to an EFC that has not chosen to terminate the agreement, any security or priority for its damages as a result of Bellatrix's ongoing failure to perform under the agreement. In other words, does the exception to the debtor's right to disclaim an EFC set out in section 34(7)(a) of the CCAA create an obligation for the debtor to continue to perform the EFC throughout insolvency proceedings?

[32] Other issues include the following:

- (a) Is BP entitled to the funds held by the Monitor in respect of the December payment pursuant to a right of set-off?
- (b) Is BP entitled to lift the stay to permit it to obtain and enforce a judgment against the sale proceeds?
- (c) Is BP entitled to equitable relief?
- (d) Has BP proved the amount of its claim for damages?

IV Analysis

A. Does the exception to the debtor’s right to disclaim an EFC set out in section 34(7)(a) of the CCAA create an obligation for the debtor to continue to perform the EFC throughout insolvency proceedings?

[33] The stay provision of the CCAA, which prevents termination of an agreement because of a contractual counterparty’s insolvency, does not apply to an EFC: section 34(7).

[34] Section 34(8)(a) of the CCAA allows solvent counterparties to EFCs certain “permitted actions” during the stay period if they are allowed to take such actions under the specific EFC agreement, including netting or setting off or compensation of obligations between the company and the other parties to the EFC. However, section 34(10) does not permit enforcement actions to recover net termination values once they are determined. Rather, if net termination values are owed by the company to another party to the EFC, section 34(10) deems the non-insolvent counterparty “to be a creditor of the company with a claim against the company in respect of those net termination values”.

[35] As noted by the First Lien Lenders, the purpose of protection for EFCs under the CCAA is to provide stability to financial markets by allowing a non-defaulting counterparty the right to terminate and crystallize claims arising under an EFC.

[36] Like other creditors of the company, the net claims of a non-insolvent counterparty after termination are subject to the stay of proceedings. The Canadian Bankers Association in its submissions in favour of EFC amendments to the *Bankruptcy and Insolvency Act* in 1991 commented that:

... it cannot be overemphasized that our proposal is not to benefit either party to an eligible financial contract. ... Any net amount, if owed to the other party, would be fully subject to the proposed stay provisions. What would be achieved is that the rights of both parties would have been reduced to a fixed and certain amount, just like an amount owed under a regular contract at the time of the stay. (emphasis added): as cited in *Re Androscoggin Energy LLC*, [2005] OJ No. 395 at para 3.

[37] The Insolvency Institute of Canada Report of the Task Force on Derivatives dated September 26, 2013 notes at pages 2 and 3 that:

EFC protection is a significant exception to the stay of proceedings under the CCAA and BIA. There are two main purposes of the EFC safe harbours: (i) to protect non-defaulting counterparties from the risk of increasing exposure to the insolvent counterparty under the EFC and (ii) to reduce systemic risk in Canadian

and global financial markets. Non-defaulting counterparties may be at risk because, in certain instances, the amounts under the EFCs are very substantial and the value of the underlying products subject to EFCs are volatile in nature and can change dramatically during an insolvency proceeding. If the solvent counterparty to an EFC is subject to a stay of proceedings and therefore unable to terminate its EFCs with the insolvent counterparty, there is a risk that the value of such EFCs could deteriorate sufficiently (from the insolvent counterparty's perspective) to put the solvent counterparty at risk. Systemic risk may arise where the solvent counterparty is a systemically important institution or where the solvent counterparty has entered into EFCs with one or more other counterparties. In extreme cases, the failure of one counterparty could have a domino effect, where the failure of one counterparty, particularly a derivatives dealer, triggers the failure of a second counterparty who is also a derivatives dealer and the failure of the second counterparty could trigger the failure of others. Multiple insolvencies may cause a lack of liquidity in the financial sector and unavailability of credit to solvent enterprises and, ultimately, systemic risk. The systemic risk could spread to global markets and lead to world-wide financial instability and, in extreme cases, recession.

[38] The protection offered to non-insolvent counterparties to an EFC is the ability to terminate the EFC and crystallize its loss despite the stay provision of the CCAA, a protection not afforded to other creditors. The other protection is allowing set-off if the EFC agreement itself permits it. The exceptions were included in the *Act* for the protection of the derivative market generally from volatile and systemic risk. They do not compel a CCAA debtor to continue to perform an EFC that has not been terminated, nor does the CCAA provide the non-insolvent counterparty with any priority for its claim, apart from the protection of the exemption.

[39] Unless the non-insolvent counterparty to the EFC has a security interest, it is an unsecured creditor, and participates in the CCAA proceedings on the same footing as other creditors: *Re Blue Range Resource Corp.*, 2000 ABCA 239 at para 9.

[40] Therefore, assuming that the GasEDI Agreement is an EFC, BP is allowed to terminate it and crystallize its loss. However, as BP has not done so, its remedy for Bellatrix's breach of the GasEDI Agreement is a claim in the CCAA proceedings as an unsecured creditor unless there are other remedies available to it in the specific circumstances.

[41] BP submits that, unless it is granted the relief it seeks, the practical effect of Bellatrix's conduct would be to render the disclaimer rules of the CCAA meaningless. It notes that a valid disclaimer under section 32(7) of the CCAA results in a "provable claim", unsecured unless otherwise provided for in the disclaimed contract. However, if CCAA debtors are allowed to breach executory contracts at will, the result is identical: the solvent party has a provable claim, unsecured unless otherwise provided for under the contract. BP submits that, if that is true, section 32(7) of the CCAA is without a purpose, as there is no practical difference between contracts that can and cannot be lawfully disclaimed. Either way, if the debtor chooses to breach the contract, the solvent counterparty is left with the same remedy – which in many cases, is no remedy at all.

[42] Therefore, BP submits that the “clear implication” of the statutory disclaimer provisions of the CCAA is that a company is required to perform its obligations under executory contracts as of the filing date, unless and until those contracts can be validly disclaimed under section 32.

[43] As noted previously, the exception from EFCs included in the disclaimer provisions of the *Act* do not expressly provide that an EFC must be performed. Such a mandatory requirement would thwart the objectives of the CCAA, since compelling a CCAA debtor to perform an EFC that it cannot afford to perform would in many cases affect its ability to attempt to restructure.

[44] The disclaimer provisions, while initiated by the debtor, provide the solvent party to a disclaimable contract an opportunity to object to the disclaimer and a process for doing so. Section 32(4) of the *Act* sets out factors that the court must consider in deciding the issue.

[45] While the solvent party to a contract that the debtor merely stops performing may not have available to it the same statutory process, it may apply to the court for an order compelling performance as BP initially purported to do. The court supervising the CCAA proceedings in its consideration of such an application would likely take into account factors similar to those set out in section 32(4), including whether compelling performance would interfere with the prospect of a viable arrangement, and whether refusing such an order would cause significant financial hardship to a party to the contract.

[46] While the considerations may be similar, a disclaimer proceeding is initiated by the debtor, provides for a statutory process and mandates a termination date for the disclaimer. As noted by Morawetz, J. in *Re Target Canada Co*, 2015 CarswellOnt 3274, the disclaimer is beneficial to creditors generally because it enables the debtor to move forward with a liquidation plan without further delay. In contrast, the unilateral non-performance of a contract gives rise to uncertainty for both the debtor and the counterparty as to the status of the contract, including whether or not the solvent counterparty at its election will accept the termination of the contract as repudiated, and the date of its termination.

[47] The disclaimer provisions are thus not rendered meaningless by the existence of a less formal option, but provide an opportunity for orderly termination and certainty to the parties to the disclaimed contract. Implying an obligation to perform an uneconomic contract that may affect the ability of the CCAA debtor to attempt to restructure would require more direct statutory language.

[48] It must be noted that Bellatrix attempted to resolve the issue through the disclaimer option before the GasEDI Agreement was found to be an EFC.

B. Is BP entitled to the funds held by the Monitor in respect of the December payment pursuant to the right of set-off?

[49] Assuming that the GasEDI Agreement is an EFC, section 34(8)(a) of the CCAA permits the netting or setting off of obligations between the debtor company and the other party to the EFC if the EFC is terminated on or after the commencement of the CCAA proceedings and if such action is “in accordance with the provisions of the contract”.

[50] However, BP has not terminated the GasEDI Agreement and is not seeking to terminate and set-off its position to reduce exposure to risk. Therefore, the set-off provisions of section 34(8)(a) are not available to it.

[51] BP seeks to maintain Bellatrix’s obligation to perform the agreement but set-off amounts it owes to Bellatrix for previously delivered product. Whether or not the GasEDI Agreement is an EFC, the agreement does not on its terms allow the set-off of the December payment.

[52] Section 10.2 of the base contract in the GasEDI Agreement permits the non-defaulting party to withhold any amounts owed to the defaulting party when there is an event of default or a potential event of default and to set-off such amounts against “any amounts owed to the Defaulting Party under the [GasEDI Agreement] whether or not yet due” and set-off against such withheld amounts “any amounts owed the non-Defaulting Party hereunder (whether or not yet due)”. BP submits that it is entitled to set-off its damages claim against the December payment, relying on the language “whether or not due” in section 10.2.

[53] However, BP is the payor, not the payee under the agreement and Bellatrix was not obligated to pay BP anything “hereunder”, either when the agreement to hold the funds in trust was entered into or when the funds would normally be paid later in December. Although an event of default includes a party’s failure to deliver gas “for the greater of 4 cumulative days or 5% of the number of days in a Delivery Period in any one transaction”, and BP may have a claim for damages in an amount has not yet been determined, there were no amounts “owed to” BP at the time of the December payment in respect of which it could exercise any contractual right of set-off.

[54] Section 10.5 of the agreement states that a “Performing Party” has the right to withhold any or all payments due the non-performing party for the period of the applicable non-performance and net or set-off amounts due the Performing Party against such withheld amounts. Bellatrix stopped delivering gas on November 26, 2019. The December payment was for the delivery of gas between November 1 and November 25, 2019. Therefore, for the same reasons, section 10.5 of the agreement does not give BP a right of set-off.

[55] BP thus has no contractual right of set-off with respect to the December payment but submits that it has a right of equitable set-off, citing *Re Blue Range Resource Corp.*, 2000 ABCA 200. In *Blue Range*, the appellants were allowed to set-off anticipated damages they would incur under certain natural gas marketing contracts against payments owed under those contracts for the delivery of natural gas.

[56] In that case, as in this, the cost to the appellants to replace the gas was higher than the cost they were paying under the contracts. The Court of Appeal in *Blue Range* set out the principles from the Supreme Court of Canada decision in *Telford v Holt* (1987), 41 D.L.R. (4th) 385(S.C.C.), at 398 that apply when dealing with equitable set-off:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary’s demands;
2. The equitable ground must go to the very root of the plaintiff’s claim before a set-off will be allowed;
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim;

4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and
5. Unliquidated claims are on the same footing as liquidated claims.

[57] The Court noted at para 19:

The important point for invoking equitable set-off is the close connection of the transactions. Would it be manifestly unjust to require the appellants to pay the costs of the February and March deliveries in view of the fact that they will suffer significant losses due to the early termination of the same contract that called for the delivery of gas in February and March? In our view, such a requirement is unjust.

[58] In *Blue Range*, the CCAA debtor terminated the contracts. Here, BP's position is that the GasEDI Agreement has not been terminated, remains in full force and effect and that Bellatrix is required to perform the agreement.

[59] The First Lien Lenders and Bellatrix submit that BP does not meet the test for equitable set-off because it would not be "manifestly unjust" to allow Bellatrix to claim the December payment without taking into consideration the cross-claim.

[60] They point out that, in a letter dated February 11, 2020, Bellatrix's counsel advised BP on its position on the ability of a CCAA debtor to elect non-performance of an agreement. Bellatrix responded that the EFC Decision did not deal with the issue of performance or set-off. Bellatrix has been consistent in its position throughout the CCAA proceedings. Despite this, BP did not apply to lift the stay or to claim a right of set-off until this application was filed.

[61] While I have found later in this decision that BP's delay in taking action would not disentitle it from a equitable remedy, BP has not established an equitable ground for being protected, and therefore fails the *Telford* test for that reason. BP is not entitled to set-off the December payment, whether or not the GasEDI Agreement is an EFC.

[62] Bellatrix submits that, since BP does not fit within the permitted set-off provisions of section 34(8), but for the agreement among Bellatrix, BP and the Monitor to have the Monitor hold the December payment in trust, BP would have been in violation of the stay under the initial CCAA order had it purported to withhold the December payment. If it had unilaterally withheld the payment, BP would have deprived Bellatrix of substantial liquidity at a time when Bellatrix was seeking to pursue its strategic process to identify a going concern transaction for the benefit of its many stakeholders, relying on funds drawn under its Interim Financing Facility, and Bellatrix would have been unable to make various payments to secured and other unsecured creditors.

[63] However, as I have found that BP has neither a legal nor an equitable right of set-off, it is not necessary that I decide this issue.

C. Is BP entitled to lift the stay to permit it to obtain and enforce a judgement against the sale proceeds?

[64] As a corollary to the relief of lifting the stay, BP asks the Court to direct immediate payment of the alleged damages to BP out of the sale proceeds, less the December payment.

[65] The test for lifting a stay focuses on the totality of circumstances and the relative prejudice to the parties involved: *Alberta Energy Regulator v Lexin Resources Ltd*, 2019 ABQB 23 in the context of a receivership, citing *Alignvest Private Debt Ltd. v Surefire Industries Ltd.*, 2015 ABQB 148 (Alta. Q.B.) at para 40 and 43 (appeal on other grounds dismissed, [2015] A.J. No. 1234 (Alta. C.A.)).

[66] Guidance can be drawn from the provisions of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended, in determining whether a stay in CCAA proceedings should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Re Ma*, [2001] O.J. No. 1189 (Ont. C.A.).

[67] Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Re Ma*, at para 3.

[68] In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at para 18-19. Examples may include hardship caused by the stay or necessity of payment or a situation where it is in the interests of justice to allow the stay to be lifted: *Re Canwest Global Communications Corp.* (2009), 61 CBR (5th) 200 (Ont S.C.J.). The prejudice to the applicant should be different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.

[69] BP submits that it suffers unique harm from the breach of the GasEDI Agreement, and argues that such prejudice favours the lifting of the stay to allow it to enforce its damages claim against Bellatrix. However, BP does not provide any valid reason why its damages claim is unique.

[70] First, BP submits that it is a post-filing creditor. This is incorrect: its damages claim arises from a pre-filing contract, whether it is an EFC or not.

[71] Second, BP notes, relying on *Bank of Montreal v Probe Exploration Inc.*, [2000] AJ No 1752, that courts are reluctant to interfere with the rights of contractual parties in a liquidation scenario where the result would be to prefer the interests of the debtor and its primary secured creditor. However, I agree with the First Lien Lenders that the *Probe* case is distinguishable from the situation of Bellatrix's failure to perform under the GasEDI Agreement.

[72] In *Probe*, the unique facts included the existence of an intercreditor agreement that contemplated the mutual intent between the secured creditor and the party opposing the termination of the agreement at issue that any purchaser of Probe would be bound by Probe's obligations under the contract.

[73] BP submits in proposing the lifting of the stay that Bellatrix has abused and violated the CCAA process. As noted later in this decision, there is no basis for this allegation.

[74] BP also submits that the stay should be lifted because the GasEDI Agreement as an EFC is entitled to certain benefits. These benefits do not imply a right to lift the stay in the context of a damages claim. Section 34(10) of the *Act* makes it clear that such a claim merely makes the holder a creditor, in this case an unsecured creditor. The unique risks inherent in the status of an

EFC contract are recognized in the limited relief offered in section 34. The CCAA does not provide any special security or priority for a damages claim arising from an EFC.

[75] Finally, as noted by the Agent, this is the end of the CCAA process, and in the nature of a priorities dispute. There exists no valid reason to lift the stay or to order the immediate payment to BP of damages out of the sale proceeds or to grant BP a priority charge on the sale proceeds ranking *pari passu* with the Interim Lenders Charge unless consideration of good faith or equity compel that result.

D. Is BP entitled to equitable relief?

[76] BP seeks a declaration of constructive trust as a remedy for Bellatrix's breach of the GasEDI Agreement, arguing that Bellatrix's stakeholders have been unjustly enriched. BP also submits that Bellatrix has engaged in a pattern of abusive conduct and has unjustly appropriated approximately \$14.5 million by breaching a contract that it is prohibited from disclaiming.

[77] The onus of proving a constructive trust rests with the claimant. It is a discretionary remedy that will not be imposed without taking into account the interest of others who may be affected by granting the remedy: *Re Hoard*, 2014 ABQB 426 at para 26.

[78] As noted at para 23 of *Hoard*, given that the BIA provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust. The same reasoning applies to the CCAA.

1. Unjust enrichment

[79] A constructive trust can be used to remedy unjust enrichment where monetary damages are inadequate and there is a link or causal connection between the claimant's contribution and the property in which the constructive trust is claimed: *Moore v Sweet*, 2018 SCC 52 at para 91. Therefore, even if the elements of unjust enrichment are satisfied in this case, there is no link between the funds that are the proceeds of sale of Bellatrix's assets and BP. The most that could be recovered through this remedy would be the December payment.

[80] The doctrine of unjust enrichment requires an enrichment, a corresponding deprivation, and the absence of a juristic reason for the enrichment: *Hoard*, at para 26.

[81] With respect to the requirement of enrichment, the Alberta Court of Appeal noted in *Luscar Ltd v Pembina Resources Ltd*, 1994 ABCA 356 at para 129 that:

where there exists a contract under which parties are governed, and one party gains by the breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract.

[82] With respect to deprivation, BP was not required to provide any goods or services to Bellatrix or take on any financial risk or exposure. As noted in this decision, BP has failed to establish the amount of any financial hardship it may have suffered as a result of Bellatrix's disclaimer or breach of the GasEDI Agreement.

[83] BP concedes that the provisions of the CCAA can provide a juristic reason for an enrichment, but submits that BP is in a unique position as compared to other CCAA creditors in that Bellatrix has breached a contract that it was prohibited from breaching, both by the CCAA and by the Court.

[84] As noted previously, the CCAA does not prohibit a debtor from failing to perform a contract, be it an EFC or otherwise. Nor is it correct that in failing to perform the GasEDI Agreement, Bellatrix is in breach of a court order. There is nothing in either the EFC Decision or the order that emanates from it that compels performance of the agreement.

[85] The statutory priority of the First Lien Lenders under the CCAA constitutes a juristic reason to deny recovery to BP through the doctrine of unjust enrichment.

[86] BP submits that Bellatrix conceded in its submissions before the Court in the application to determine whether the agreement is an EFC that, if it was, Bellatrix would be obligated to perform it. However, Bellatrix actually stated that if the agreement was an EFC, it would be required either to perform it “or otherwise to pay damages to BP”.

[87] Therefore, BP is not entitled to a constructive trust as a remedy for unjust enrichment.

2. Wrongful Conduct

[88] In *Soulos v Korkontzilas*, (1997) 36 C.B.R (3d) 1, the Supreme Court held that a constructive trust can also be used to right wrongful conduct. The following conditions must be met : the insolvent company must be under an equitable obligation in relation to the activities giving rise to the assets in its hands; the property in the hands of the insolvent company must be shown to have resulted from deemed or actual agency activities in breach of its equitable obligation to the claimant; the claimant must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the insolvent company remain faithful to their duties; and there must be no factors that would render the imposition of a constructive trust unjust in all the circumstances.

[89] Subsequent decisions emphasize that the property sought to be impressed with the trust must be the property obtained through the wrongful act, *Hoard* at para 35.

[90] BP submits that the timing of Bellatrix’s purported disclaimer and breach of contract was not a coincidence, in that Bellatrix knew payments for gas delivery under the GasEDI Agreement would be subject to BP’s contractual right to set them off against BP’s damages for Bellatrix’s breach of contract. It argues that Bellatrix timed its delivery of the disclaimer notice and its breach of contract for the day immediately after BP made its payment for October gas deliveries on November 25, 2019, thus depriving BP of the ability to set that payment off against damages.

[91] However, although it issued a disclaimer notice on November 25, 2019, Bellatrix continued to deliver gas under the agreement until November 24, 2019 and thus was not in breach of the contract until after that date. It did not mislead BP about the timing of its decision. While the decision on the timing of the disclaimer notice may have been strategic, it was not wrongful conduct.

[92] BP also alleges that the timing of the disclaimer notice put it in the position of being an involuntary interim lender, as Bellatrix was able to use funds that BP may have been able to set-off if it had known about the disclaimer earlier.

[93] BP’s position is different from the position of an interim lender that advances funds to an insolvent debtor to finance an uncertain restructuring process. BP did not advance the roughly \$14.5 million that Bellatrix estimated it would be able to achieve in additional revenue by selling its gas elsewhere, and BP it is not out of pocket for that amount.

[94] BP also submits that failure to perform the agreement allowed Bellatrix to sell the gas it would have been required to sell BP to other parties and use the proceeds to fund operations and pay other creditors, including the actual interim lender, and that this was wrongful conduct.

[95] As noted previously, Bellatrix's decision to cease performing an uneconomic contract during the CCAA process is not wrongful conduct: it allowed the company to generate increased revenue it would not be able to generate under the BP agreement to fund the company's operations while it attempted to restructure. BP was not required to pay for gas that was not delivered or provide any services to Bellatrix. While the outcome of the process was a liquidation, it was a going concern liquidation that was the best opportunity for the preservation of jobs and likely the maximization of value.

[96] As noted previously, there is no merit to the allegation that Bellatrix misled the Court. As was the case with unjust enrichment, there is no link or causal connection between the alleged wrongful acts and the proceeds of sale of Bellatrix's assets.

[97] In short, BP has no basis to claim a constructive trust based on wrongful conduct.

[98] In *Re Hollinger Inc*, 2013 ONSC 531 at para 39, leave to appeal denied in 2014 ONCA 282, the Ontario Court of Justice found that there is no legitimate reason for the proprietary remedy where the claimant relies on the remedy to try and gain a super-priority over other creditors in the CCAA. BP has an unsecured monetary damages claim and it should not be entitled to a constructive trust that would subvert the priorities of other creditors unless it has established that it would be unconscionable not to recognize such a trust. BP has not done so.

3. Bad Faith

[99] BP also relies on section 18.6 of the CCAA, a new provision that provides that any interested person in any proceedings under the *Act* shall act in good faith with respect to the proceedings, and that if it is satisfied that an interested person fails to act in good faith, the Court may make the appropriate order. The duty of acting in good faith is not a new duty for a CCAA debtor: sections 11.02(3), 33(3), 50(12), 50.4(11) and 65.12(2)

[100] As I have noted previously, BP has not established any wrongful conduct by Bellatrix, which has merely used the tools available to it under the CCAA. Bellatrix was faced with an uneconomic agreement that it could not afford to perform while attempting to restructure. Bellatrix advised BP at an early stage of the proceedings that, in the circumstances, the agreement would never be accepted by a purchaser of Bellatrix's assets, which BP as a sophisticated party would likely have recognized. BP had the option of terminating the agreement as an EFC and exercising its right to set-off after termination, but chose the option of maintaining that Bellatrix was required to continue to perform the agreement.

[101] While Bellatrix breached the GasEDI Agreement by non-performance, it has been transparent and candid throughout with respect to its position and conduct. Although it did not abide by the statutory 30 days notice under its notice of disclaimer, that was after BP refused to accept the disclaimer and advised Bellatrix of its view that the agreement was an EFC.

[102] It is not unusual for a CCAA debtor to fail to perform uneconomic ongoing monthly contracts, both before and after filing, whether formally disclaimed or not, and such failure to perform is not per se bad faith.

[103] The December payment has been held in trust pending a resolution of the issues of set-off and priority, so Bellatrix has not failed to act in good faith with respect to the payment. The timing of the disclaimer notice, while strategic, was not bad faith conduct, and Bellatrix has not, as alleged by BP, misled the Court or failed to comply with a Court order.

[104] The Monitor has stated that it is satisfied that Bellatrix has acted in good faith throughout the proceedings.

[105] As noted by Dr. Janis Sarra in “La bonne foi est une considération de base – Requiring Nothing Less than Good Faith in Insolvency Law Proceedings”, Annual Review of Insolvency Law, eds Janis Sarra & Barbara Romaine, Toronto: Thomson Reuters Canada, 2014:

The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.

[106] Bellatrix has not exhibited conduct that would fall within these categories and has not acted in bad faith.

[107] The First Lien Lenders and Bellatrix point out that BP failed to allege that Bellatrix was not acting in good faith through four stay applications, and only raised the allegation at the end of August, 2020. However, BP responds that, as Bellatrix as a concession to BP agreed to hold back an amount from the sale proceeds to cover BP’s damages claim, it had no need to object to the stay extension. While I have not found bad faith by Bellatrix, I accept that BP’s failure to object to the stay does not preclude its claim of bad faith in the circumstance.

4. Delay

[108] The First Lien Lenders and Bellatrix submit that it would be inequitable to grant BP the super-priority it seeks for damages in priority to the stakeholders of Bellatrix.

[109] They note that BP initially applied for various forms of relief, including orders directing Bellatrix to resume performance of the GasEDI Agreement and to remedy any existing default, but ultimately only pursued the issue of characterization of the GasEDI Agreement as an EFC. While BP may have been constrained by time limits in its initial application heard on January 23, 2020, it knew by February 25, 2020, that Jones, J’s decision dealt only with the characterization of the GasEDI Agreement as an EFC, and that it was free to proceed with the remainder of the relief it sought before any other commercial duty judge. The order emanating from the decision grants BP leave to apply for further advice and direction with respect to the remaining relief.

[110] While the pandemic interfered with regular commercial duty chambers in March and April, during Bellatrix’s May 22, 2020 application before Hollins, J. to make interim distributions to certain priority and secured lenders. BP advised the Court that it may have a priority claim against Bellatrix and asked the Court to set aside US\$14.5 million to be held in trust pending resolution of the disclaimer dispute with Bellatrix. The Court refused and suggested that BP bring its own application if it was concerned that it was facing disadvantage. It was not until August 7, 2020, in response to First Lien Lenders priority application, that BP

brought a cross-application seeking relief similar to that it had originally sought in December, 2019.

[111] The First Lien Lenders submit that it would be inequitable and prejudicial to the First Lien Lenders if BP were now allowed a priority claim in relation to Bellatrix's breach of the GasEDI Agreement. Bellatrix remains indebted to the First Lien Lenders in excess of \$44 million and it is clear that Bellatrix would not be able to pay the First Lien Lenders' secured claims in full if BP's unsecured damages claim is paid in priority to its claim.

[112] Bellatrix points out that BP did not proceed to seek the remainder of its relief at a time when Bellatrix may have been able to perform the contract if ordered to do so. Now, nine months later, it has no assets that would allow performance.

[113] BP responds that it has protested its treatment from the start, and that the First Lien Lenders have suffered no prejudice from the delay, as they and Bellatrix were aware of BP's claim from December, 2019, even though BP did not act on it until after the sale of assets had been concluded. As noted in *Re Blue Range Resources Corp.*, 2000 ABCA 285, albeit in a different context, the fact that creditors will receive less money if late claims are allowed is not prejudice. "Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31": *Blue Range* at para 40.

[114] Bellatrix and the First Lien Lenders were fully aware of BP's claim, and there is no evidence that earlier determination of the claim would have caused Bellatrix to do anything differently with respect to the sale of assets. This is not a case of a creditor "lying in the weeds", or even a case where BP implied that it had changed its position even though it did not take earlier action. In the specific circumstances of this case, including the disruption of court proceedings caused by the COVID pandemic, I would find that BP is not disentitled to relief on the basis of delay if I am incorrect on its entitlement to equitable relief.

E. Has BP proved the amount of its claim for damages?

[115] The amount of damages claimed by BP, in this application, \$14.5 million, is equal to the amount that Bellatrix estimated, as part of the EFC determination application, that it could generate as additional revenue from the date of the disclaimer until the end of October, 2020, based on certain assumptions.

[116] BP concedes that its damages claim is based on this estimate. However, that estimate must be reduced by the fact that Bellatrix did not realize any revenues for its natural gas after the sale of its assets closed on June 1, 2020.

[117] I agree with Bellatrix and the First Lien Lenders that benefits to Bellatrix of the disclaimer do not necessarily equate to BP's entitlement to damages. BP has not provided any evidence of its actual damages relating to the disclaimer of or non-performance under the GasEDI Agreement, taking into account any mitigation BP would have been able to obtain by entering into other arrangements for the purchase of natural gas or otherwise.

[118] Therefore, the claim remains an unliquidated unsecured claim.

V Conclusion

[119] The First Lien Lenders are entitled to a declaration that they have a first priority interest in all the property of Bellatrix, including the December payment held in trust and funds held back from the sale of assets. Any amounts owing to BP are an unsecured claim. The Monitor is authorized to make a further distribution to the Agent in the amount of approximately \$28.9 million, the exact amount subject to its final calculations.

[120] BP's cross-application is dismissed.

Dated at the City of Calgary, Alberta this 22nd day of December, 2020.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Kelly Bourassa and James Reid
for National Bank of Canada, as Agent

Robert J Chadwick and Caroline Descours
for Bellatrix Exploration Ltd.

Howard A Gorman, Q.C. and Gunnar Benidiktsson
for BP Canada Energy Group LLC

Joseph G.A. Kruger, Q.C. and Robyn Gorofsky
for the Monitor Pricewaterhousecoopers Inc.

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COURT FILE NO.: CV-09-8241-OOCL

DATE: 20091215

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE
OTHER APPLICANTS LISTED ON SCHEDULE "A"

COUNSEL: *Lyndon Barnes, Alex Cobb and Shawn Irving* for the CMI Entities

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors
of Canwest

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of
Noteholders

K. McElcheran and G. Gray for GS Parties

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian
Media Guild

Hilary Clarke for Senior Secured Lenders to LP Entities

Steve Weisz for CIT Business Credit Canada Inc.

DATE HEARD: December 8, 2009

REASONS FOR DECISION

PEPALL J.

Relief Requested

[1] The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and

GS VI AA One Parallel Holding S.ar.1 (the “GS Parties”) is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

[2] Canwest’s television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

[3] The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation (“NSULC”).

[4] CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. (“441”). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a “blocker” to potential liability. The CMI Entities state that similarly the GS parties served as “blockers” for Goldman Sachs’ part of the transaction.

[5] According to the GS Parties, the essential elements of the deal were as follows:

- (i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

- (ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
- (iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
- (iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

[6] The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

[7] A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall

sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

[8] The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

[9] On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

[10] For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

[11] The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

[12] On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual “pre-packaged” recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

[13] The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the “Stay Period”), no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”) shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the

applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

[14] The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the “main motion”), the GS Parties request an order:

- (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
- (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
- (c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
- (d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
- (e) if necessary, a trial of the issues arising from the foregoing.

[15] They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

[16] The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

[17] In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

[18] The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

[19] In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

[20] In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

[21] Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*¹ which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

[22] The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*² in support of their position on timing.

[23] The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

¹ (2000), 19 C.B.R. (4th) 1.

² [1990] B.C.J. No. 2385 (C.A.) at p. 4.

[24] The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

[25] Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

[26] First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

[27] The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

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 30 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.

(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,

- (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (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.

[28] The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of

the CCAA: *Re Stelco Inc*³ and the key element of the CCAA process: *Re Canadian Airlines Corp.*⁴ The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*⁵, the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

“It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors.”⁶
(Citations omitted)

[29] The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*⁷ in this regard.

[30] Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*⁸ was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA,

³ (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

⁴ (2000), 19 C.B.R. (4th) 1.

⁵ (1993), 17 C.B.R. (e3d) 24.

⁶ Ibid, at p. 32.

⁷ Supra, note 2

section 106 of the Courts of Justice Act⁹ and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.¹⁰ Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

[31] The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

[32] As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"¹¹, an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*¹². That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.¹³

⁸ (1992) 14 C.B.R. (3d) 303.

⁹ R.S.O. 1990, c.C.43.

¹⁰ Supra, note 6 at paras. 24 and 25.

¹¹ (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

¹² (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

¹³ Ibid, at para. 68.

[33] Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*¹⁴ and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

(b) Application

¹⁴ Supra, note 3.

[34] Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

[35] In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

[36] In essence, the GS Parties' motion seeks to:

- (i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
- (ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

[37] It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

[38] The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

[39] When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the

transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

[40] Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

[41] The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.

- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company¹⁵ without the prior written consent of one of the GS Parties¹⁶.

[42] The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

[43] The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*¹⁷:

“The Initial Order enjoined all of San Francisco’s landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place.”¹⁸

[44] Similarly, in *Norcen Energy Resources Ltd.*¹⁹, one of the debtor’s joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

[45] If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility

¹⁵ This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

¹⁶ Specifically, GS Capital Partners VI Fund, L.P.

¹⁷ 5 C.B.R. (5th) 92 at para.37.

¹⁸ Ibid, at para. 37.

¹⁹ (1988), 72 C.B.R. (N.S.) 1.

for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

“The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities’ restructuring and recapitalization efforts.”

[46] While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

[47] A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

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

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

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

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

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[48] Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor

does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

[49] In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

[50] Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

[51] The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

[52] The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Pepall J.

DATE: December 15, 2009

8

Alberta Court of Queen's Bench
Canadian Airlines Corp. (Re)
Date: 2000-05-04

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q.C., and H.M. Kay, Q.C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C., and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

(Calgary 0001-05071, 0001-05044)

May 4, 2000.

[1] PAPERNY J. [orally]: — Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and

2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

[2] Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

[3] The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is \$175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured

by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the \$56 million intercompany indebtedness owed by Canadian Regional to CAIL.

[4] Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

[5] On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of \$500,000 U.S. These applications were dismissed.

[6] The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or
2. To be unaffected by the CCAA Plan and realize on their security.

[7] On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

[8] The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

[9] The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

- interest has continued to accrue at approximately \$2 million U.S. per month;
- the security has decreased in value by approximately \$6 million Canadian;

- the Collateral Agent and the Trustee have incurred substantial costs;
- no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;
- no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

[10] The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

[11] The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

[12] The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

[13] This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

[14] The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11 (4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

[15] In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

[16] Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

[17] As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

[18] Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

[19] Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

(1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.

(2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.

(3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.

(4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of the particular case.

[20] At pages 342 and 343 of this text, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Aurora: Canada Law Book, looseleaf). R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

[21] I now turn to the particular circumstances of the applications before me.

[22] I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v.*

Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

[23] The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

[24] Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

[25] Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

[26] In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

[27] Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CA1L of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately \$115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

[28] The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of \$1.1 billion.

[29] This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

[30] On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at \$445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

[31] The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

[32] Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

[33] An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

[34] The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

[35] With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

...any and all proceedings ... against or in respect of... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

[36] As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ...

in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

[37] If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

[38] As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

[39] The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

[40] The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

[41] I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they

experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

9

Date of Release: 17 October 1991

No. A913228
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF	)	
THE COMPANIES' CREDITORS	)	
ARRANGEMENT ACT, R.S.C.	)	REASONS FOR JUDGMENT
1985, C. c-36	)	
	)	
AND	)	OF THE HONOURABLE
	)	
IN THE MATTER OF	)	MR. JUSTICE B.D. MACDONALD
PHILIP'S MANUFACTURING LTD.	)	
	)	
	)	

David F. Tysoe	Counsel for Philip's Manufacturing Ltd.
Allan R. Caplan	Counsel for Variform Inc.
Robert J. Sewell	Counsel for Master Shield, Inc.
Samuel Huberman	Counsel for Holland Imports Inc.
Peter P. Bieg	Counsel for Kuehne & Nagel International Ltd.
Valerie J. Anderson	Counsel for Aggressive Investments Inc.
David W. Donohoe	Counsel for Northern Warehouse Equipment Ltd.
Arthur L. Edgson	Counsel for K.C. Metal Products Inc.
Stephen G. Wright	Counsel for LeDrew Mfg. Ltd. & other creditors
Douglas B. Hyndman	Counsel for Pacific Lead & Metal Inc.
Colin M. Emslie	Counsel for Hongkong Bank of Canada
Dates & Places of Hearing	New Westminster, B.C.

3 October 1991
Vancouver, B.C.
10, 11 & 15 October 1991

On September 3, 1991, an ex parte order was made in this matter which stayed all proceedings against Philip's Manufacturing Ltd. (the Company) for a period of six months, within which the Company has leave to file a Reorganization Plan. The order was made under the authority of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the Act), and in particular, s. 11 thereof. The application was considered on an ex parte basis because a demand for payment of the Company's bank debt was imminent (demand for payment was served two hours after the ex parte order was made) and because it would have been impractical to serve the more than 300 creditors with adequate notice.

THE PRESENT APPLICATIONS

Now before the court are a number of applications brought by various creditors of the Company in reaction to the ex parte order of September 3, 1991. Those applications seek orders to:

- a) set aside the ex parte order on two grounds;

or, if the stay is not vacated, to:

- b) remove therefrom any prohibition against suing directors and officers of the Company (in respect, inter alia, of allegations that credit has recently been extended to the Company on the basis of their deceit);
- c) reduce the time available to the Company to file its Reorganization Plan, or in the alternative, to crystallize the date which is applicable under the Bankruptcy Act, R.S.C. 1985, c. B-3, to reviewable transactions in which the Company may have been involved;
- d) expand the duties of the Monitor appointed by the ex parte order so as to provide the creditors with useful information regarding such matters as the causes of the Company's present financial problems, the past benefits received by the directors and officers, and the true liquidation value of the business;
- e) exclude particular claims from the stay of proceedings to permit specific actions against the company to proceed, including the landlord's claim for possession under the Commercial Tenancy Act, R.S.B.C. 1979, c. 54, a claim under the Builder's Lien Act, R.S.B.C. 1979, c. 40, and several claims for rescission of contracts for sale and for preservation of the goods in question.

Since several of the applicants support the orders sought by others, and since this hearing of necessity involved several "rounds" of argument, I shall treat the several applications now before me to set aside or vary the ex parte order as if they were one, involving claims for alternative relief.

THE APPLICATION TO SET ASIDE

Two grounds were advanced in support of the application to set aside or vacate the ex parte order made on September 3, 1991.

- a) There was less than full disclosure in the material in support of the ex parte order.
- b) The Company was not one qualified to apply under the Act, and its creation of an "instant" trust deed and the issue of two \$100.00 debentures thereunder is not sufficient to bring it within the Act.

INADEQUATE DISCLOSURE

In Re 229531 B.C. Ltd. (1989) 72 C.B.R. 310 (B.C.S.C.) at p. 318, where the court rejected a Reorganization Plan under the Act despite approval by the creditors because it was unfair to a minority creditor who would have been forced to abandon his personal guarantees, the failure to disclose some material

information in the affidavits filed in support of the original ex parte order was characterized as another "...matter of concern".

Many of the authorities which deal with the obligation of an applicant to disclose all material facts on an ex parte application arise from labour injunctions granted by this court in the years before the Industrial Relations Act, R.S.B.C. 1979, c. 212 and its predecessor. One of those cases is C.P.R. v. United Transportation Union, Local 144 (1970) 14 D.L.R. (3d) 497 (B.C.S.C.) at pp. 500 and 501, where Mr. Justice McIntyre of this court (as he then was) states:

I must consider whether...full disclosure was made to me by the plaintiff on the ex parte motion.
...if the facts above referred to had been before me, it might have influenced my decision on the question of granting the ex parte motion. The omission to disclose is, in my view, fatal.

In reaching that conclusion, Mr. Justice McIntyre relied upon statements by then Chief Justice Wilson of this court in Gulf Islands Navigation v. S.I.U. (1959) 18 D.L.R. (2d) 216 at p. 218, to the effect that there must be a full and frank disclosure of relevant facts or the ex parte order will be vacated.

Several breaches of that standard are cited by the present applicants. One of them points to the fact that it was blamed for

the Company's present financial troubles whereas the dispute with it is clearly only a part of the story. Another raises the evidence of the Company in response to an application for an injunction earlier this year to the effect that the Company was able to pay any judgment which might be recovered against it. There are complaints about the omission of comparative financial statements and the "snapshot" financial picture contained in the material which does not disclose the 6-fold increase in accounts payable between December 31, 1990 and the time of the application for the ex parte order. There are allegations regarding bonuses paid to officers and directors while that growth in accounts payable was occurring and applications for further credit were being made. The affidavit of Mr. Alan Petrie of Northern Warehouse Equipment, filed herein on November 7, 1991, contains some 17 paragraphs alleging less than "full and frank" disclosure.

After considering all those allegations, I have concluded that none of the facts alleged, or even all of them taken together, would have influenced my decision to grant the ex parte order in the first place. That is not to say that they may not have a bearing on the ultimate approval or rejection by this court of any Reorganization Plan which the Company may ultimately present.

The complicated financial picture, which may not be fully known at the time of the application, cannot be completely covered

in the initial application. The level of disclosure which the applicants suggest is completely impractical in respect of applications under the Act. There is still, and will always remain, a risk that by applying ex parte, the order may subsequently be set aside for material non-disclosure. However, the financial situation of the Company remains much the same as it was represented in the material and on the application for the ex parte order. I would still be prepared, despite the arguments I have now heard, but subject to the variations discussed below, to direct the stay of proceedings under the Act which I pronounced ex parte on September 3, 1991.

Further material now filed reveals that the level of disclosure in this case was determined by counsel experienced in these matters. I consider that advice to have been adequate, in this case, in respect of an application under the Act.

THE "INSTANT TRUST DEED"

Section 3 of the Act states:

This Act does not apply in respect of a debtor company unless

- (a) the debtor company has outstanding an issue of...bonds issued under a trust deed...;
- and
- (b) the compromise...includes a compromise or

an arrangement between the...company and the holders of an issue referred to in paragraph (a).

(my emphasis)

The Company did not have "an outstanding issue of bonds issued under a trust deed" until it created one (after consulting counsel in early July, 1991 in respect of its financial problems) for the express purpose of qualifying it under s. 3 of the Act.

In the recent decision in Re Norm's Hauling Ltd. [1991] 3 W.W.R. 23 (Sask. Q.B.) at p. 25, the practice of "creating insubstantial trust deeds for the purpose of qualifying under the Act" was rejected. At p. 26, the court states:

It is the duty of the court to give effect to legislation, not to emasculate it. The plain language of s. 3 offers no other conclusion than that it was enacted to exclude certain companies from the benefits of the Act. No company is excluded if all that is required is an "entrance fee" in the form of a trust deed created not to raise capital but simply to gain access to a legal remedy not otherwise available....In my opinion, s. 3 contemplates the existence of securities characterized by genuineness in the sense that they were issued to raise capital or secure existing indebtedness and not, as here, to achieve an oblique purpose.

That approach is consistent with the remarks of the Minister of Justice at the time he introduced the amendment to the Act in

1952 which forms the present s. 3. He stated that the amendment "...left companies with complex financial structures free to resort to the Act, but excluded companies which had only unsecured mercantile creditors". That statement is perhaps the explanation for the relative obscurity of the Act until the last few years.

Instant trust deeds (for the express purpose of qualifying under s. 3 of the Act) are not universally rejected. In Re United Maritime Fishermen Co-op (1988) 67 C.B.R. (N.S.) 44 (N.B.Q.B. - Trial Div.) at pp. 55/56, the court speaks directly to the use of "instant" trust deeds and refuses to read any words into s. 3 of the Act which would limit its availability based upon the purpose for which the issue of bonds and the trust deed were created. It must be noted in that case, that the debt was an outstanding and genuine one and only the documentation was created to enable the company to qualify under s. 3.

Two judgments in this province support, or appear to support, the practice. Re Stephanie's Fashions Ltd. (1990) 1 C.B.R. (3d) 248 (B.C.S.C.) rejected the argument that an instant trust deed was a "sham" and held that it was not a fraud to create such an instrument solely for the purpose of complying with s. 3 of the Act. A similar conclusion can be drawn from the decision in Re Chef Ready Foods Ltd. (1990) 51 B.C.L.R. (2d) 84 (B.C.C.A.). While the sole issue on that appeal was whether or not the bank's s. 178

security was affected by the stay granted under the Act, both the Chambers Judge appealed from and the Court of Appeal were well aware that the trust deed and the unsecured \$50.00 bond issued thereunder were created for the express purpose of qualifying the company under s. 3 of the Act.

Elan Corporation et al v. Comiskey (1990) 1 C.B.R. (3d) 101 (Ont. C.A.) at pp. 123-127, deals squarely with the instant trust deed issue. That analysis appears in a dissenting judgment, since the majority found it unnecessary to deal with the question. The dissent, after considering the New Brunswick and British Columbia decisions referred to above, reaches the opposite conclusion to that expressed in Re Norm's Hauling Ltd. (above), and concludes that there is no purpose in denying a debtor company resort to the Act because the debt and the accompanying documentation was created for the specific purpose of bringing the application.

I find myself in a position on this issue where there is no authority which I regard as binding upon me. The Saskatchewan and Ontario decisions, which reach opposite conclusions, do not bind me. The New Brunswick decision is in a similar position and can be distinguished on its facts because the debt there was "genuine" in the sense of having no connection with any proceedings under the Act. The issue was not argued before the Court of Appeal in Re Chef Ready Foods Ltd. (above). This court did not have the benefit

of the judicial opinions referred to above in Re Stephanie's Fashions Ltd. (above).

The question falls to be decided on the basis of which approach I adopt. A strict approach to the interpretation of s. 3, coupled with a search for the intention of Parliament, would lead inevitably to the result in Re Norm's Hauling Ltd. (above). On the other hand, a public policy approach taking into consideration those factors outlined in Re Chef Ready Foods Ltd. (above, at pp. 91 and 92) leads to the opposite result; an acceptance and endorsement of the practice of instant trust deeds to qualify a company under s. 3 of the Act. I adopt the latter approach.

The Bankruptcy Proposal procedures are quite impractical for the average company because they do not bind secured creditors, such as the bank and the lien claimant in this case. While that deficiency appears to have been recognized, based on the bankruptcy amendments presently proposed, the Act now forms the only practical means of avoiding liquidation in the event of insolvency. That means, and access to it by the greatest number of potential debtors, should be preserved. The practice of gaining access to the Act by the "entry fee" of an instant trust deed is by no means new. It has been condoned by this and other courts on numerous occasions in the past. If that is judicial legislation, so be it.

The applicants urge upon me the argument that an instant trust deed is void under the Fraudulent Conveyance Act, R.S.B.C. 1979, c. 142 as being "...a bond...made to delay, hinder or defraud creditors...of their...lawful remedies...". They argue that it is not saved by the exclusion clause (a disposition for good consideration to a person without notice or knowledge of collusion) because the trustee and debenture holders are always "tame" in the instant trust deed situations, and certainly are here. The court in Re Norm's Hauling Ltd. (above) would likely agree. I do not.

If an instant trust deed is regarded by the court as a proper means of qualifying under s. 3 of the Act, how can the court regard it as a fraudulent conveyance. That act has no application here.

I also reject the argument that, because of the dictionary definitions of the words "compromise" and "arrangement" in s. 3(b) of the Act (which involve concepts such as settlement of a dispute and agreements between contending parties) there can never be an arrangement with a "tame" trustee or bond-holder.

THE STAY AGAINST DIRECTORS, ETC.

Section 11 of the Act authorizes the court to restrain proceedings against the Company, including those which might be taken under the Bankruptcy Act or the Winding-up Act. The ex parte

order made here extended that stay to cover directors, officers, employees, agents or consultants of the Company. The present applicants attack the authority of this court to so extend the stay and the wisdom of so doing.

The Company relies on the "floodgates" argument to support the extended stay. It says that many of its creditors will attempt to attack it indirectly through its officers and directors if this stay is lifted to that extent. It points to the need for such personnel to devote their time and energy to the formulation of its Reorganization Plan rather than the defence of misrepresentation actions against themselves in respect of Company business dealings. It points to Chapter 11 Bankruptcy proceedings in the United States such as In re Johns - Manville Corp. (1984) 40 B.R. 219, and argues that proceedings under the Act are analogous.

However, there is a specific provision under the U.S. Bankruptcy Code (s. 105(a)) which empowers the court to issue "any order...necessary or appropriate" to carry out the provisions of the Code. In the Johns-Manville case there were literally thousands of pending asbestos-related cases to consider. Here, the only authority which the Company can suggest for the breadth of the stay which was granted in the ex parte order is the inherent jurisdiction of this court.

I have grave doubts that the U.S. authorities go so far as to bar fraud actions against directors and officers. The floodgates argument has little validity in this situation, particularly where the rights of potential claimants are merely postponed as against the Company itself. Even if the inherent jurisdiction of this court is sufficient to support a restraint on actions against officers and directors, and I would require further argument to so convince me, I am not satisfied that this is a case where such an order should be made. There is, however, a legitimate interest in the Company having its employees and officers available to it in connection with preparation of the Reorganization Plan. There will be liberty to apply should the situation degenerate to the point where actions against officers and directors become a significant factor in that regard. In the meantime, the stay in regard to proceedings against anyone other than the Company itself is removed.

THE SIX MONTH STAY

Six months is the usual period for the initial stay. In complicated cases, it has been extended, sometimes more than once, to enable the company to arrive at agreement with a majority of the creditors in each class. After hearing argument on these motions, and in light of the expansion of the Monitor's duties on which I have decided, I am satisfied that the length of the stay originally

ordered is appropriate. One and one-half months of that six have already gone by. The first Report of the Monitor, filed October 8, 1991, makes it clear that much remains to be done before a Reorganization Plan can be presented to the creditors and the court.

Several applicants suggested during the hearing that the results of a "straw vote" among counsel indicate that the Company has no hope of achieving a 75% vote in favour of any reorganization plan. Those expressions of opinion occurred before the Monitor's Report of October 8, 1991 was filed. It projects the amount available to creditors on liquidation as insufficient to pay the bank; there would be nothing available for unsecured creditors. I would not act on such a "straw vote" in any event, because it may take time for the unsecured creditors to accept that a Reorganization Plan will benefit them.

There is, however, one aspect of the length of the stay which causes me some concern. At least some of the creditors suspect that there may be transactions subject to attack under the Bankruptcy Act. Some of such transactions, if any are found to exist, may fall outside the time periods set out in the Bankruptcy Act by the time the stay is lifted or expires. To guard against that possibility, I am prepared to permit the filing of a petition for a receiving order in bankruptcy against the Company.

That step will crystallize the date from which all such time periods pertaining to settlements and preferences under the Bankruptcy Act will be calculated. No further steps will be permitted in that bankruptcy proceeding until the stay is lifted or expires. A successful Reorganization Plan will carry with it an order for the dismissal of that petition.

I am the first to appreciate, as the Company submits, that the filing of a petition in bankruptcy will not make life any easier for it. However, I see no practical alternative to avoiding potential harm to the creditors if the Company's Reorganization Plan fails to gain their approval. The presumption which arises under the preference provisions of the Bankruptcy Act is a powerful tool in the hands of a trustee in bankruptcy.

DUTIES OF THE MONITOR

Several of the applicants complain of the lack of adequate disclosure and voice suspicions about the conduct of management of the Company in respect of the causes of its present financial difficulties and the payment of bonuses and management or consulting fees in the face of an accelerating list of accounts payable. K.C. Metal Products Inc. suggests fairly extensive revisions to the ex parte order, designed to ensure the bona fides of the Company's efforts to reorganize under the Act and to provide

the creditors with information which may answer many of their questions.

While I am not prepared to go as far, at least at this time, as K.C. Metal Products suggests, I am prepared to adopt several of its suggested changes in response to the concerns expressed by a number of the applicants. The duties of the Monitor will be expanded in the following respects:

1. Details of all management salaries, bonuses and fees of whatever kind (including the cost of leasing property used by management) paid by the Company to or for shareholders, officers and directors of the Company during 1990 and 1991 will be reported to the Court by December 15, 1991.

2. The Monitor shall report to the court, and provide copies to all counsel appearing on these applications, on the causes of the Company's current financial problems. To the extent possible, that report should minimize the disclosure of confidential information. It should include copies of any comprehensive reports to management dealing with such matters as expansion projects undertaken by the Company during 1990 and 1991 (edited as may be appropriate to maintain confidentiality) and the estimated commencement and completion dates as well as the projected and actual costs thereof. That report should also deal with the

disposition or acquisition of capital assets valued at over \$10,000.00 during those periods, including the person to whom they were disposed or from whom they were acquired. That report will be filed by December 15, 1991 or such later date as may be ordered.

3. The Monitor shall forthwith report to the court any payment by the Company, in respect of an obligation incurred prior to September 3, 1991 other than to the Hongkong Bank of Canada, and the Company shall not apply any of its cash flow for such purpose.

4. No arrangement or compromise by the Company with any creditor shall be made unless first approved by the Monitor as being in the best interests of the Company, provided that court approval of any such arrangement involving a debt in excess of \$10,000.00 must first be obtained.

5. The Monitor's approval shall be required for the sale of any fixed assets of the Company or any sale of inventory out of the ordinary course of business, provided that no such sale for an amount in excess of \$10,000.00 (book value or cost, whichever is the greater) shall be approved without prior court order.

THE SPECIFIC APPLICATIONS

a) Variform Inc.

This application seeks removal of the prohibition against proceedings against officers, directors, etc. and a reduction of the time within which the Company may file its Reorganization Plan. Both of those matters are dealt with above. It also seeks "particulars of [the Company's] assets and liabilities as of the date of the Petition". That matter has been dealt with by broadening the Monitor's responsibilities.

b) Master Shield, Inc.

This applicant has an action pending against the Company and two of its employees claiming, among other things, rescission of an agreement to supply vinyl siding and related products to the Company. Master Shield wishes to continue with its action and to have the balance of the inventory which it supplied preserved in the meantime. If the Company is allowed to continue selling the product which Master Shield supplied, its action for rescission will gradually become academic.

There are three difficulties with granting such an order. First, Master Shield attempted to obtain, and was denied, such an

order in its own action albeit on the basis of material filed by the Company on July 2, 1991 that it was "a good credit risk, on good terms with most of its suppliers, and had never missed a bank payment". That was hardly full and frank disclosure! Secondly, there is a serious question as to whether or not the title to the goods supplied by Master Shield has passed to the bank under its s. 178 security. Even though Master Shield might otherwise be entitled to rescission against the Company, its action in that regard may already be academic.

Finally, the court must take care not to "carve out one portion of the order and give advantage to one creditor over another" (See, Quintette Coal v. Nippon Steel (1990) 80 C.B.R. 98 (B.C.S.C.) at p. 108). No doubt all of the Company's suppliers would like their product returned for the appropriate credit. The prejudice that will necessarily occur to a few creditors is offset by the potential advantage to those who would receive nothing should a stay be refused. (See, Re Stephanie's Fashions Ltd., above, at p. 252). Here, in light of the Monitor's first Report of October 8, 1991, it is obvious that the only hope for the vast majority of the more than 300 ordinary creditors is a successful Reorganization Plan.

Except to the extent that it is in a position to advance a claim against Messrs. John Gross and Gerald Baer personally, Master

Shield's action is stayed. Its requests for preservation of the inventory which it supplied and for a special listing thereof by the Monitor, are denied.

c) Holland Imports Inc.

Holland is the Company's landlord in respect of some 57,000 square feet of warehouse space. Holland alleges that both leases in question expire on October 31, 1991 and that the Company failed to give the six month's notice in writing which was necessary to entitle it to a renewal term. It seeks leave to commence proceedings against the Company under the Commercial Tenancy Act, R.S.B.C. 1979, c. 54. It also asks that the period of the stay be reduced to one month, a time which expired on the day its application was heard. I dealt earlier with the length of the stay.

A successful Reorganization Plan will necessarily involve an agreement with Holland which will enable the company to continue in occupation of its present premises. The question of whether or not there has been an effective renewal notice (the leases provide for settlement of the renewal rent by arbitration if the parties cannot agree) may be important in the context of whether such an agreement can be reached. That agreement is important to the unsecured creditors as a whole.

There is no substantial prejudice to Holland in the short run as the ex parte order requires payment of the ongoing rent in the amount applicable at the date of the order. However, I consider that it would be appropriate to try the issue of whether or not here has been notice of renewal. That can be conveniently done in the context of proceedings under the Commercial Tenancy Act, so long as those proceedings stop short of an order for possession should Holland prove to be successful.

There will be leave to Holland to commence and pursue such proceedings despite the general stay, but any order for possession therein will be stayed for so long as the ex parte order remains in effect, to be dealt with in the context of any Reorganization Plan ultimately brought before the court.

d) Kuehne & Nagel International Ltd.

This applicant, a customs broker, sued on June 20, 1991 for some \$85,000.00 of which all but \$4,000.00 was duties and taxes paid on the Company's behalf. As late as August 13, 1991, that action was settled by a part payment of \$10,000.00, the delivery of post-dated cheques for the balance, and a possessory lien on some \$30,000.00 worth of merchandise.

During the course of argument on these motions, I ordered that Kuehne & Nagel could not realize on its possessory lien, but was not obliged to deliver up the merchandise except against payment until further order. That order was not intended to affect the rights, if any, of a third party such as the bank.

Despite my initial sympathy for Kuehne & Nagel, arising out of the settlement which it achieved and the small proportion of its account arising from its own fees, more mature consideration brings the realization that it is really no different than suppliers of inventory. They have made expenditures for material and labour to produce the goods which they supplied to the Company. They are out of pocket as Kuehne & Nagel is. Its application for leave to continue with its action is denied.

Kuehne & Nagel's request for "a detailed statement of all management wages and bonuses paid by [the Company] during "...1990 and 1991..." was dealt with in the context of the Monitor's expanded duties. During the course of argument, I also directed that no further bonuses or management or consulting fees be paid without prior order, and that remuneration to directors and officers of the company be limited for the time being to the salaries listed in paragraph 19 of the affidavit of John Gross sworn the 3rd day of October, 1991 and filed herein.

e) Aggressive Investments Inc.

This applicant, which carries on business as Able Office Products, sold office furniture and filing cabinets to a total value of approximately \$10,000.00 to the Company around mid-July of 1991. Title to the furniture was retained by the vendor until payment in full. On September 12, 1991, before becoming aware of the ex parte order, it started a Small Claims action against the Company for \$10,000.00. It seeks leave to continue that action. That leave is denied for reasons expressed above.

Aggressive also seeks an order that title to the goods "be vested" in it. This is not the forum for such a declaration. Aggressive's final request, that the Company be restrained from disposing of those goods, may be unnecessary in the light of Aggressive's filing under the Personal Property Security Act, S.B.C. 1989, c. 36, but considering the circumstances of the Company at the time of that purchase, I have decided that Aggressive is entitled to such a restraining order, at least until further order of this court.

f) Northern Warehouse Equipment Ltd.

Northern supplied to the Company, in connection with its plans to expand into the vinyl siding business, a used racking or storage

system which is now installed in its rented premises. Northern's claim for about \$100,000.00 is the subject of a claim of builder's lien against the interests of both the Company and its landlord in those premises.

In addition to leading the charge against the validity of the ex parte order, Northern applies for a preservation order in respect of the racking system and leave to continue its lien action, at least against the landlord, or alternatively, for leave to cross-examine John Gross, the president of the Company on his affidavits filed in these proceedings.

The Company alleges that the racking system is unsuitable and plans to replace it. Whether that is a genuine concern or merely an excuse for delay is not for me to determine. Northern submits that the racking system which it supplied, and the debt arising from the contract to supply it, should be treated differently than inventory intended for resale. Except to a very limited extent, I disagree. I am prepared to restrain the Company from disposing of the components of the racking system without further order so long as the stay of proceedings is in effect. Those components may well have a much greater value to Northern than to any third party. Such additional value should not be lost, whether it accrues to Northern alone or to the creditors generally.

I am not prepared to permit Northern to continue with its lien action, except to the extent of obtaining a date for trial. It would be pointless for that action to continue against Holland Imports Inc. alone because the Company is entitled to be heard on the question of whether the racking system is an "improvement" and a "fixture", and the amount of any lien can only be determined on the basis of what is owing to Northern by the Company

Any cross-examination of Mr. Gross should await further investigation by the Monitor. There will be liberty to apply in that regard at a future stage of these proceedings. Several questions must be resolved before such an examination proceeds. How many counsel will be entitled to question Mr. Gross? How will he (or she or them) be chosen? What limits, if any, should be placed on the scope of such a cross-examination? I believe those questions will be more easily answered once the Monitor has provided further reports in the context of its expanded duties.

JUDGMENT

1. The applications to set aside the ex parte order are dismissed. The level of disclosure here was adequate for such an order. For public policy reasons, the "instant" trust deed device is acceptable.

2. The prohibition against proceedings against directors, officers, employees, agents or consultants is deleted from the order of September 3, 1991, with liberty to apply should the volume of such litigation threaten the ability of the Company to prepare a Reorganization Plan.

3. The six month period initially ordered will remain unchanged.

4. Variform Inc. and Master Shield, Inc. jointly, or either of them (but not each of them separately) shall have liberty to file a petition against the Company for a receiving order under the Bankruptcy Act. No further proceedings may be taken in respect of that petition so long as the stay in the September 3, 1991 order remains in effect.

5. The duties of the Monitor are expanded as set out in these Reasons.

6. The specific applications to vary the ex parte order are disposed of in the manner set out in these Reasons.

7. There will be no order for the costs of these applications

at this time. The issue of such costs is reserved until further order.

Vancouver, B.C.
October 17, 1991.

"B.D. MACDONALD, J."

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CITATION: Comstock Canada Ltd. (Re), 2013 ONSC 6043
COURT FILE NO.: CV-13-10181-00CL
DATE: 20130926

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

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

AND:

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF COMSTOCK CANADA LTD., CCL EQUITIES INC., AND CCL
REALTY INC., Applicant**

BEFORE: MORAWETZ J.

**COUNSEL: Alex MacFarlane and Frank Lamie, for Comstock Canada Ltd., CCL
Equities Inc., and CCL Realty Inc., Applicant**

Aubrey Kauffman, for Honeywell Limited

Robin Schwill, for PricewaterhouseCoopers Inc., in its capacity as Monitor

Harvey Chaiton, for the Bank of Montreal

M. Kanter, for CNRL

Karen Groulx, for Cofely Adelt Ltd.

Michael McGraw, for EllisDon Corporation

HEARD: SEPTEMBER 16, 2013

ENDORSEMENT

[1] Honeywell Limited (“Honeywell”) brings this motion for:

- (i) an order directing Comstock Canada Ltd. (“Comstock”) to disclaim the subcontract between Comstock and Honeywell made on June 1, 2010 (the

“Honeywell Subcontract”) with respect to the Sick Kids Research Tower Project (the “Project”);

- (ii) or, in the alternative, an order lifting the stay of proceedings contained in paragraphs 22, 23 and 24 of the Amended and Restated Initial Order dated July 9, 2013 in order to permit Honeywell to terminate the Honeywell Subcontract, in accordance with its terms based on the default of Comstock.

[2] Comstock has failed to pay Honeywell monthly progress draws in accordance with the Honeywell Subcontract since November 2012. Honeywell contends that EllisDon, the contractor, has paid approximately \$831,000 to Comstock on account of Honeywell’s monthly progress draws for the period of November 2012 to March 2013. Honeywell alleges that these amounts have not been paid down to Honeywell.

[3] On June 21, 2013, Honeywell gave notice to Comstock of its breach of the Honeywell Subcontract. The cure of the breach was requested by June 27, 2011.

[4] On June 28, 2013, Comstock filed a Notice of Intention to make a proposal pursuant to the provisions of the *Bankruptcy and Insolvency Act (Canada)* (“BIA”).

[5] On July 9, 2013, the BIA proceedings were continued under the provisions of the *Companies’ Creditors Arrangement Act* (“CCAA”) pursuant to an Initial Order dated July 9, 2013. On July 26, 2013 the Initial Order was subsequently amended pursuant to an Amended and Restated Initial Order.

[6] Paragraphs 22, 23 and 24 of the Amended and Restated Initial Order contain broad stays of proceedings which affect Honeywell.

[7] As of August 16, 2013, Comstock alleges that the amount owing by EllisDon to Comstock in respect of the Project is approximately \$9.6 million.

[8] Comstock further alleges that EllisDon has (a) refused to make payment to Comstock, its subtrades, and suppliers for the supply of materials, goods and services pursuant to the subcontract agreement dated June 4, 2010 made between Comstock and EllisDon in respect of the Project; and (b) without Comstock’s authorization and consent, transferred to another contractor for completion, specific items which were to be performed by Comstock on the Project.

[9] Comstock further alleges that on account of EllisDon’s refusal to honour its agreement with Comstock, Comstock was rendered unable to continue with its performance in respect of the Project.

[10] Honeywell takes the position that contracts for abandoned projects should be disclaimed forthwith. In this case, as a result of Comstock’s failure to provide a disclaimer, Honeywell submits that it is being prejudiced and that it should be put in a position where it can mitigate its damages by entering into a new contract for the completion of the scope of work under the

Honeywell Subcontract. Honeywell does not want to be involved in two contracts at the same time.

[11] Comstock takes the position that it has not confirmed that it would disclaim the Honeywell Subcontract, nor could it, as neither the Monitor nor BMO, the major secured creditor and DIP Lender has approved such action by Comstock.

[12] Comstock submits that its estate, stakeholders, creditors, and BMO would suffer substantial prejudice if Honeywell were permitted to cause Comstock to disclaim or it were permitted to terminate the Honeywell Subcontract.

[13] Comstock further submits that its primary concern is that the warranty and indemnity obligations of Honeywell under the Honeywell Subcontract remain in place. This could possibly give Comstock and its creditors recourse against Honeywell for any claims that EllisDon is likely to advance against Comstock on the Project for which Honeywell could be liable under the Honeywell Subcontract with Comstock. This would include any claim for deficiencies. Consequently, Comstock submits that in the event that it is unable to advance a claim under the warranty and indemnification provisions of the Honeywell Subcontract, Comstock and its creditors will suffer substantial prejudice.

[14] Comstock takes the position that it has no issue with Honeywell entering into a new contract with the replacement contractor to Comstock in respect of the Project.

[15] The Monitor and BMO support Comstock's position.

[16] This motion underscores the inherent difficulty which surrounds the attempted reorganization of certain entities, in particular, real estate companies and construction companies. By definition real estate companies and construction companies operate on a project by project basis. In many cases, each project is the subject of specific-purpose financing. In the case of real estate companies, secured creditors vary on a project-by-project basis. With respect to construction companies, creditors, including construction lien trust claimants, vary on a project-by-project basis and the assets or trust funds will also vary on a project-by-project basis. The legal rights of these creditors vary to such a degree that quite often they cannot be grouped in one class. The community of interest is often lacking, resulting in fragmented interests.

[17] The purpose of any stay of proceedings issued pursuant to section 11 of the CCAA is to maintain the *status quo* for a period of time so that proceedings can be taken under the CCAA for the wellbeing of the debtor company and of the creditors. See *Re Northland Properties Limited* (1988), 73 C.B.R. (NS) 141 (B.C.S.C.). The stay order is intended to prevent any creditor from obtaining an advantage over other creditors while the company is attempting to reorganize its affairs.

[18] Comstock has acknowledged that it is unable to continue with its performance in respect of the Project. It has also acknowledged that it has no issue with Honeywell entering into a new contract with the replacement contractor to Comstock in respect of the Project. In short, the

Project will not form part of a restructured or reorganized Comstock. Comstock has acknowledged that a replacement contractor will be involved.

[19] With Comstock no longer being actively involved with the Project, many aspects of the CCAA proceedings will no longer involve the Project. The Sale and Investor Solicitation Process (the "SISP"), is intended to provide a platform by which the Monitor, in consultation with Comstock, is authorized to (i) market the assets of the Comstock Group for sale, and/or (ii) attract new investors. In these circumstances, it is apparent that the Project is not an asset that will form part of the SISP.

[20] Further, the Lien Regularization Order which is intended to re-establish the cash flow on Comstock projects is no longer relevant to the Project.

[21] Consequently, it seems to me that there is no principled basis on which a stay of proceedings, insofar as it affects Honeywell, should be maintained. Put another way, maintaining the stay could be prejudicial to Honeywell. At this time, Honeywell should not be precluded from considering its options. Insofar as the Project is concerned, there is no reorganization or liquidation process. The only outstanding issue is the quantum of Honeywell's claims as against Comstock and Comstock's claims as against Honeywell. These issues do not have to be resolved at this time. Rather, they can be resolved in the claims process.

[22] With respect to the specific relief sought by Honeywell, I accept the submission of Comstock to the effect that where the debtor company does not wish to disclaim a contract, there is no mechanism for such a disclaimer to be imposed upon it. Section 32 of the CCAA provides that the company may not give such notice unless the monitor approves the proposed disclaimer. In this case, the Monitor does not approve the disclaimer of the Honeywell Subcontract.

[23] With respect to the alternative relief, in my view, there is no principled basis upon which the CCAA stay of proceedings should continue to affect Honeywell. Comstock has acknowledged that it is unable to continue with its performance of the Project. Honeywell has indicated that it wishes to enter into a new contract for the completion of the scope of work under the Honeywell Subcontract.

[24] In view of the stated position of the parties, it seems to me to be appropriate to lift the stay of proceedings solely with respect to Honeywell. Honeywell is free to take actions it deems appropriate in the circumstances. However, I do not think it necessary or appropriate to give specific direction with respect to any purported termination of the Honeywell Subcontract.

[25] An order shall issue to give effect to the foregoing.

Date: September 26, 2013

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CITATION: Timminco Limited (Re), 2014 ONSC 3393

COURT FILE NO.: CV-12-9539-00CL

DATE: 2014-07-07

SUPERIOR COURT OF JUSTICE - ONTARIO

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 TIMMINCO LIMITED AND BÉCANCOUR SILICON
INC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jane Dietrich* and *Kate Stigler*, for the Board of Directors, except John Walsh

Kenneth D. Kraft, for Chubb Insurance Company of Canada

James C. Orr, for St. Clair Pennyfeather, Plaintiff in the Class Action

Maria Konyukhova, for Timminco Entities

Robert Staley, for John Walsh

Linc Rogers, for the Monitor

HEARD: July 22, 2013

SUPPLEMENTARY WRITTEN SUBMISSIONS RECEIVED MARCH 2014

ENDORSEMENT

Introduction

[1] On May 14, 2009, Kim Orr Barristers PC, counsel to the representative plaintiff Mr. St. Clair Pennyfeather ("Plaintiff's Counsel"), initiated the proposed class action (the "Class Action"), which names as defendants Timminco Limited ("Timminco"), a third party, Photon Consulting LLC, and certain of the directors and officers of Timminco, (the "Directors").

[2] The Class Action focusses on alleged public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.

[3] Mr. Pennyfeather alleges that the representations were first made in March 2008, after which the shares of Timminco gained rapidly in value to more than \$18 per share by June 5,

2008. Subsequently, Mr. Pennyfeather alleges that as Timminco began to acknowledge problems with the alleged proprietary process, the share price fell to the point where the equity was described as “penny stock” prior to its delisting in January 2012.

[4] In the initial order, granted January 3, 2012 in the *Companies’ Creditors Arrangement Act.*, R.S.C. 1985, c. C-36, as amended (the “CCAA”) proceedings, Timminco sought and obtained stays of all proceedings including the Class Action as against Timminco and the Directors (the “Initial Order”).

[5] Timminco also obtained a Claims Procedure Order on June 15, 2012 (the “CPO”). Among other things, the CPO established a claims-bar date of July 23, 2012 for claims against the Directors. Mr. Pennyfeather did not file a proof of claim by this date.

[6] No CCAA plan has been put forward by Timminco and there is no intention to advance a CCAA plan.

[7] Mr. Pennyfeather moves to lift the stay to allow the Class Action to be dealt with on the merits against all named defendants and, if necessary, for an order amending the CPO to exclude the Class Action from the CPO or to allow the filing of a proof of claim relating to those claims.

[8] The Class Action seeks to access insurance moneys and potentially the assets of Directors.

[9] The respondents on this motion, (the Directors named in the Class Action), contend that the failure to file a claim under the CPO bars any claim against officers and directors or insurance proceeds.

[10] Neither Timminco nor the Monitor take any position on this motion.

[11] For the reasons that follow, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action.

The Stay and CPO

[12] The Initial Order contains the relevant stay provision (as extended in subsequent orders):

24. This Court Orders that during the Stay Period... no Proceeding may be commenced or continued against any former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacities as directors or officers for the payment or performance of such obligations, **until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this court or is refused by the creditors of the Timminco Entities or this Court.**

[emphasis added]

[13] In May and June 2012, The Court approved sales transactions comprising substantially all of the Timminco Entities' assets. In their June 7, 2012 Motion, the Timminco Entities sought an extension of the Stay Period to "give the Timminco Entities sufficient time to, among other things, close the transactions relating to the Successful Bid and carry out the Claims Procedure". The Timminco Entities sought court approval of a proposed claims procedure to "identify claims which may be entitled to distributions of potential proceeds of the ... transactions..." The Timminco entities took the position that the Claims Procedure was "a fair and reasonable method of determining the potential distribution rights of creditors of the Timminco Entities".

[14] The mechanics of the CPO are as follows. Paragraph 2(h) of the CPO defines the Claims Bar Date as 5:00 p.m. on July 23, 2012. "D&O Claims" are defined in para. 2(f)(iii):

Any existing or future right or claim of any person against one or more of the directors and/or officers of the Timminco Entity which arose or arises as a result of such directors or officers position, supervision, management or involvement as a director or officer of a Timminco Entity, whether such right, or the circumstances giving rise to it arose before or after the Initial Order up to and including this Claims Procedure whether enforceable in any civil, administrative, or criminal proceeding (each a "D&O Claim") (and collectively the "D&O Claims"), including any right:

- a. relating to any of the categories of obligations described in paragraph 9 of the Initial Order, whether accrued or falling due before or after the Initial Order, in respect of which a director or officer may be liable in his or her capacity as such;
- b. in respect of which a director or officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Timminco Entities or any one of them or for vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Timminco Entities or amounts which were required by law to be withheld by the Timminco Entities;
- c. in respect of which a director or officer may be liable in his or her capacity as such as a result of any act, omission or breach of duty; or
- d. that is or is related to a penalty, fine or claim for damages or costs.

Provided however that in any case "Claim" shall not include an Excluded Claim.

[15] The CPO appears to bar a person who fails to file a D&O Claim by the Claims Bar Date from asserting or enforcing the claim:

19. This Court orders that any Person who does not file a proof of a D&O Claim in accordance with this order by the claims-bar date **or such other later date as may be**

ordered by the Court, shall be forever barred from asserting or enforcing such D&O Claim against the directors and officers and the directors and officers shall not have any liability whatsoever in respect of such D&O Claim and such D&O Claim shall be extinguished without any further act or notification. [emphasis added]

Mr. Pennyfeather's Position

[16] Mr. Pennyfeather advances a number of arguments. Most significantly, he argues that it is not fair and reasonable to allow the defendants to bar and extinguish the Class Actions claims through the use of an interim and procedural court order. He submits that the respondents attempt to use the CCAA in a tactical and technical fashion to achieve a result unrelated to any legitimate aspect of either a restructuring or orderly liquidation. The operation of the fair and reasonable standard under the CCAA calls for the exercise of the Court's discretion to lift the stay and, if necessary, amend the CPO to either exclude the Class Action claims or permit submissions of a class proof of claim.

[17] In support of this argument, Mr. Pennyfeather adds that there is no evidence that any of the Directors who are defendants in the class action contributed anything to the CCAA process, and that the targeted insurance proceeds are not available to other creditors. Thus, he submits, a bar against pursuing these funds benefits only the insurance companies who are not stakeholders in the restructuring or liquidation.

[18] Mr. Pennyfeather advances a number of additional arguments. Because I am persuaded by this first submission, it is not necessary to discuss the additional arguments in great detail. However, I will give a brief summary of these additional arguments below.

[19] First, Mr. Pennyfeather submits, since the stay was ordered, he has attempted to have the stay lifted as it relates to the Class Action.

[20] Second, Mr. Pennyfeather submits that the CPO did not permit the filing of representative claims, unlike, for example, claims processed in *Labourers' Pension Fund of Canada and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078, 100 C.B.R. (5th) 30. Representative claims are generally not permitted under the CCAA and the solicitors for the representative plaintiff do not act for class members prior to certification (see: *Muscletech Research and Development Inc. (Re)* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.)). Therefore, Mr. Pennyfeather submits that the omission in the order obtained by the Timminco entities, of the type of provision contained in the *Sino-Forest* Claims Order, precluded the action that they now assert should have been taken.

[21] Third, Mr. Pennyfeather responds to the significant argument made by the responding parties that the CPO bars the claim. He submits that the Class Action, which alleges, *inter alia*, misrepresentations and breaches of the *Securities Act*, R.S.O. 1990, c. S.5, is unaffected by the CPO. There are several reasons for this. First, the CPO excludes claims that cannot be compromised as a result of the provisions of s. 5.1(2) of the CCAA. Alternatively, even if Mr. Pennyfeather and other class members are not creditors pursuant to section 5.1(2), he submits that Parliament has clearly intended to exclude claims for misrepresentation by directors

regardless of who brought them. In addition, insofar as the Class Action seeks to recover insurance proceeds, the CPO did not, according to Mr. Pennyfeather, affect that claim.

[22] In summary, Mr. Pennyfeather's most significant argument is that the CCAA process should not be used in a tactical manner to achieve a result collateral to the proper purposes of the legislation. The rights of putative class members should be determined on the merits of the Class Action, which are considerable given the evidence. Further, the lifting of the stay is fair and reasonable in all of the circumstances.

Directors' Position

[23] Counsel to directors and officers named in the proposed class action, other than Mr. Walsh (the "Defendant Directors") submit there are three issues to be considered on the motion: (a) should the CPO be amended to grant Mr. Pennyfeather the authority to file a claim on behalf of the class members in the D&O Claims Procedure? (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, should the claims-bar date be extended to allow him the opportunity to file a late claim against the Defendant Directors? and (c) if Mr. Pennyfeather is permitted to file a late claim against the Defendant Directors, should the D&O stay be lifted to allow the proposed class action to proceed against the Defendant Directors?

[24] The Defendant Directors take the position that: (a) Mr. Pennyfeather does not have the requisite authority and/or right to file a claim on behalf of the class action members and the CPO and should not be amended to permit such; (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, the claims-bar date should not be extended to allow Mr. Pennyfeather to file a late claim; and (c) if Mr. Pennyfeather is permitted to file a late claim, the D&O stay should not be lifted to allow the proposed class action to proceed against the Defendant Directors.

[25] The Defendant Directors counter Mr. Pennyfeather's arguments with a number of points. They take the position that while they were holding office, they assisted with every aspect of the CCAA process, including (i) the sales process through which the Timminco Entities sold substantially all of their assets and obtained recoveries for the benefit of their creditors; and (ii) the establishment of the claims procedure, resigning only after the claims-bar date passed.

[26] The Defendant Directors also submit that Mr. Pennyfeather has been aware of, and participated in, the CCAA proceedings since the weeks following the granting of the Initial Order. They submit that at no time prior to this motion did Mr. Pennyfeather take any position on the claims procedures established to seek the authority to file a claim on behalf of the class members. They submit that, at this point, Mr. Pennyfeather is asking the court to exercise its discretion to (i) amend the CPO to grant him the authority to file a claim on behalf of the class members; (ii) extend the claims-bar date to allow him to file such claim; and (iii) lift the stay of proceedings. They submit that Mr. Pennyfeather asks this discretion be exercised to allow him to pursue a claim against the Defendant Directors which remains uncertified, is in part statute barred, and lacks merit.

[27] Counsel to the Defendant Directors submits that the D&O Claims Procedure was initiated for the purpose of determining, with finality, the claims against the directors and officers. They submit that the D&O Claims Procedure has at no time been contingent on, tied to, or dependent on the filing of a Plan of Arrangement by the Timminco Entities.

[28] Simply put, the Defendant Directors submit that the CPO sets a claims-bar date of July 23, 2012 for claims against Directors and Mr. Pennyfeather did not file any Proof of Claim against the Defendant Directors by the claims-bar date. Accordingly, they submit that the claims against the Defendant Directors contemplated by the Class Action are currently barred and extinguished by the CPO.

[29] The arguments put forward by Mr. Walsh are similar.

[30] Counsel to Mr. Walsh attempts to draw similarities between this case and *Sino-Forest*. Counsel submits this is a case where Mr. Pennyfeather intentionally refused to file a Proof of Claim in support of a securities misrepresentation claim against Timminco and its directors and officers.

[31] They further submit that Mr. Pennyfeather is asking for the Court to exercise its discretion in his favour to lift the stay of proceedings, in order to allow him to pursue a proceeding which has been largely, if not entirely neutered by the Court of Appeal (leave to appeal to the Supreme Court of Canada dismissed). They point out that just like in *Sino-Forest*, to lift the stay would be an exercise in futility where the Court commented that “there is no right to opt out of any CCAA process...by virtue of deciding, on their own volition, not to participate in the CCAA process”, the objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[32] Counsel to Mr. Walsh also takes the position that Mr. Pennyfeather’s only argument is a strained effort to avoid the plain language of the CPO in an effort to say that his claim is an “excluded claim” and therefore a Proof of Claim was never required. Even if Mr. Pennyfeather was right, counsel to Mr. Walsh submits that Mr. Pennyfeather still would have been required to file a Proof of Claim, failing which his claim would have been barred. Under the CPO, proofs of such claims were still called for, even if they were not to be adjudicated.

[33] They note that Mr. Pennyfeather was aware of the CCAA proceeding and the Initial Order. As early as January 17, 2012, counsel to Mr. Pennyfeather contacted counsel for Timminco, asking for consent to lift the Stay.

[34] Counsel contends that the “excluded claim” language that Mr. Pennyfeather relies on is not found in the definition of D&O Claim. Under the terms of the CPO, the language is a carve-out from the larger definition of “claim”, not the subset definition of D&O Claim. As a result, counsel submits that proofs of claim are still required for D&O Claims, regardless of whether they are excluded claims. In that way, the universe of D&O Claims would be known, even if excluded claims would ultimately not be part of a plan.

[35] Mr. Walsh also takes the position that Mr. Pennyfeather made an intentional decision not to file a claim. Mr. Walsh emphasizes that Mr. Pennyfeather had full notice of the motion for the CPO and chose not to oppose or appear on the motion. Further, at no time did Mr. Pennyfeather request the Monitor apply to court for directions with respect to the terms of the CPO.

[36] Mr. Walsh submits he is prejudiced by the continuation of the Class Action and he wants to get on with his life but is unable to do so while the claim is extant.

Law and Analysis

[37] For the purposes of this motion, I must decide whether the CPO bars Mr. Pennyfeather from proceeding with the Class Action and whether I should lift the stay of proceedings as it applies to the Class Action. For the reasons that follow, I conclude that the CPO should not serve as a bar to proceeding with the Class Action and that the stay should be lifted.

[38] As I explain below, the application of the claims bar order and lifting the stay are discretionary. This discretion should be exercised in light of the purposes of both claims-bar orders and stays under the CCAA. A claim bar order and a stay under the CCAA are intended to assist the debtor in the restructuring process, which may encompass asset realizations. At this point, Timminco's assets have been sold, distributions made to secured creditors, no CCAA plan has been put forward by Timminco, and there is no intention to advance a CCAA plan. It seems to me that neither the stay, nor the claims bar order continue to serve their functional purposes in these CCAA proceedings by barring the Class Action. In these circumstances, I fail to see why the stay and the claim bar order should be utilized to obstruct the plaintiff from proceeding with its Class Action.

The Purpose of Stay Orders and Claims-Bar Orders

[39] For the purposes of this motion, it is necessary to consider the objective of the CCAA stay order. The stay of proceedings restrains judicial and extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on negotiating of a compromise or arrangement: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. S.C.).

[40] Sections 2, 12 and 19 of the CCAA provide the definition of a "Claim" for the purposes of the CCAA and also provide guidance as to how claims are to be determined. Section 12 of the CCAA states

12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

The use of the word "may" in s. 12 indicates that fixing deadlines, which includes granting a claims bar order, is discretionary. Additionally, as noted above the CPO provided at para. 19 that a D&O Claim could be filed on "such other later date as may be ordered by the Court".

[41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".

[43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[44] Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the CCAA that compromises certain claims against directors and officers. In this context, the provisions of s. 5.1 of the CCAA must be respected.

[45] In the case of Timminco, there have been distributions to secured creditors which are not the subject of challenge. The Class Action claim is subordinate in ranking to the claims of the secured creditors and has no impact on the distributions made to secured creditors. Further, there is no CCAA plan. There will be no compromise of claims against directors and officers. I accept that at the outset of the CCAA proceedings there may very well have been an intention on the part of the debtor to formulate a CCAA plan and further, that plan may have contemplated the compromise of certain claims against directors and officers. However, these plans did not come to fruition. What we are left with is to determine the consequence of failing to file a timely claim in these circumstances.

[46] In the circumstances of this case, i.e., in the absence of a plan, the purpose of the claims bar procedure is questionable. Specifically, in this case, should the claims bar procedure be used to determine the Class Action?

[47] In my view, it is not the function of the court on this motion to determine the merits of Mr. Pennyfeather's claim. Rather, it is to determine whether or not the claims-bar order operates as a bar to Mr. Pennyfeather being able to put forth a claim. It does not act as such a bar.

[48] It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding,

where there will be no CCAA plan, should not be used in such a way as to defeat the claim of Mr. Pennyfeather. The determination of the claim should be made on the merits in the proper forum. In these circumstances, where there is no CCAA plan, the CCAA proceeding is, in my view, not the proper forum.

[49] Similar considerations apply to the Stay Order. With no prospect of a compromise or arrangement, and with the sales process completed, there is no need to maintain the status quo to allow the debtor to focus and concentrate its efforts on negotiating a compromise or arrangement. In this regard, the fact that neither Timminco nor the Monitor take a position on this motion or argue prejudice is instructive.

Applicability of Established Tests

[50] The lifting of a stay is discretionary. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of (a) the balance of convenience; (b) the relative prejudice to the parties; and (c) where relevant, the merits of the proposed action: *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156, at para. 27.

[51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[52] These are factors that have been considered by the courts on numerous occasions (see, for example, *Sino-Forest; Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), *Blue Range Resource Corp. (Re)*, 2000 ABCA 285, 193 D.L.R. (4th) 314, leave to appeal to S.C.C. refused, [2000] SCCA No. 648; *Canadian Red Cross Society (Re)* (2000), 48 C.B.R. (5th) 41 (Ont. S.C.); and *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (S.C.)).

[53] However, it should be noted that all of these cases involved a CCAA Plan that was considered by creditors.

[54] In the present circumstances, it seems to me there is an additional factor to take into account: there is no CCAA Plan.

[55] I have noted above that certain delay can be attributed to the CCAA proceedings and the impact of *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, at the Court of Appeal. That is not a full answer for the delay but a partial explanation.

[56] The prejudice experienced by a director not having a final resolution to the proposed Class Action has to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constitutes a degree of prejudice to the defendants, it can be alleviated by requiring the parties to agree upon a timetable to have this matter addressed on a timely basis with case management.

[57] I have not addressed in great detail whether the CPO requires excluded claims to be filed. In my view, it is not necessary to embark on an analysis of this issue, nor have I embarked on a review of the merits. Rather, the principles of equity and fairness dictate that the class action plaintiff can move forward with the claim. The claim may face many hurdles. Some of these have been outlined in the factum submitted by counsel to Mr. Walsh. However, that does not necessarily mean that the class action plaintiff should be disentitled from proceeding.

[58] In the result, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action. The CPO is modified so as to allow Mr. Pennyfeather to file his claim.

Morawetz, R.S.J.

Date: July 7, 2014