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BANKRUPTCY AND INSOLVENCY
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FAILLITE ET INSOLVABILITÉ

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IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ADVEN INC. AND ADVEN INDUSTRIES INC.

APPLICANTS	**ADVEN INC. AND ADVEN INDUSTRIES INC.**
DOCUMENT	**BOOK OF AUTHORITIES**

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1.	*Bankruptcy and Insolvency Act*, RSC 1985
2.	*Gray Aqua Group of Companies (Re)*, 2015 NBQB 107
3.	*Mustang GP Ltd. (Re)*, 2015 ONSC 6562
4.	*Electro Sonic Inc, (Re)*, 2014 ONSC 942
5.	*The Body Shop Canada Limited, (Re),* 2024 ONSC 1651
6.	*Eureka 93 Inc. et. al. (Re)*, 2020 ONSC 1482
7.	*Re Mantle Materials Group, Ltd*, 2023 ABKB 488
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12.	*Indiva Limited et al. (Re)*, 2024 ONSC 3426
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14.	*Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775
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TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

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garanti, voter sur toutes questions relatives à la proposition jusqu'à concurrence d'un montant égal à la différence entre le montant de la réclamation et la valeur attribuée à la garantie.

Idem

(4) Where a secured creditor is dissatisfied with the proposed assessed value of his security, the secured creditor may apply to the court, within fifteen days after the proposal is sent to the creditors, to have the proposed assessed value revised, and the court may revise the proposed assessed value, in which case the revised value henceforth applies for the purposes of this Part.

Idem

(4) S'il n'est pas d'accord avec la valeur attribuée à sa garantie, le créancier garanti peut, dans les quinze jours suivant l'envoi de la proposition aux créanciers, demander au tribunal de réviser l'évaluation proposée. Le tribunal peut procéder à la révision souhaitée, auquel cas la présente partie s'applique par la suite en fonction de la valeur révisée.

Where no secured creditor in a class takes action

(5) Where no secured creditor having a secured claim of a particular class files a proof of secured claim at or before the meeting of creditors, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

1992, c. 27, s. 19; 1997, c. 12, s. 31(F).

Rejet présumé de la proposition

(5) Les créanciers visés au paragraphe (1) qui possèdent une réclamation garantie appartenant à une catégorie particulière sont réputés avoir voté en faveur du rejet de la proposition si aucun d'entre eux n'a déposé une preuve de réclamation garantie avant l'assemblée des créanciers ou lors de celle-ci.

1992, ch. 27, art. 19; 1997, ch. 12, art. 31(F).

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

(c) le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les

notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

b.1) le séquestre officiel délivre un certificat de cession, en la forme prescrite, qui a, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les

previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

Calling of meeting of creditors

51 (1) The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books;

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

g) le rapport du syndic visé aux alinéas 50(6)b) ou 50.4(2)b), selon le cas.

2005, ch. 47, art. 36; 2007, ch. 36, art. 18.

Convocation d'une assemblée des créanciers

51 (1) Le syndic convoque immédiatement une assemblée des créanciers — qui doit avoir lieu dans les vingt et un jours suivant le dépôt de la proposition auprès du séquestre officiel aux termes du paragraphe 62(1) — en adressant, de la manière prescrite, à chaque créancier connu et au séquestre officiel, au moins dix jours avant l'assemblée, les documents suivants :

a) un avis des date, heure et lieu de l'assemblée;

b) un état succinct des avoirs et obligations;

c) une liste des créanciers que vise la proposition, avec des réclamations se chiffrant à deux cent cinquante dollars ou plus, et des montants de leurs réclamations, connus ou indiqués aux livres du débiteur;

d) une copie de la proposition;

e) si elles n'ont pas déjà été envoyées, les formules prescrites — en blanc — devant servir à l'établissement d'une procuration, d'une preuve de réclamation ou, dans le cas d'un créancier garanti à qui la proposition a été faite, d'une preuve de réclamation garantie;

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Court may order security or charge to cover certain costs

64.2 (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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

64.1 (1) Sur demande de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs de ses administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après le dépôt de l'avis d'intention ou de la proposition.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la personne peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

(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 the effective participation of that person in proceedings under this Division.

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal shall be valued by the court and shall be paid in cash on approval of the proposal.

R.S., 1985, c. B-3, s. 65; 2004, c. 25, s. 35(F).

Cas où la proposition est subordonnée à l'achat de nouvelles valeurs mobilières

65 Une proposition faite subordonnément à l'achat d'actions ou de valeurs mobilières ou à tout autre paiement ou contribution par les créanciers doit stipuler que la réclamation de tout créancier qui décide de ne pas participer à la proposition sera évaluée par le tribunal et payée en espèces lors de l'approbation de la proposition.

L.R. (1985), ch. B-3, art. 65; 2004, ch. 25, art. 35(F).

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Limitation de certains droits

65.1 (1) En cas de dépôt d'un avis d'intention ou d'une proposition à l'égard d'une personne insolvable, il est interdit de résilier ou de modifier un contrat — notamment de garantie — conclu avec cette personne ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat, au seul motif que la personne en question est insolvable ou qu'un avis d'intention ou une proposition a été déposé à son égard.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

Idem

(2) Lorsque le contrat visé au paragraphe (1) est un bail ou un accord de licence, l'interdiction prévue à ce paragraphe vaut également, avec les mêmes modalités, dans le cas où la personne insolvable n'a pas payé son loyer ou ses redevances, selon le cas, ou n'a pas effectué quelque

Order to disclose information

(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Unrevised collective agreements remain in force

(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Parties

(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Ordonnance visant la communication de renseignements

(5) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes intéressées, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tous renseignements qu'elles ont en leur possession ou à leur disposition — sur les affaires et la situation financière de la personne insolvable — qui ont un intérêt pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (1).

Maintien en vigueur des conventions collectives

(6) Il est entendu que toute convention collective que la personne insolvable et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur.

Parties

(7) Pour l'application du présent article, les parties à la convention collective sont la personne insolvable et l'agent négociateur liés par elle.

2005, ch. 47, art. 44.

Restriction à la disposition d'actifs

65.13 (1) Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Personne physique

(2) Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

Avis aux créanciers

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

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

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

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

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

Related persons

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

(a) a director or officer of the insolvent person;

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

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

Facteurs à prendre en considération

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

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

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

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

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

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Stay on issue of order

182 (1) An order of discharge or annulment shall be dated on the day on which it is made, but it shall not be issued or delivered until the expiration of the time allowed for an appeal, and, if an appeal is entered, not until the appeal has been finally disposed of.

(2) [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

Suspension de l'émission de l'ordonnance

182 (1) L'ordonnance de libération ou d'annulation porte la date à laquelle elle est rendue, mais ne peut être émise ou délivrée avant l'expiration du délai accordé pour un appel ni, si appel est interjeté, avant que l'appel ait été finalement jugé.

(2) [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

PART VII

Courts and Procedure

Jurisdiction of Courts

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

PARTIE VII

Tribunaux et procédure

Compétence des tribunaux

Tribunaux compétents

183 (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

a) dans la province d'Ontario, la Cour supérieure de justice;

b) [Abrogé, 2001, ch. 4, art. 33]

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;

e) dans la province de l'Île-du-Prince-Édouard, la Cour suprême;

f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;

g) dans la province de Terre-Neuve-et-Labrador, la Division de première instance de la Cour suprême;

h) au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

TAB 2

2015 NBQB 107
New Brunswick Court of Queen's Bench

Gray Aqua Group of Companies, Re

2015 CarswellNB 222, 2015 NBQB 107, 1139 A.P.R. 197, 254 A.C.W.S. (3d) 25, 436 N.B.R. (2d) 197

In the Matter of the bankruptcy of Gray Aqua Group of Companies

Reg. Natalie H. LeBlanc

Heard: January 7, 2014
Judgment: May 25, 2015
Docket: NB 19425, Estate No. 51-1780540

Counsel: John D. Stringer, Q. C., Ben R. Durnford, for Ernst & Young Inc. - Trustee
Joshua J.B. McElman, for Business Development Bank of Canada
Ian Purvis, Q.C., for Gray Aqua Farms Ltd, Gray's Aqua Management Ltd, Gray Aqua Processing Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., and Goblin Bay Aqua Farms Ltd.
Celine Leicher, for Europharma Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.1 Approval by court
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
Group filed notices of intention to make proposal ("NOI") — Proposal trustee was appointed — Order allowed for service on all creditors and affected parties to NOIs via telecommunications — Group companies were vertically and financially integrated with singular management and accounting structure — Group companies operated as integrated enterprise with centralized management, sales and accounting based in New Brunswick — Group shared common senior creditors — Proposal trustee brought motion for order to file consolidated proposal to respective and individual creditors — Motion granted — Historically, courts have been reluctant to grant right of consolidation to moving parties on basis of consolidation being seen as extraordinary remedy under Bankruptcy and Insolvency Act — Group was suitable candidate for order for consolidated proposal — All creditors were served and none contested motion — Evidence was sufficiently integrated from financial and practical perspective that it functioned as centralized company — Purpose of Act is to facilitate financial rehabilitation in fair and structured atmosphere while protecting integrity of process and all of its participants, including creditors — Proposal trustee's evidence struck right balance of efficiency and equity that would serve to streamline proposal, create savings for all parties and facilitate faster restructuring of group.
Table of Authorities
Cases considered by *Reg. Natalie H. LeBlanc*:
Ashley v. Marlow Group Private Portfolio Management Inc. (2006), 2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List])
Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List])
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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s. 34 — pursuant to

s. 66 — pursuant to

s. 183 — considered

s. 192 — pursuant to

MOTION brought by proposal trustee for order to file consolidated proposal to respective and individual creditors.

***Reg. Natalie H. LeBlanc*:**

Background

1 On August 21, 2013 various Notices of Intention to Make a Proposal ("NOI") were filed by Gray Aqua Farms Ltd, Gray's Aqua Management Ltd, Gray Aqua Processing Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., and Goblin Bay Aqua Farms Ltd., (collectively the "Group").

2 As a result of the filing of the NOIs, Ernst & Young ("Proposal Trustee) was appointed as the Proposal Trustee ("Proposal Trustee"). On September 24, 2013 the Proposal Trustee presented a Motion for an Order Respecting Service and Accessibility Protocol which was granted. This Order allowed, *inter alia*, for service on all creditors and affected parties to the NOIs filed by the Group via telecommunications.

3 On or about January 7, 2014 solicitors for the Proposal Trustee applied to the Court for an Order allowing the filing of a Consolidated Proposal to the respective and individuals creditors of the Group, pursuant to sections 34, 66, 183 and 192 of the *Bankruptcy and Insolvency Act* (Canada).

4 Evidence contained in various reports from the Proposal Trustee, in particular the sixth report of the Proposal Trustee and the sixth affidavit of Tim Gray, which documents submit evidence supporting the Group's suitability for the filing of a Consolidated Motion.

5 In particular, the Group companies are vertically and financially integrated with a singular management and accounting structure. Moreover, solicitors for the Proposal Trustee submit uncontested evidence that Group companies operated at all times as an integrated enterprise with centralized management, sales and accounting based in Northampton, New Brunswick.

6 The Group also shares several common senior creditors, which include Callidus Capital Corporation ("Callidus") who acquired debt and security from HSBC Canada ("HSBC") on a number of the Group companies and Business Development Bank of Canada ("BDC").

7 It is submitted that the shared and respective creditors of the Group, if an Order allowing a Consolidated Proposal would not be deprived of any rights and would not suffer any measurable prejudice.

8 The largest individual respective group of creditors who require accommodation deriving from a Group company would be the unsecured creditors of Gray Aqua Processing Limited ("GAPL") who are proposed as a distinct class of creditors under a Consolidated Proposal.

Analysis

9 Historically, Courts have been reluctant to grant the right of consolidation to moving parties on the basis of consolidation being seen as an extraordinary remedy under the BIA, *supra.*

10 The BIA is void of any statutory test establishing benchmarks for the consolidation of corporate entities. Limited caselaw on point seems to rely on the equitable jurisdiction of the Court under Section 183.

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TAB 3

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

2015 ONSC 6562 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

BEFORE: Justice H. A. Rady

COUNSEL: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

Introduction

[1] This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(a) Harvest Ontario Partners:

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) Harvest Power Mustang Generation Ltd.

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

[24] There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

[25] The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion

2015 ONSC 6562 (CanLII)

materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).

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b) the DIP agreement and charge

[26] S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

[27] S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;

[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** 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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

d) the D & O charge

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

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> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

2015 ONSC 6562 (CanLII)

[35] I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

[36] The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

[37] In *Re Brainhunter* (2009), 62 C.B.R. (5th) 41, Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

TAB 4

CITATION: Electro Sonic Inc. (Re), 2014 ONSC 942
COURT FILE NO.: 31-1835443 and 31-1835488
DATE: 20140210

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF the Notice of Intention to Make a Proposal of Electro Sonic Inc.

AND IN THE MATTER OF the Notice of Intention to Make a Proposal of Electro Sonic of America LLC

BEFORE: D. M. Brown J.

COUNSEL: H. Chaiton, for the Applicants, Electro Sonic Inc. and Electro Sonic of America LLC

I. Aversa, for the Royal Bank of Canada

HEARD: February 10, 2014

2014 ONSC 942 (CanLII)

REASONS FOR DECISION

I. Motions for administrative consolidation of NOI proceedings, an Administrative Professionals Charge and authorization to initiate Chapter 15 proceedings

[1] Electro Sonic Inc. ("ESI") is an Ontario corporation with its registered office in Markham, Ontario. Electro Sonic of America LLC ("ESA") is a Delaware limited liability corporation which carries on business from a facility in Tonawanda, New York. Both companies are owned by the Rosenthal family. Both companies are involved in the distribution of electronic and electrical parts.

[2] On February 6, 2014, both companies filed notices of intention to make proposals pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. MNP Ltd. was appointed proposal trustee.

[3] Both companies applied for three types of relief: (i) the administrative consolidation of the two proceedings; (ii) the approval of an Administrative Professionals Charge on the property of both companies to secure payment of the reasonable fees of the legal advisors; and, (iii) authorization that the proposal trustee could act as foreign representative of the NOI proceedings and could apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code* (the "Code"). At the hearing I granted the orders sought; these are my reasons for so doing.

II. Administrative consolidation

[4] Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits: *Bankruptcy and Insolvency General Rules*, s. 3; *Ontario Rules of Civil Procedure*, Rule 1.04(1). One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court. Administrative consolidation of two bankruptcy proceedings would be analogous to bringing two separate civil actions under common case management.

[5] In the present case, the evidence disclosed that the operations of ESI and ESA are highly integrated, sharing a common managing director as well as consolidated accounting, finance and human resource functions, including payroll. As well, ESI has been the sole customer of ESA in 2013 and 2014.

[6] Given the possibility of the applicants applying together at future dates for relief such as stay extensions and sale approvals, and given that both companies share the same lender – Royal Bank of Canada – it made sense to order that both bankruptcy proceedings be consolidated for the purposes of future steps in this order. For those reasons, I granted the administrative consolidation order sought.

III. Administrative Charge

[7] The applicants seek a charge in the amount of $250,000 on the property of ESI and ESA to secure payment of the reasonable fees and expenses of the legal advisors retained by the applicants, MNP and its legal counsel (the "Administrative Professionals"). The applicants sought an order granting such an Administrative Professionals Charge priority over security interests and liens, save that the Charge would be subordinate to the security held by RBC and all secured claims ranking in priority thereto.

[8] The applicants filed evidence identifying their creditors, as well as the results of searches made under the Personal Property Registration systems in Ontario and British Columbia and under the Uniform Commercial Code in respect of ESA. The applicants complied with the service requirements of *BIA* s. 64.2(1).

[9] RBC did not oppose the Charge sought, but advised that it might later bring a motion to lift the stay of proceedings to enable it to enforce its security or to appoint an interim receiver.

[10] As noted, ESA is a Delaware corporation with its place of business in New York State. ESA filed evidence that it has a U.S. dollar bank account in Canada, although it did not disclose the amount of money in that account.

[11] *BIA* s. 50(1) authorizes an "insolvent person" to make a proposal. Section 2 of the *BIA* defines an "insolvent person" as, *inter alia*, one "who resides, carries on business or has property

2014 ONSC 942 (CanLII)

TAB 5

CITATION: In the Matter of the Notice of Intention to Make a Proposal of The Body Shop Canada Limited, 2024 ONSC 1651
ESTATE/COURT FILE NO.: BK-31-3050418
DATE: 20240304

2024 ONSC 1651 (CanLII)

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF THE BODY SHOP CANADA LIMITED

RE: The Body Shop Canada Limited

BEFORE: Peter J. Osborne J.

COUNSEL: *Natasha MacParland and Natalie Renner*, for The Body Shop Canada Limited

Jane Dietrich and Alec Hoy, for the Proposal Trustee

D.J. Miller, for Oxford Properties & its Affiliates

David Bish, for Cadillac Fairview Corporation Ltd. and its Affiliates and other Landlords

S. Michael Citak, for Crombie Property Holdings Ltd. and agent for counsel to RioCan Real Estate Investment Trust and Cushman & Wakefield Asset Services ULC

HEARD: March 4, 2024

ENDORSEMENT

1. The Body Shop Canada Limited ("TBS Canada" or the "Company") seeks an order:

   a. expanding the scope of the stay of proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c.B-3 (the "*BIA*") by way of an order directing the continuation of services and certain other protections in respect of the Company;

   b. granting an administration charge;

   c. approving an indemnity and granting a priority charge with respect thereto to idemnify the director and officers of the Company;

   d. directing all persons who have in their possession or power, any property of TBS Canada or any book, document or paper of any kind relating to the Company to produce same to the Company; and

54. On this basis, but recognizing that the rent relief preserves the liquidity of the Company here, I am satisfied that the relief is appropriate.

The Administration Charge and the Director's and Officers' Charge

55. The Company requests an Administration Charge in favour of the Proposal Trustee, its counsel and counsel to the Company in the amount of $700,000. The authority for this Court to grant such a charge is found in s. 64.2 of the *BIA*. Administration charges have been approved in other proposal proceedings where, as I am satisfied is the case here, the participation of the parties whose fees are to be secured is necessary to maximize the chances of a successful proceeding under the *BIA*. I observe that none of the proposed beneficiaries have retainers. See: *Scotch & Soda* at para. 13-18; *Mustang GP Ltd., (Re)*, 2015 ONSC 6562 at para. 33; and *Colossus Minerals Inc., (Re),* Endorsement dated February 7, 2014 (Court File No. CV-14-10401-00CL) ("*Colossus*") at para. 11-15.

56. The quantum of the proposed Administration Charge was calculated in consultation with the Proposal Trustee who is of the view that the amount is reasonable and appropriate. It will rank ahead of the D&O Charge, the Aurelius Security and HSBC Registrations but behind the Enterprise Security. Again, each of Aurelius, Enterprise and HSBC received notice of this motion. I further observe that the Aurelius Security is not enforceable today according to its terms and no demand has been sent to the Company, and as noted above the Company is of the view that there is no indebtedness secured by the HSBC Registrations in any event.

57. I am also satisfied that the Director's and Officers' Charge should be granted up to a maximum of $2,100,000. It would rank behind the Administration Charge and Enterprise Security but ahead of the Aurelius Security and the HSBC Registrations.

58. The quantum reflects the statutory obligations for which the one director (the affiant on this motion) and officers are liable in the event the Company does not pay them, such as unpaid vacation pay, payroll and sales taxes.

59. Jurisdiction to approve such a charge flows from s. 64.1 of the *BIA*, although there is a restriction on that jurisdiction found in s. 64.1(3) in that the court may not make the order if, in its opinion, the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

60. TBS Canada purportedly has coverage under a global director's and officers' insurance policy held by TBS International in the UK, which is said to apply to the officers and directors of its subsidiaries. However, the Company does not have access to the wording of the UK Policy, despite repeated requests for same from the UK Parent. Nor has it received any proof that premiums have been paid and that the policy is in force.

61. In the circumstances, and unless and until it is clear that adequate insurance is available, the charge is appropriate. I observe that in *Colossus,* such a charge was approved in circumstances that were similar, in that there was uncertainty as to whether the existing insurance in that case was sufficient to cover all potential claims.

62. In this case, it is unclear whether there is any applicable insurance, and if there is, what the terms or limits are. Moreover, the proposed charge will apply only to the extent that the director

2024 ONSC 1651 (CanLII)

TAB 6

CITATION: Eureka 93 Inc. et. al. (Re) 2020 ONSC 1482
COURT FILE NO.: 33-2618511
DATE: 2020/03/09

2020 ONSC 1482 (CanLII)

COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENEDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: E. Patrick Shea, for the debtors

Sean Zweig, for Dominion Capital LLC

Lou Brzezinski, for the Proposal Trustee

HEARD: March 6, 2020

DECISION AND REASONS

[1] The debtors (the NOI Companies) move to have four related matters consolidated, to extend the time for making proposals, and for approval of proposed interim priority financing arrangements ("DIP financing").

[2] Four related corporations have served notice of intention to make a proposal pursuant to s. 50.4 (1) of the *Bankruptcy and Insolvency Act*[1]. Three of the corporations are subsidiaries of Eureka 93, the publicly traded parent company. Only one of these corporations has any significant asset. That is Artiva Inc. which owns a 100 acre parcel of land containing a largely completed, licenced, but not yet operational, cannabis facility. The purpose of the proposed financing is to complete the facility and to generate sales so that there is cash flow.

[3] The temporary financing and extension of time to make a proposal is actively supported by the secured creditor holding the first mortgage. Other creditors are either in support of the plan or are neutral but the motion is strongly opposed by Dominion Capital on behalf of a group

[1] RSC 1985, C. B-3 as amended

of three secured creditors ("the noteholders"). Dominion takes the view that "there is no business to rehabilitate, no air of reality to the NOI Companies' business plan, no significant assets apart from the Ottawa facility, and no hope of satisfying the claims of creditors through the Proposal Proceedings."

[4] If an extension of time is not granted, then pursuant to s. 50.1 (8) of the *BIA* the NOI companies will be deemed to have made an assignment in bankruptcy on March 15th, 2020. If the interim financing is not granted then it is likely there will be a receivership and a liquidation of the assets. In that case there will be no recovery for the unsecured creditors. The total debt at this point in time appears to be in excess of $28 million although that is inclusive of intercompany debt.

[5] If the plan is approved it is possible but not guaranteed that the value of the business as a going concern will be higher than the "as is" value of the land, it is possible the debtors will put forward an acceptable proposal and possible there will be full recovery for the secured creditors and something for those that are unsecured. On the other hand, the plan may fail, the proposal may be voted down but there will be another $2.3 million in debt in priority to all other creditors.

[6] The court must decide if it is reasonable to authorize this additional debt while continuing to protect the debtors from their existing creditors in the hope that this will generate a better outcome. The noteholders urge the court not to do so.

Background

[7] Eureka 93 Inc. is the parent company of a corporate group that was intended to be a vertically integrated hemp and cannabis company. Livewell and Vitality are subsidiaries of Eureka and Artiva is a subsidiary of Livewell. Eureka is or was publicly traded until a cease trading order was issued by the Ontario Securities Commission (OSC) in September of last year when it ran into significant financial difficulty and was unable to meet its obligations as an issuer of securities.

[8] Eureka is a holding company and currently has five employees. Artiva owns a farm equipped with greenhouses and has a cannabis cultivation licence from Health Canada. This facility (the Ottawa facility) is not yet completed and it requires a further significant capital investment to begin production. None of the other corporations are operational at this time. The focus of the motion and of the intended proposal is to salvage the Ottawa facility and to generate positive cash flow through Artiva.

[9] Dominion describes the business of Artiva as more of an idea than a reality. They say that Artiva owns the land and the Ottawa facility but does not have a business. Despite the significant funds raised to date, the Ottawa facility remains incomplete and inoperable. The noteholders take the view that permitting the NOI companies to raise more funds in priority to the existing secured creditors is futile and will only result in further erosion of their collateral and any potential recovery for the existing creditors. Essentially, the moving party has no faith in Eureka's remaining management nor in the business plan the proponents now seek to put forward.

2020 ONSC 1482 (CanLII)

[19] Counsel for the debtor submitted that this was not an appropriate area for judicial notice particularly in light of the specific evidence before me. The affidavit evidence filed on behalf of the debtors indicated a different business strategy focused on seedlings or "clones" and painted an optimistic picture of quickly generating positive cash flow. I agree that a news report should not be taken as evidence, but it is useful background. There is no doubt that there is significant risk for any new business particularly in an evolving and volatile sector such as legal cannabis production.

[20] The question is whether this is a risk worth taking despite the misgivings of the noteholders and the potential prejudice to their position. I am encouraged by the First Report of the Proposal Trustee and the support for the plan set out therein. I am also impressed by the support for the plan voiced by the representative of the first mortgagee and the interim lenders.

[21] I appreciate that both the interim lender and the first mortgagee are fully secured against the value of the land but the willingness to lend the additional funds is supported by their analysis of the plan as viable. Mr. Martin deposes that he has been working with Mr. Poli since September of 2019 and has full confidence in the plan. It is his position that the interim financing plan and proposal proceedings based on a completed and operational facility is likely to generate greater value for all stakeholders than would be the case in a liquidation.

[22] There are other stakeholders, not the least of which are two lien claimants and the unsecured creditors. There is at least $15 million in secured debt and over $9 million in unsecured debt. As noted, the other secured creditors support the motion and neither the lien holders nor the unsecured creditors appeared to oppose it.

[23] There are five current employees but perhaps 20 other employees who were laid off from the various companies. The completion of the project and the start of cannabis production would involve calling some of those employees back to work.

[24] I am persuaded that immediate liquidation would have dire effects whereas the brief extension of time and the interim financing hold at least the prospect of increased value and a successful proposal.[8]

Conclusion & Order

[25] I am granting the proposed order substantially in the form proposed although I have simplified the title of the proceedings in paragraph 2 of the draft order as shown at the top of these reasons. I am also imposing an additional term.

[8] See *Mustang GP Ltd (Re)*, 2015 ONSC 6562

2020 ONSC 1482 (CanLII)

TAB 7

Court of King's Bench of Alberta

Citation: Re Mantle Materials Group, Ltd, 2023 ABKB 488

Date: 20230828
Docket: 2301 10358
Registry: Calgary

2023 ABKB 488 (CanLII)

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

And in the Matter of the Notice of Intention to Make a Proposal of Mantle Materials Group, Ltd.

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

Introduction

[1] Mantle Materials Group, Ltd. applied for an extension of time to make a proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 50.4(8), approval of various charges on the bankrupt estate ("Restructuring Charges") including the priority of those charges, and approval of the payment of certain pre-filing debts to creditors whose support is required to perform environmental reclamation work that will be integral to the pending proposal. The application was granted with a temporary proviso with respect to the priority of the Restructuring Charges over certain equipment to ensure that Travelers Capital Corp, a secured lender, was not prejudiced prior to the release of these Reasons.

[2] Mantle advises that the proposal that it intends to make will not allow payment to any creditors before Mantle has satisfied its end-of-life obligations stemming from Environmental Protection Orders issued by Alberta Environment and Protected Areas ("AEPA" formerly Alberta Environment and Parks) with respect to several gravel producing properties. Mantle submits that this is what is required by ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 ("*Redwater*") because the environmental remediation obligation is an obligation of the company that must be satisfied prior to distributions to creditors. AEPA supports Mantle's position.

the performance of reclamation work by Mantle and compliance with the EPOs. AEPA objected to the original proposed Reverse Vesting Order.

[11] As a result of AEPA's objections, the Court approved a revised Reverse Vesting Order that provided that the order did not affect the liability of JMB, 216, or the directors of those companies for "Compliance Issues" or performing "Reclamation Obligations" in respect of the various gravel-producing properties. Mantle accordingly remained liable for the EPOs issued with respect to both the properties acquired in the amalgamation with JMB and 216 and the properties now possessed by the residual company. Mantle negotiated a plan with AEPA for the reclamation work to be done to satisfy the EPOs.

[12] Following completion of the JMB CCAA proceedings, Mantle entered a loan transaction with Travelers. Travelers loaned Mantle $1,7000,000 for the acquisition of equipment for use in its operations. Mantle granted Travelers a purchase-money security interest (PMSI) over the equipment. The security interest was registered in the Alberta Personal Property Registry. Pursuant to an agreement between Travelers, Mantle, and Fiera Private Debt Fund V LP, which holds a general security interest in all of Mantle's present and after acquired property, Travelers' security interest in the equipment was designated to have first priority. As of July 21, 2023, Mantle owed Travelers just short of $1.1 million.

[13] 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 to make a proposal under s 50.4 of the BIA.

[14] On August 15, 2023, I granted an extension of the BIA stay period and the time period to permit Mantle to make its proposal. I further approved the creation and priority ranking of various Restructuring Charges, including an Administration Charge, a Directors & Officers Charge, and an Interim Lending Facility Charge. I was satisfied that the participation of lawyers, insolvency professionals, and directors and officers was required for the proposal to succeed. I was further satisfied that the Interim Lending Facility, which is to be primarily used to fund reclamation work, is necessary for the success of the proposal.

[15] Travelers' argued that the Restructuring Charges should not have priority over Travelers' security interest in the equipment and that Travelers should be able to be paid out or realize on its security without delay. Mantle, supported by AEPA, submitted that the Restructuring Charges were necessary to put the proposal into effect and that the main plank of the proposal was the completion of the reclamation work to satisfy the EPOs. Mantle is of the view that the value of the gravel pits that are still active exceeds the amount of the reclamation obligations. Mantle has also posted more than $1 million as security with AEPA which will be returned upon completion of the reclamation obligations to AEPA's satisfaction. Mantle submits that Travelers should not be permitted to realize on its security prior to the completion of the reclamation work because if it were allowed to do so, that would jeopardize Mantle's ability to complete the reclamation work and thereby jeopardize its ability to make a proposal to its creditors.

[16] I granted an Order to allow work on the pending proposal, including reclamation work, to get underway while preserving Travelers' position pending these Reasons. The Order provided, in part, as follows:

2023 ABKB 488 (CanLII)

authority. That means that the question in the present case is whether Mantle's equipment subject to the Travelers security interest is analogous to the equipment and real estate in ***Trident***.

[39] Warren Miller, Vice President of Structured Finance and Capital Markets at Travelers, deposed that it was his understanding that Mantle sought financing from Travelers so that it could "purchas[e] the equipment necessary to operate its business (instead of renting it)." Mr. Miller's Affidavit attached as part of an exhibit a Notice of Intention to Enforce Security which listed all Mantle's equipment that Travelers had financed. The descriptions include the following: Jaw Crushing Plant, Cone Crushing Plant, Screen Plant, Aggregate Feeder, Aggregate Surge Bin, Material Washer, Conveyor, Truck Scale, Articulated Dump Truck, Tracked Excavator, and the like. The equipment in which Travelers has a security interest appears to be part to Mantle's gravel production business.

[40] In my view, no sensible distinction can be made between the equipment and real estate in ***Trident*** and the equipment in the present case. The equipment over which Travelers has a security interest is as much a part of Mantle's gravel business as the equipment and real estate in ***Trident*** was a part of Trident's oil and gas business. Based on this factual finding, I am bound by the principle of horizontal *stare decisis* to follow ***Trident***. In finding that the equipment in the present case is part of Mantle's gravel business, I make no comment on how in theory a line should be drawn between related and unrelated assets or even if a line should be drawn. As the Court of Appeal said in ***Manitok***, that "can be left for another day."

[41] Travelers advanced policy arguments as to why it should not have to wait to realize upon its security until after Mantle completes the reclamation work required by the EPOs. Mantle and AEPA responded with policy arguments supporting the deferral of realization of all secured creditors, including Travelers, until after the satisfactory completion of the reclamation work. Given my conclusion that the equipment subject to the Travelers security interest is related to the assets to which Mantle's environmental obligations pertain in the sense that the equipment is used in gravel production, it is not necessary to explore these policy arguments.

[42] Though I decline to debate the wisdom of the policy of effectively subordinating secured creditors to environmental obligations in these Reasons, it is noteworthy that the evidential record shows that Travelers conducted due diligence prior to entering the financing arrangement with Mantle. Among the materials available to Travelers as part of that due diligence process were documents indicating the existence of Mantle's environmental reclamation obligations and the security posted by Mantle with AEPA. Prior to entering the financing arrangement, Travelers had the opportunity to assess the risk of doing business with Mantle, make an informed decision whether to do business with Mantle, and to negotiate a cost of borrowing that reflected the risk inherent in Mantle's business.

Conclusion

[43] The Travelers security interest in the equipment must be subordinated to the Restructuring Charges because the Restructuring Charges are necessary to the completion of the environmental remediation work that is an important part of the pending proposal. Travelers cannot realize on its security until the environmental reclamation work is completed to AEPA's satisfaction and the only way that such work can be done is with the support of the officers and directors of Mantle, lawyers and insolvency professionals, and the interim lender who are all protected by the Restructuring Charges.

2023 ABKB 488 (CanLII)

TAB 8

In the Court of Appeal of Alberta

Citation: Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66

Date: 20210218
Docket: 2101-0002-AC
2101-0004-AC
Registry: Calgary

2021 ABCA 66 (CanLII)

Docket: 2101-0002-AC

Between:

Athabasca Workforce Solutions Inc.

Applicant

- and -

Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation

Respondents

- and -

Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

Not a Party to the Application

- and -

Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation

Respondents on Application

Docket: 2101-0004-AC

Between:

Behrokh Azarian, Homayoun Hodaie, Mandana Rezaie, Mehran Pooladi-Darvish, Meysam Ovaici, Firooz Abbaszadeh, Mehran Joozdani, Layla Amjadi, Meer Taher Shabani-Rad, Zahra Ahmadi-Naghdehi, Afshin Shameli,

Maryam Mohsen Zadeh, Parham Minoo, Haleh Peiravi, Mohammad Ahadzadeh Ardebili, Ramin Jalalpoor, Elham Vakili Azghandi, Tariq Mahmood Roshan, Amin Jalalpoor, Faisal Khan, Poonam Dharmani and Ali Nilforoush

Applicants

- and -

Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

Respondents

- and -

Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

Not a Party to the Application

- and -

Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation

Respondents on Application

Reasons for Decision of The Honourable Madam Justice Marina Paperny

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Application for Permission to Appeal

2021 ABCA 66 (CanLII)

Reasons for Decision of
The Honourable Madam Justice Marina Paperny

2021 ABCA 66 (CanLII)

Introduction

[1] The applicants seek a declaration that they, as proposed appellants, do not require leave to appeal the decision of a supervising judge under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). If leave is required, they seek leave to appeal the decision.

[2] The impugned decision approved a sale and vesting order (SAVO), an interim financing order, and an interim financing charge order (collectively, the IFO) over the assets of Greenfire Hangingstone Operating Corporation. The applicant Athabasca Workforce submits it is a creditor of Greenfire Hangingstone as well as a significant shareholder of its parent company, Greenfire Oil & Gas Ltd. (collectively, Greenfire). The second set of applicants are individual investors in Greenfire.

Background

[3] On April 3, 2018, Greenfire purchased the Hangingstone Facility, a bitumen production plant in Alberta's oilsands region. On July 5, 2019, Athabasca and Greenfire Hangingstone entered into a transportation agreement related to the plant's operations. Athabasca Workforce says that, after Athabasca was required to purchase shares in the parent company, Greenfire failed to pay them for their services. On August 20, 2020, Athabasca Workforce filed an application that Greenfire be declared bankrupt. Greenfire disputed the bankruptcy, claimed that in fact it was a creditor of Athabasca Workforce, and, in an effort to keep the facility viable, filed a Notice of Intention to Make a Proposal under the BIA on October 8, 2020.

[4] During this time, Greenfire sought interim financing from potential lenders. Greenfire was required to extend its time to submit a proposal on several occasions thereafter. Meanwhile, the Hangingstone facility was non-operational and began to accrue damage due to freezing temperatures and inactivity. In December 2020, Greenfire sought court approval of the SAVO and IFO. Absent an interim lender and therefore a resumption in operations, damage to the Hangingstone facility and associated environmental liability would continue to increase. With respect to the SAVO and IFO, Greenfire negotiated an Asset Purchase Agreement with an arm's length party, Greenfire Acquisition Co, and negotiated an Interim Financing Agreement with Trafigura Canada General Partnership (Trafigura), the terms of which were contingent on court approval. In December 2020, Greenfire filed an application to approve interim financing, grant Trafigura a priority charge (the interim lender), and approve the Asset Purchase Agreement.

[5] On December 17, 2020, the chambers judge granted the requested orders. The applicants wish to appeal those orders and submit that leave is not required, or in the alternative, that leave ought to be granted in the circumstances.

[6] For the reasons that follow, I have concluded that leave to appeal is required. I have considered the leave application and conclude that the test for leave has not been met.

Is leave to appeal required?

[7] Under section 193 of the BIA, an appeal exists as of right from bankruptcy proceedings in limited circumstances:

> (a) if the point at issue involves future rights;
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; or
> (e) in any other case by leave of a judge of the Court of Appeal.

[8] While at first blush the section, and in particular s 193(c), appears broad, the provision has been narrowly interpreted. The provision, and the BIA generally, are to be interpreted purposively, to ensure bankruptcy proceedings are administered efficiently and expeditiously.

[9] Applicants seeking to avoid the requirement for leave often rely on ss 193(a) and (c), and this appeal is no exception.

[10] Looking first at s 193(a), the investors submit that the SAVO approves vesting title to assets free and clear of all charges and claims, including those of the investors, and thus their future rights are being negatively impacted. I do not accept that submission. Future rights are not procedural rights or commercial advantages, which is in reality what the investors assert. The submission that they no longer have a claim against the assets of Greenfire overlooks the reality that they are not asserting future rights, but rather present rights, and that any proceeds of sale will be available for distribution to creditors in accordance with the BIA. See *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 15; *Ravelston Corp., Re*, 2005 CanLII 63802 at para 17, [2005] OJ No 5351 (Ont CA); *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 CBR 240 (Ont CA); *Dominion Foundry Co., Re* (1965), 1965 CanLII 596, 52 DLR (2d) 79 (Man CA); and *Fiber Connections Inc. v SVCM Capital Ltd.*, 2005 CanLII 15454, 10 CBR (5th) 201 (Ont CA).

[11] The situation is similar to that in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225. In *Bending Lake*, the Ontario Court of Appeal considered whether leave

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to appeal a sale and vesting order was required under s 193, it having been submitted that "future rights" were engaged. The court held that to the extent a SAVO affects the rights of those with an economic interest in the debtor, only the present, existing rights of the debtor's creditors and shareholders are affected, not their future rights (para 27). The court examined the applicant's real complaint - the "commercial advantages or disadvantages that may accrue from the order challenged on appeal" (para 28), for example eliminating shareholder equity or precluding efforts by the shareholders to raise financing (the precise circumstances here). The court determined that those are existing, not future rights. The same is true in this case.

[12] Applicants also rely on s 193(c). They assert that the value of the property far exceeds the threshold of ten thousand dollars, because the value of the asset being sold exceeds that amount. This is a broad interpretation of "value of the property" within the meaning of s 193(c), and has been rejected. In *Dominion Foundry*, the Manitoba Court of Appeal noted that to allow an appeal as of right under subsection (c) where the property of the bankrupt exceeds this threshold would undermine the purpose of the BIA, which is to allow for the disposition of the bankrupt's assets and the distribution of the proceeds amongst creditors. Almost every case would qualify, making the requirement for leave meaningless and undermining one of the most important purposes of the act, expeditious determination and the prospect of finality.

[13] The court in *Bending Lake* also considered the scope of s 193(c). Justice Brown adopted a contextual approach and identified two factors that should inform any interpretation of the subsections: first, the predecessor section to s 193(c) was enacted at a time when the BIA did not include the right to seek leave to appeal, and this prompted courts to give categories of appeals as of right a wide and liberal interpretation to avoid shutting out meritorious appeals. Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, requires leave under s. 13. No principled basis exists to distinguish the treatment of a sale by a receiver or trustee from that under the CCAA. Brown JA concluded that these factors militated against employing an expansive interpretation. He favoured an approach alive to the needs of modern, real time insolvency litigation. He concluded that s 193(c) does not apply to: (i) orders procedural in nature; (ii) orders that do not bring into play the value of the debtor's property; and (iii) orders that do not result in a loss.

[14] In *Dominion Foundry,* an attempt to set aside a sale of assets by a trustee as being improvident was considered procedural, and therefore not falling within s. 193(c). In *Alternative Fuel Systems Inc. v EDO (Canada) Limited*, 1997 ABCA 273, 206 AR 295, this court concluded that where the issue was an order directing acceptance of a tender for the assets of a bankrupt estate, the order was procedural – it was a challenge to the method by which assets were sold. The same is true here. The issue before the supervising judge was whether the SAVO and IFO were appropriate methods of securing financing for the current operation and a purchase of the assets so as to ultimately monetize them to satisfy creditors to the extent possible.

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[15] In *Bending Lake*, an issue was raised as to whether a transaction ought to be postponed to let shareholders re-finance the company. The court held, and I agree, that such an appeal does not bring into play the value of the debtor's property. Rather, the effect of the SAVO is to generate sale proceeds that stand in place of the assets; it is a means to monetize the estate. As to whether the order results in a gain or loss, an approval and vesting order does not determine the entitlement of any party with an economic interest in the sale proceeds. No interested party has gained or lost as a result of the order.

[16] For these reasons, I conclude that neither s 193(a) nor (c) apply to the proposed appeal, and leave to appeal is therefore required.

Should leave to appeal be granted?

[17] The following factors are considered on an application for leave to appeal under s 193(e) of the BIA:

a) whether the point on appeal is of significance to the practice;
b) whether the point raised is of significance to the action itself;
c) whether the appeal is *prima facie* meritorious or frivolous; and
d) whether the appeal will unduly hinder the progress of the action.

[18] In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy: see *Alternate Fuel Systems* at para 12; *Dykun v Odishaw,* 1998 ABCA 220 at para 4; *West Edmonton Mall Property Inc. v Duncan & Craig*, 2001 ABCA 40 at para 9; *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*, 2020 ABCA 442 at para 18.

(a) Is the point on appeal significant to the practice?

[19] The applicants submit the orders are novel in that approval of the IFO required the approval of the proposed sale of assets as a condition. Therefore, the SAVO was granted in the absence of a proper sale process being conducted and with inadequate evidence of value. I disagree. The approval of interim financing and sales of assets under sections 50.6 and 65.13 of the BIA are matters of judicial discretion and are highly fact dependent. The BIA includes a list of non-exhaustive factors to inform the exercise of that discretion. The reasons of the supervising judge demonstrate a balancing of interests of all stakeholders, having regard to the precarious financial situation, the already serious damage done to the asset, and the restarting and environmental risks. Having regard to the lack of other viable alternative proposals, the support of key stakeholders, the lack of prejudice to Greenfire's creditors as a result of the interim financing, and the attendant lenders charge, there is no basis on the record to suggest the appeal will have any broad significance to the practice.

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(b) Is the point raised of significance to the action?

[20] It would be a rare case where an interested party does not view a proposed appeal to be significant to the action. In most instances the answer to this question will be in the affirmative, and will be balanced against the other criteria. That is the case here.

(c) Is the proposed appeal prima facie meritorious?

[21] The applicants submit that the supervising judge made several errors of law or palpable and overriding errors in his assessment of the facts. While they recognize that the granting of the SAVO and the interim financing orders are discretionary, they submit the conclusions were based on incorrect inferences relating to the parties' positions and upon unwarranted findings. For instance, they submit that the supervising judge erred in concluding: there was no better recovery for the creditors, Greenfire had the confidence of its major creditors, the interim financing enhanced the prospects of a viable proposal, the sale would benefit creditors, and if the interim financing orders were not approved, the most likely outcome would be the transfer of the assets to the Orphan Well Association.

[22] The supervising judge reviewed the criteria that guides discretion under the BIA. He was aware of the leading authorities and principles for the approval of a sale of assets in insolvency proceedings as set forth in *Royal Bank of Canada v Soundair Corp*, 4 OR (3d), 83 DLR (4th) 76 (ONCA). He understood the purposes of the interim financing and appreciated that such financing would not be available absent a priority charge securing same. He considered the process that had been undertaken to secure that financing and that it eventually resulted in the Trafigura offer. He recognized that the granting of the order and charge was critical, failing which the facility faced enormous risk of damage and increased repair and restart costs. The record does not support the conclusion that the chambers judge misdirected himself or misapprehended the evidence when he concluded that the IFO and SAVO warranted his approval.

[23] In addressing the consideration payable under the APA, the supervising judge found it to be fair and reasonable having regard to the *Soundair* principles. He recognized that there had not been a formal auction process, nor is one required or advisable in every case. He commented that Alberta courts have acknowledged that "pre-pack sales" resulting from processes conducted prior to insolvency proceedings can satisfy the *Soundair* requirements. He considered the relevant factors, including the deteriorating financial condition of the debtor; that other options were considered even though the sale would only provide returns to the debtor's primary secured creditors; the prospect of employment and utilization of existing trade creditors and the fairness of the consideration having regard to the price paid by Greenfire to acquire the facility less than three years earlier.

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[24] The supervising judge weighed the evidence before him, and his finding that any potential alternative source of interim financing was "too little too late" was grounded in that evidence. With respect to the applicants being denied an opportunity to test evidence through cross-examination, the critical information had already been filed in previous affidavits, and the supervising judge was aware of concerns with respect to the seventh affidavit. He put questions to Greenfire's counsel about this evidence and was satisfied with the responses. He recognized that this transaction was not "the usual" transaction, but that no one had provided any other viable alternative. Speculation about what might be possible did not replace the significance of a certain transaction.

[25] The applicants do not point to any error of law in the analysis that would warrant judicial intervention. This was a discretionary decision that warrants a high degree of deference. The prospect of a successful appeal is doubtful.

(d) Will the appeal unduly delay the proceedings?

[26] Not only will an appeal delay the proceedings, it will also create further jeopardy for the stakeholders of Greenfire. Pursuant to the interim financing agreement, Trafigura has already advanced $4 million between December 19 and 21, and a further $4.5 million between December 29 and January 19. That is, $8.5 million of a total of $20 million has already been advanced. Granting leave to appeal in these circumstances risks serious potential damage to the facility, given that the additional funds are required to perform repairs and for maintainance. Moreover, there is no reason to believe that the sanctioned transaction can be delayed pending the outcome of an appeal, or for that matter that there will be another viable transaction for anyone to consider. Repairing the damage and returning the facility to an operational state depends on the transaction closing.

Fresh evidence application

[27] The applicant investors also seek leave to file an additional affidavit in which they put forward a term sheet to provide for further interim financing options. They submit the test for fresh evidence has been met because the affidavit material was not available before the chambers judge as it was yet to be completed, but now it could bear decisively on the issue before me – whether leave ought to be granted to appeal the decision to approve the interim financing and SAVO.

[28] In my view such affidavit evidence ought not to be allowed. This court in *Roswell Group Inc. v 1353141 Alberta Ltd*, 2020 ABCA 428 reiterated the test. That this document was not available to the chambers judge was due to the fact that it had not yet been agreed to. This supports his conclusion of "too little too late". Moreover, I am persuaded that the conditional nature of the document would have been insufficient to displace the conclusion arrived at by the supervising judge. I also note that trying to bring an improved or better offer to the court on appeal is a dubious practice and may have the effect of undermining the principles of fairness articulated in *Soundair*.

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Conclusion

[29] I have concluded that leave to appeal is required. The test for leave has not been met, and leave to appeal is denied.

Application heard on February 10, 2021

Reasons filed at Calgary, Alberta
this 18th day of February, 2021

Paperny J.A.

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Appearances:

R. Zahara
J.J. Bourchier (no appearance)
for the Athabasca Workforce Solutions Inc.

D. LeGeyt
R.E. Algar
J.D. Murphy (no appearance)
for Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

A.C. Maerov
K. Ryland (no appearance)
for Alvarez Marsal Canada Inc.

K.L. Fellows Q.C.
J.J. Maslowski
R.L.R. Hamilton (no appearance)
for Trafigura Canada General Partnership

K. Kashuba
J. Mann (no appearance)
for McIntytre Partners

D.S. Nishimura
for Behrokh Azarian et al.

G.G. Plester
for Regional Municipality of Wood Buffalo

J.W. Reid
for ABC Funding LLC

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TAB 9

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Great Basin Gold Ltd. (Re),*
2012 BCSC 1459

Date: 20121001
Docket: S126583
Registry: Vancouver

2012 BCSC 1459 (CanLII)

In the Matter of the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended
and
In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44
and
In the Matter of Great Basin Gold Ltd.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Petitioner:	P.J. Reardon J.L. Cockbill W. Rostom (via phone)
Counsel for Monitor:	J. McLean, Q.C. A. MacFarlane (via phone) R. Adlington (via phone) P.J. Reynolds
Counsel for Credit Suisse AG:	P.L. Rubin K. McEachern D. O'Donnel (via phone) M. Chow (via phone)
Counsel for Ad Hoc Group of Convertible Debenture Holders:	J.R. Sandrelli C. Cheuk R. Jacobs S. Kukulowicz K. Mak B. Grossman (via phone)
Counsel for CIBC:	M. Stewart (via phone)
Place and Date of Hearing:	Vancouver, B.C. September 26 and 27, 2012
Place and Date of Judgment:	Vancouver, B.C. October 1, 2012

> **11.2** (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, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> ...
>
> Factors to be considered
>
> (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.

[14] While the factors in s. 11.2(4) of the *CCAA* are more usually addressed in the context of whether a particular DIP financing proposal will be approved, I consider that the above factors are equally applicable in deciding *who* shall be the DIP lender and on what terms the DIP financing is to be provided. The factors set out in this subsection do not represent the entirety of the factors that may be considered by a judge on this issue - the subsection specifically refers to "among other things". There may, of course, be further factors beyond those enumerated in s. 11.2(4), such as were raised on this application, which are relevant and will be considered by the court in the exercise of its discretion under this section.

[15] I will comment at the outset that the competing DIP proposals here are complex and must be considered within the equally complex circumstances faced by the GBG Group. There are certain preliminary matters to be addressed in relation to

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both proposals, and the resolution of those issues affects the viability of those proposals. Even assuming that both proposals are viable, the court must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the GBG Group as a whole by enhancing the prospects of a successful restructuring.

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Circumstances of the GBG Group

[16] As stated above, the principal assets of the GBG group include two gold mines: firstly, the Burnstone Property located in South Africa; secondly, the Hollister Property in Nevada, U.S.A.

(i) The Burnstone Property

[17] The Burnstone Property is located approximately 80 kilometers southeast of Johannesburg. Mining development work has been underway at Burnstone since 2007. The mine commenced production in January 2011. There is an estimated 6.4 million gold ounces in reserve and the mine has an estimated life of 25 years.

[18] The mine properties and operations are owned by and operated through various South African subsidiaries, with the principal operating subsidiary being Southgold Exploration (Pty) Ltd. ("Southgold"). The GBG Group employs some 1,275 employees world-wide, approximately 1,032 of which are employed at the Burnstone mine or the South African offices.

[19] Due to some unforeseen ramp-up challenges, the Burnstone mine failed to meet certain production amounts. This, in turn, led to working capital deficits. As a result, GBG announced that it was suspending operations at the Burnstone mine on September 11, 2012. It immediately commenced a care and maintenance program to preserve the value of the mine.

[20] On September 14, 2012, Southgold filed for creditor protection under the applicable South African legislation. Peter van den Steen was appointed as a "business rescue practitioner" in those proceedings (a position which I assume

TAB 10

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Date: 20200306
Docket: S200586
Registry: Vancouver

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

- and -

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

- and -

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

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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

2020 BCSC 318 (CanLII)

Counsel for Her Majesty The Queen In Right of Province of British Columbia:	L.V. Mauro
Place and Date of Hearing:	Vancouver, B.C. January 27, 2020
Place and Date of Judgment:	Vancouver, B.C. January 27, 2020
Place and Date of Written Reasons:	Vancouver, B.C. March 6, 2020

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INTRODUCTION

[1] On January 16, 2020, the petitioner, Quest University Canada ("Quest"), filed this proceeding, seeking creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] On that date, there was limited attendance at the hearing. Two secured creditors, Capilano University ("CapU") and Vanchorverve Foundation ("VF"), were represented by counsel. I rejected VF's application for an adjournment of the hearing and granted an initial order (the "Initial Order").

[3] In accordance with new amendments to the *CCAA*, the relief granted in the Initial Order was limited to matters that were reasonably necessary until the comeback hearing in 10 days' time after all stakeholders had received notice of the proceedings: *CCAA*, ss. 11.02(1) and 11.001.

[4] At this comeback hearing, Quest applied for an amended and restated initial Order (ARIO) to provide for a further extension of the stay. Quest also sought approval of interim financing from RCM Capital Management Ltd. ("RCM") for its continued operations during this proceeding, consistent with what Quest's counsel had foreshadowed when the Initial Order was granted.

[5] VF opposed the proposed interim financing and brought a cross-application to approve interim financing that it has secured with Burley Capital Inc. ("Burley"). Concurrently, VF applied for orders removing four governors from Quest's board and replacing them with its own nominees. In the alternative, if the Burley financing was not approved and the governors not removed, VF applied for an order directing a sales and investment solicitation process (SISP) in respect of Quest and its assets.

[6] At the hearing on January 27, 2020, I granted the relief sought by Quest and dismissed VF's application, with reasons to follow. These are my reasons.

BACKGROUND FACTS

[7] In the early 2000s, Quest was formed as a private, not-for-profit, post-secondary institution, pursuant to the *Sea to Sky University Act*, S.B.C. 2002, c. 54.

[8] Quest is governed by a board of governors (the "Board"), whose members are elected in accordance with Quest's bylaws (the "Bylaws"). Pursuant to Bylaw 8.1, the Board appoints a president, who is the university's chief executive officer, to supervise and direct Quest's operations.

[9] Quest was founded in association with a federal society, the Sea to Sky Foundation ("SSF"). Funding for the development of Quest was initially provided through donations. Various individuals were involved in this endeavour, including Dr. David Strangway, Blake Bromley and Peter Ufford.

[10] In 2001, SSF acquired a 97 hectare (240 acre) property outside of Squamish, BC. Those lands were then subdivided and partially sold to fund, along with ongoing donations, the construction costs for the university campus on the portion still then held by Quest. In 2006, SSF transferred the remaining lands to Quest.

[11] In 2007, Quest accepted its first class of 73 students. By 2019, that complement had grown to include 510 students. All students are required to reside on campus in the present four student housing buildings, which also accommodate some faculty. Plans for the fifth student residence building are underway.

[12] Quest employs approximately 100 full-time persons in Squamish as staff or faculty.

[13] Quest's main assets include the real property on which the campus is located (12 acres) and the remaining development lands (presently 38 acres) which surround the campus. In addition, Quest is part of certain joint ventures which were formed to develop the current and proposed residences located on the campus. The book value of Quest's assets is estimated to be more than $80 million.

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[14] Over the years since its inception, Quest has received various loans to fund the development of the campus and cover operating losses. Quest has never generated sufficient revenue to fund its expenses, in that it has always, to this time, operated at a deficit. Quest anticipates that an increase in student enrollment will assist in resolving that difficulty, at least in part.

[15] As of December 2019, Quest's outstanding liabilities (save for capital leases) were approximately $37 million, including $28.6 million owing to the five secured lenders. The two most significant secured creditors include CapU (owed $2.2 million) and VF (owed $23.6 million), both holding mortgage security against Quest's real and/or personal property interests.

[16] Mr. Bromley is an advisor to VF and various other foundations. In addition, Mr. Bromley is the president and director of Benefic Group Inc. ("Benefic"), whose offices are also the offices of VF. Employees of Benefic serve as directors of VF and other foundations in which Mr. Bromley is involved.

[17] Mr. Bromley served on Quest's Board from 2002-2010/2011. During that time, Mr. Bromley was actively involved in overseeing Quest's finances and he introduced programs that were described as financings. From 2011-2015, foundations associated with Mr. Bromley, including VF, entered into or took assignments of at least nine loan agreements with Quest.

[18] The evidence also establishes that Mr. Bromley has had deep ties to Quest and its operations over the years. PricewaterhouseCoopers Inc. (the "Monitor") indicates that there are a large number of complex transactions involving Quest and Mr. Bromley and his organizations. The Monitor has not yet reviewed those details to understand them.

[19] In prior years, certain of Quest's land transactions involved organizations with which Mr. Bromley is associated. In addition, Mr. Bromley's organizations purchased the naming rights to certain campus buildings and took control of the leases for several Quest residence buildings.

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[20] Also relevant to Mr. Bromley's involvement in Quest and this proceeding is another lawsuit. In early 2018, two foundations in which Mr. Bromley is involved sued Quest, asserting claims arising from the development of certain lands held by Quest. In essence, these foundations seek injunctive relief to prevent Quest from developing its own lands. This litigation is being defended by Quest.

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QUEST'S INSOLVENCY

[21] Quest's financial difficulties came to a head in the fall 2019.

[22] In the months leading to that time, Quest sought some concessions from VF that would see some portion of the debt forgiven or restructured. These efforts were not successful. VF's loans came due on November 1, 2019.

[23] On November 22, 2019, VF demanded payment of its loans and issued a notice of intention to enforce its security, pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

[24] Also, on November 22, 2019, Mr. Bromley wrote to the Board indicating that he was of the view that four members of the Board (then comprised of seven persons) should resign and that his nominees should be appointed in their place. His nominees included persons with roles at Benefic and other foundations in which he is involved.

[25] In December 2019, the Board sought some clarity from VF as to its intentions with respect to Quest, given Mr. Bromley's view that the Board should cede majority control of it to his representatives. The Board also sought further information as to what VF had in mind in terms of future transactions or plans for Quest. No information was forthcoming from VF or Mr. Bromley. As a result, on December 19, 2019, the Board declined Mr. Bromley's proposal.

[26] At the time of the initial hearing, I was satisfied that Quest was insolvent, as required by the *CCAA*: *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.); leave to appeal to C.A. refused, [2004] O.J. No. 1903 ; leave to appeal to SCC

refused, [2004] S.C.C.A. No. 336. As Justice Farley held, an “insolvent person” as defined in the *BIA* includes a financially troubled corporation that is “reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring”.

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[27] In particular, Quest was facing the imminent requirement to make payments for payroll and leases; Quest was unable to satisfy these amounts without further financing. At this hearing, Quest indicated that it had initiated discussions with potential lenders for interim financing and that a term sheet was expected to be received shortly for its overall funding requirements in this proceeding.

[28] Given the new restrictions regarding the approval of interim financing during the initial 10-day stay period now found in s. 11.2(5) of the *CCAA*, it was appropriate to allow all stakeholders to be given notice before such relief was considered and possibly granted at the comeback hearing.

[29] The overall intention of Quest to seek relief in this *CCAA* proceeding is to allow it to continue with its operations and complete at least the existing academic year (ending April 2020). I agree that this objective has, at the very least, provided some certainty to the students and their families and preserved considerable value for Quest and its stakeholders while a more long term solution was sought.

[30] The “kernel of a plan” presented at the initial hearing was toward a consideration of one or a combination of:

a) Increasing the current student body;

b) Reducing expenses;

c) Seeking fundraising;

d) Seeking potential academic partners; and

e) Pursuing a transaction with respect to the remaining development lands.

[31] By the time of the *CCAA* filing, Quest had already made significant efforts toward a resolution of its financial difficulties.

[32] In March 2019, it had commenced a process toward the development of its excess lands and a potential bidder was selected. Unfortunately, that bidder did not proceed, in part because of the uncertainty about the level of support it would receive from the secured lenders, including VF.

[33] In addition, on December 16, 2019, Quest retained Halladay Education Group Inc. (“Halladay”), a private educational consultant. Halladay was tasked with marketing and soliciting interest from other post-secondary institutions toward a transaction with Quest.

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ISSUES AND PARAMETERS

[34] Quest and VF agree that Quest requires interim financing in order to complete its restructuring efforts within this proceeding. The crux of the matter, however, is *who* should be the person to provide that financing, RCM (per Quest) or Burley (per VF)

[35] Quest submits that it is appropriate to approve the RCM financing and grant a charge in favour of RCM, pursuant to s. 11.2 of the *CCAA*.

[36] Section 11.2 of the *CCAA* grants this Court jurisdiction to approve an interim financing charge over Quest’s assets in an amount considered appropriate having regard to its cash-flow statement. Factors to be considered in granting such an order are set out in s. 11.2(4) and include, but are not limited to:

a) the period during which the debtor is expected to be subject to *CCAA* proceedings;

b) how the debtor’s business and financial affairs are to be managed during the proceedings;

c) whether the debtor’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 debtor;

e) the nature and value of the debtor’s property;

f) whether any creditor would be materially prejudiced as a result of the charge; and

g) the monitor's report, if any.

[37] The above factors are also engaged in respect of VF's interim financing application, with the addition of other considerations as they relate to VF's concurrent application to remove four governors from Quest's Board and appoint four of its nominees as new governors in their place.

[38] With respect to the removal of four of Quest's governors on the Board and their replacements, VF relies on s. 11.5(1) of the *CCAA*:

> (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.
>
> (2) The court may, by order, fill any vacancy created under subsection (1).

[39] Finally, with respect to VF's application to approve a SISP, the Court must exercise its statutory discretion in light of the statutory objectives under the *CCAA* toward granting an order that is appropriate in the circumstances: *CCAA*, s.11.

THE COMPETING FINANCING PROPOSALS

[40] The competing proposals by Quest and VF are similar in most respects, but also differ in very material ways. In this context, I will also outline the relief sought by VF in relation to the removal of some of Quest's governors, since that relief is integrally tied to the financing proposed by Burley.

RCM's Proposal

[41] After the Initial Order was granted, with the assistance of the Monitor, Quest sourced interim financing from several parties. Quest's President, George Iwama, states that two proposals for interim financing were received from well-recognized

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and experienced lenders in the field of interim financing who are independent of Quest.

[42] Both Quest and the Monitor concluded that RCM's offer was more competitive and involved the least risk. On January 18, 2020, Quest entered into a commitment letter with RCM with respect to a $5 million secured loan. Quest intends to use the RCM funds to fund its operational deficit for the current academic year and to continue to meet its normal course obligations while a plan is implemented in the course of these proceedings. The cash-flow statement before me supports that the amount of this financing is appropriate.

[43] The RCM financing does not contain any unusual features. The terms of the commitment letter and the now settled loan documentation include what are normal commercial terms.

[44] In addition, the RCM loan and charge would rank in priority only subject to the Administration Charge and certain secured interests, such as PMSIs. It would rank behind the D&O Charge granted in the Initial Order.

VF's Proposal

[45] As previously stated, the Burley financing has similar financial terms to that of RCM. However, one important difference is that the Burley commitment letter contains a condition precedent, namely:

> The board of governors of [Quest] being comprised of individuals that are acceptable to the Lender in its sole and unfettered discretion.

[46] As part of the Burley financing proposal, VF seeks an order removing four governors from Quest's Board (Mary Jo Larson, Chief Dale Harry, Stuart Louie and Claude Rinfret). In addition, VF seeks an order appointing four governors to Quest's Board (Christopher Richardson, Bill Woodson, David McMillan and Alpha Bugembe).

[47] The result of granting this relief would be to appoint VF's nominees to act as the majority of Quest's governors. The other present governors are Anna Lippman,

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Sheila Biggers and David Kerr. Mr. Kerr was just appointed on January 21, 2020 and brings considerable business and finance expertise to his role.

DISCUSSION RE FINANCING / GOVERNANCE PROPOSALS

[48] I will address the issues within the context of the ss. 11.2(4) factors and s. 11.5 of the *CCAA*.

Period of *CCAA* proceedings

[49] Both financing proposals anticipate the same timeline for the completion of the restructuring process. Both financings provide for sufficient funding over the cash-flow period to the end of May 2020, a date when Quest anticipates that a much clearer picture will emerge as to what options are before it and its stakeholders.

Management of Quest's affairs / Confidence of Quest management

[50] These are the most substantial factors to be considered in light of the allegations raised by VF in respect of Quest's Board. I will consider the s. 11.2(4) factors together with VF's application to remove four of the governors under s. 11.5 of the *CCAA*.

[51] VF does not allege that the governors they seek to remove have acted inappropriately. Rather, VF contends that Quest's Board is "unreasonably impairing … the possibility of a viable compromise or arrangement" within the meaning of s. 11.5 of the *CCAA*.

[52] VF's evidence in support is found in the Affidavit #1 of Leslie Brandlmayr sworn January 23, 2020. Ms. Brandlmayr is a director of VF and a managing director, compliance, of Benefic.

[53] Ms. Brandlmayr states that VF has lost faith and confidence in Quest's board. She points to the annual operating deficits and negative cash flows due to Board "incompetence". She says that the Board has failed to take any meaningful steps to improve Quest's financial position on a long term basis, including by increasing student enrollment and decreasing subsidies to students. She also refers to what

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she alleges were related party transactions within the three years before the *CCAA* filing.

[54] VF asserts that it is prepared to support Quest continuing in these proceedings and toward implementing a plan to achieve a sustainable long term model, but only if VF is allowed to control the Board. If not, VF baldly states that it will not support any plan developed by the current Board that might be presented in this proceeding.

[55] Yet, VF does not, in its evidence, provide any detailed reason why it has chosen to specifically remove Ms. Larson, Chief Harry, Mr. Louie and Mr. Rinfret as governors as part of its proposal. To the contrary, the evidence supports that all of these individuals, in addition to Ms. Lippman, Ms. Biggers and Mr. Kerr, are reputable and competent people and independent of Quest. There is no suggestion other than that they all bring considerable skill and knowledge to their positions as governors, in the areas of business, law, tax and finance.

[56] The evidence also contradicts VF's allegation that the Board has failed to take any steps to address the ongoing financial concerns that have persisted since Quest's inception. Based on the Monitor's recent and limited review of matters, there would appear to have been valid reasons for the continuing deficits, which did include periods of steady improvement in some years. In particular, the value of donations declined substantially after 2011 when Mr. Bromley left the Board. Finally, enrollment did increase each year after Mr. Bromley's departure from the Board until 2017, when it declined for various reasons not directly attributable to the Board's decisions.

[57] Ms. Larson states that, over the last two years, the Board has pursued a variety of avenues to address the financial situation, including negotiations with potential academic partners, significant discussions with its lenders, pursuing fundraising avenues, hiring various advisors (including Halladay), developing a proposal process with respect to the development lands and, attempting to bolster enrollment.

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

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

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

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

> [33] A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and the feasible options available to the debtor. … I note, in particular, that given this language, the fact that a shareholder or creditor may not agree with a decision of a director is far from being a sufficient ground for the director's removal. As a related matter, there is nothing in s. 11.5 that evidences an intention to displace the "business judgment rule".
>
> [34] Further, the language of s. 11.5 expressly requires that the actions of a director "unreasonably" impair, or are likely to "unreasonably" impair, a viable restructuring …
>
> [35] In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made.
>
> [36] First, removing and replacing directors of a corporation, even a debtor corporation, subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of the corporation. The shareholders have elected the directors and remain entitled to bring their own action to remove or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders.
>
> [37] Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation's stakeholders. In determining whether to exercise its discretion in s. 11.5(1), a court would

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> ordinarily take into consideration the presence or absence of any recommendation from the Monitor.
>
> [Emphasis added.]

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

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

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

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

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

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

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

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

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

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

Would the loan enhance prospects of viable compromise/arrangement?

[71] With respect to this factor, I am more than satisfied that RCM's loan would enhance the prospects of a successful restructuring. RCM is an independent lender whose interests are plain and understandable – they want to advance a loan at a price and recover those amounts in due course.

[72] The same cannot be said for Burley's proposal. There are substantial concerns regarding inherent conflicts that are apparent from a closer review of Burley and its proposal.

[73] I have already outlined Mr. Bromley's considerable involvement in Quest since its inception, whether on its Board or through VF or other organizations who have transacted with Quest, including with respect to considerable loans. As noted above, Mr. Bromley's organizations hold naming rights to certain buildings and they control certain of Quest leases. One of Mr. Bromley's organizations is suing Quest in the 2018 litigation concerning the development property.

[74] Quest argues that VF has made numerous attempts in the past to take over Quest's Board and that the Burley proposal is simply the latest iteration of those efforts. The evidence supports that this indeed is VF's intention.

[75] Members of Quest's Board and/or its executive team met with Mr. Bromley and/or his advisors on November 27 and December 5, 2019 and January 10, 2020. By as early as November 2019, Mr. Bromley had clearly signalled that VF was looking to assume control of the Board through his nominees.

[76] On January 10, 2020, Mr. Rinfret met with Mr. Bromley and VF/Burley's nominee governor, Mr. Richardson, to discuss a restructuring opportunity suggested by Mr. Richardson. Mr. Richardson stated at the meeting that the proposal was dependent on the replacement of the majority of the Board with VF's nominees. However, Mr. Bromley was not able to provide specifics with respect to significant aspects of the proposal. This proposal was later rejected by the Board on the basis that it was vague and uncertain. The Board also considered that Mr. Bromley was

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seeking to advance only his and his organization's best interests, without regard to those of Quest.

[77] Both Mr. Richardson and Mr. Woodson have considerable ties to Mr. Bromley. Mr. Richardson has been a director of several of Mr. Bromley's organizations and he has been involved in Mr. Bromley's attempted real estate developments. Mr. Bromley also put Mr. Richardson forward to Quest as a consultant to be hired as part of a loan proposal. Mr. Woodson was formerly Mr. Bromley and/or VF's lawyer and worked in transactions involving Quest's land in that capacity.

[78] Who, then, is Burley and what are its intentions in becoming involved in this restructuring?

[79] Burley is a BC company incorporated in May 2018. Shan Trouton is the sole registered director. One difficulty that arises – which Burley chose not to address at this court hearing – was that Burley, at this time, is not in good standing. The Monitor has not yet had time to assess Burley's capability to fund the required financing amount and no evidence has been presented by VF/Burley to support that conclusion.

[80] Mr. Trouton is also a director of Rostrum Developments (2015) Ltd. ("Rostrom"), a company not in good standing.

[81] Mr. Trouton is known to Quest's Board and management.

[82] Ms. Larson states that, based on personal discussions with Mr. Trouton and a review of records and Rostrom's website, Mr. Trouton has been involved in Mr. Bromley's foundations since 2015. She further states that Mr. Trouton has been actively involved in seeking to develop Quest's development lands. Ms. Larson's evidence is also supported by that of Flora Ferraro, Quest's Vice President of Finance and Operations.

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[83] On November 27, 2019, when VF disclosed possible financing by Burley/Mr. Trouton, Ms. Ferraro received a request from Mr. Trouton to meet. A meeting was scheduled for later that day. Mr. Trouton seemed to be well aware of earlier discussions between Ms. Ferraro, Mr. Iwama and VF's counsel. Mr. Trouton advised Ms. Ferraro that he would be "in charge" of real estate transactions for Quest and that he was putting a land transaction together. He declined to advise Mr. Ferraro of the details. At that meeting, Mr. Trouton clearly stated that he would discuss the transaction with the Board only if VF's proposed changes were made to the Board's composition. Mr. Trouton indicated to Ms. Ferraro that, if the Quest's executive team did not support Mr. Bromley and/or VF's proposed changes to Quest's Board, the executive team would be replaced.

[84] Finally, at that meeting, Mr. Trouton described himself as Mr. Bromley's friend and stated that they had been in business for many years.

[85] The uncontradicted evidence strongly supports that Burley/Mr. Trouton are working together with Mr. Bromley on this matter and are not truly "independent" of each other. I can only conclude that the motivation behind Burley's financing proposal is to protect VF/Mr. Bromley's own interests by securing control of Quest's Board through Mr. Bromley's business associates so that it can direct Quest's activities in this proceeding.

[86] It might be assumed that Mr. Trouton has put forward Burley's financing proposal, requiring that Burley be given full control of the composition of Quest's Board, with the intention of implementing Mr. Bromley's intentions to populate the Board with his nominees, for the reasons advanced by Ms. Brandlmayr, which I have rejected. However, it bears repeating at this stage that Burley's proposal is not only that four of the governors be replaced with VF nominees, but is dependent on Burley having the ability to replace the *entire* Board as it sees fit in its sole discretion.

[87] Accordingly, if the Burley proposal was approved, Mr. Trouton would have the ability to remove even Ms. Lippman, Ms. Biggers and Mr. Kerr. No doubt that would

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extend to the officers and other management, such as Mr. Trouton threatened at his meeting with Ms. Ferraro on November 27, 2019.

[88] It is an open question as to how the Quest Board, if controlled by VF/Mr. Bromley's nominees, would even vote on a transaction that involved VF/Mr. Bromley, either directly or indirectly. The four VF nominees have close ties to VF/Mr. Bromley and certainly, the prospect of a conflict would have to be considered.

Nature and value of Quest's property

[89] I agree that Quest's property and "business" are unique. It is a not-for-profit operation with aspirations not to make money, but to provide a valuable and unique learning experience for young adults.

[90] In addition, there are other challenges in forging a new path here, including dealing with the very unique nature of the assets which presently comprise the campus and its building. The development lands are more straightforward but, given their proximity to the campus, Quest's aspirations and the District of Squamish's requirements, they also pose some challenges.

Material Prejudice

[91] Both Quest and the Monitor state that no secured creditor would be materially prejudiced as a result of a charge to secure either the RCM or Burley loans. This is abundantly the case since, based on the apparent market value of Quest's lands, there is in excess of $50 million of equity in the lands.

The Monitor's Report

[92] The Monitor has filed its First Report to the Court dated January 24, 2020.

[93] The Monitor confirms that the RCM proposal was negotiated by Quest, with its support, after considering several proposals from different independent lenders. The Monitor supports the RCM proposal.

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[94] The Monitor does not support the Burley proposal, essentially echoing my own concerns as to the independence of Burley/Mr. Trouton from Mr. Bromley and Quest. In addition, on the matter of the replacement of the four governors, the Monitor disagrees with that relief, stating that the Board is very focussed on the task ahead, including improving enrollment and addressing the cash deficits.

[95] The Monitor states in its First Report that removal of the governors may significantly impair the ability of Quest to put forward any restructuring proposal:

> 6.7.3 … In this case, Burley is stipulating who the new board members would be and is effectively seeking control of the board. Further, Burley is seeking the replacement of specific board members: Mary Jo Larson, Claude Rinfret, Stuart Louie and Chief Dale Harry. The Monitor notes that the first three of these board members have significant legal and financial training which is in contrast to the composition of the remaining board members. Removal of these board members seems counter-productive to the interests of Quest and appears would be potentially crippling at a time when Quest requires this expertise to navigate these CCAA proceedings. The Monitor also notes that these are the same four governors that Mr. Bromley had requested be replaced in November 2019.

[96] The Monitor recommends that the Court approve the RCM financing as representing the best option in terms of pursuing a successful restructuring. It is the Monitor's view that the interim financing facility should be provided by an independent lender with no association to VF/Mr. Bromley or Quest.

The Court as Gatekeeper

[97] In *Great Basin Gold Ltd.*, I also addressed the situation where there were competing applications to approve interim financing. In that case, I commented on the need to consider financing proposals carefully to ensure that they are reasonable and appropriate. The court must closely scrutinize any such proposal that it put forward as a means to advance the interests of one particular stakeholder, or which may have that effect. I stated:

> [179] I recognize that in some restructuring proceedings, certain stakeholders may use existing leverage, to the extent that they have it, to take advantage of the chaos and uncertainty that are inherent in these situations. Strategies might be employed to secure for themselves advantages that they would not otherwise obtain. These advantages inevitably come at the expense of other stakeholders in the proceedings.

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> These advantages are also almost always court approved so that they cannot be later revisited. In those circumstances, the court must be constantly vigilant against such strategies. ...
>
> …
>
> [181] Even so, the Court remains the gatekeeper in terms of ensuring that the terms of any such agreements are reasonable and appropriate in the circumstances. Input from stakeholders participating in the process will be critical although the entire stakeholder group must be considered. Critical to the court's analysis will be evidence of the debtor company's actions in the face of these proposals. What is the underlying reason for these transactions? What due diligence was done in the face of these proposals? What negotiations took place? What are the true consequences of not obtaining this relief? What alternatives, if any, are available?

[98] To similar effect are the comments of Newbould J. in *Crystallex*:

> [63] The noteholders also contend that Tenor has been given control over Crystallex and the restructuring process by reason of the changes in the corporate governance required by the Tenor DIP facility. There is no doubt that Tenor has been given substantial governance rights, including the right to name two of the five directors and the right to agree on who the independent director shall be. An issue is whether the governance provisions are too intrusive for a DIP loan, which according to the case law relied on by the noteholders should not be excessive or inappropriate. …

[99] I readily conclude that VF's motivation in making its application to approve Burley's financing proposal is a not-so-transparent attempt to seize control of Quest's Board. While not supported by any direct evidence, there is sufficient evidence here to support a reasonable inference that those efforts are at least intended to secure control of the future sale and development of Quest's development lands for VF's own benefit or the benefit of other organizations with which VF or Mr. Bromley are involved.

[100] In my view, such a strategy in unreasonable and inappropriate in the circumstances and it may significantly disadvantage others interests in this proceeding. Quest clearly has other options, namely with RCM, which will better serve its interests and the interests of its stakeholders as a whole. I agree with the Monitor that the RCM financing represents the most appropriate option here.

[101] I approve the RCM financing proposal, on the terms sought.

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THE SISP

[102] In the alterative to VF's application to approve Burley's financing proposal and remove four of Quest's governors, VF seeks an order that the Court order an immediate implementation of a SISP.

[103] The proposed SISP is to be conducted by the Monitor. However, consistent with the Burley financing and VF's earlier demands to Quest, the SISP terms also include significant involvement by VF in the SISP process. Those terms require that VF be included in:

a) The preparation of a list of bidders, the "teaser" or initial offering summary and the confidentiality and non-disclosure agreements; and

b) The preparation of a confidential information memorandum and development of procedures for access to the data room and other due diligence by bidders.

[104] The proposed SISP also provides that no amendments or termination of the procedures would be made unless with the consent of Quest and VF or as might be ordered by the Court.

[105] I have no difficulty here concluding that the ordering of a SISP, as sought by VF in this respect, is not appropriate at this time.

[106] Despite the fact that this proceeding has only just begun, Quest, as directed by the Board and the executive team, presents a picture of a debtor company who is well aware of its present circumstances and the need to act quickly to stabilize matters and move this restructuring along. In fact, much has already been accomplished by Quest toward this end since January 16, 2020, when I granted the Initial Order.

[107] At this time, Quest has formulated concrete options to pursue, all of which are supported by the Monitor as being valid ones in the circumstances. Those efforts will continue, now aided by RCM's financing that has been secured.

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[108] The “kernel of a plan” established by Quest to support these efforts is valid and reasonable. The objectives of the *CCAA* are met by allowing the plan to continue: *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376 at para. 26 citing *Azure Dynamics Corporation (Re)*, 2012 BCSC 781.

[109] It is simply too early to set this restructuring on a path – through the SISP and its strict deadlines – that would likely foreclose other possible solutions that may better serve Quest’s stakeholders and be acceptable to them and the Court through the *CCAA* process.

[110] I agree with Quest that, at this time, a SISP would be antithetical to the purposes and objectives of the *CCAA* which is intended to afford financially troubled companies with the breathing room to address, within appropriate constraints, its financial difficulties as opposed to sending the company into liquidation of its assets, no doubt having significant negative impacts on many stakeholders: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 59.

CONCLUSION

[111] Since the *CCAA* filing, Quest’s Board and its management have moved quickly to stabilize matters and expedite their efforts toward a solution in the best interests of all of Quest’s stakeholders.

[112] There is considerable interest and concern in the community as to these efforts, particularly evidenced by the number of people who attended on this court application. Many of those people were students, no doubt concerned about the viability of their school and education, particularly to the end of the present term in late April 2020.

[113] We are in the very early stages of this restructuring, with the Initial Order having been granted only 10 days ago. Despite that short time, I am satisfied that Quest is moving expeditiously and in good faith toward exploring options that might be considered by its stakeholders.

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[114] The RCM financing presents the best option to fund those efforts in the meantime. I am full satisfied at this time that there is no basis upon which to question the ability or intentions of Quest's Board, management and the RC in those efforts, all as assisted by their legal counsel, the Monitor and other advisors, as appropriate.

[115] Quest seeks an extension of the stay to May 29, 2020, which is supported by the Monitor. No person opposes the stay, including VF. I agree that an extension of the stay to that date is appropriate in the circumstances: *CCAA*, s. 11.02(3).

"Fitzpatrick J."

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TAB 11

CITATION: Tacora Resources Inc. (Re), 2023 ONSC 6126
COURT FILE NO.: CV-23-00707394-00CL
DATE: 20231030

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.**

BEFORE: KIMMEL J.

COUNSEL: *Ashley Taylor, Eliot Kolers, Lee Nicholson, Natasha Rambaran and RJ Reid*, for the Applicant, Tacora Resources Inc.

Alan Merskey, Jane Dietrich and Ryan Jacobs, for the Monitor (FTI Consulting Canada Inc.)

Robert Chadwick, Caroline Descours, Peter Kolla and Carlie Fox, for Cargill, Incorporated and Cargill International Trading Pte Ltd.

Richard Swan, Sean Zweig and Alexander Payne, for the Ad Hoc Group of Senior Noteholders and the Indenture Trustee

Natasha MacParland, for Crossingbridge Advisors, LLC

Joe Thorne, for 1128349 B.C. Ltd.

HEARD: October 24, 2023

ENDORSEMENT – COME-BACK HEARING (ARIO AND SOLICITATION ORDER)

The Come-Back Motion

[1] The court made an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") in respect of Tacora Resources Inc. ("Tacora" or the "company") on October 10, 2023 (the "Initial Order"). The come-back hearing was originally scheduled for October 19, 2023, but was adjourned to October 24, 2023 by order dated October 13, 2023 to afford the company and the participating stakeholders additional time to address certain issues of disagreement among them, and in particular their disagreement over the terms and source of debtor in possession ("DIP") financing that the company needs to carry out its intended restructuring efforts.

[2] The court's October 13, 2023 order adjourning the come-back hearing also extended the expiry of the stay of proceedings provided for in the Initial Order from October 20, 2023 to October 27, 2023 (the "Stay Period"). A further stay extension order was granted on October 27, 2023

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while the court's decision on this motion was under reserve, extending the Stay Period to October 31, 2023 and increasing the permitted draws under the DIP financing approved under the Initial Order by $5 million to address the company's immediate cash needs, which the Monitor confirmed and recommended.

[3] The company seeks the following relief on the come-back motion:

a. an amended and restated initial order (the "ARIO") to, among other things:

i. extend the Stay Period until and including February 9, 2024;

ii. authorize Tacora to borrow up to $75,000,000 under the Cargill DIP Facility;

iii. approve the Greenhill Engagement Letter and the Transaction Fee Charge;

iv. approve the company's proposed Key Employee Retention Plan (the "KERP"), and authorize Tacora to pay the KERP Funds to the Monitor and grant the KERP Charge;

v. grant a sealing order over a confidential schedule to the KERP; and

vi. grant an increase to the quantum of the Directors' Charge,

b. a solicitation order (the "Solicitation Order") to, among other things:

i. approve the proposed Solicitation Process; and

ii. authorize Tacora, Greenhill and the Monitor to immediately commence the Solicitation Process.

[4] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Initial Order and the company's proposed ARIO.

[5] The company owns and operates the Scully Mine (the "Scully Mine"), an iron ore concentrate producer located near Wabush, Newfoundland and Labrador, Canada with a production capacity of six (6) million tonnes per annum ("Mtpa").

Stakeholder Positions

The Ad Hoc Group of Noteholders

[6] An *ad hoc* group of holders of senior secured priority notes ("Senior Priority Notes") and holders of senior secured notes ("Senior Notes") of Tacora (the "AHG") oppose the relief sought by the company on the come-back motion. They comprise a substantial majority of the holders of

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both series of Tacora notes[1]. The total amount of all of the secured notes under both series, including accrued interest, is estimated to be almost $270 million. The noteholders (including the AHG) are the most significant secured creditors of Tacora. They are the only stakeholders who oppose the relief sought by the company on the come-back motion.

[7] The AHG's opposition to the ARIO is primarily in respect of the requested court approval and authorization of the Cargill DIP Facility. By a cross-motion the AHG seek the court's approval of their competing DIP proposal made on October 8, 2023 (the "AHG DIP Proposal") that is provided for in their own proposed amended and restated initial order (the "AHG ARIO"). Their cross-motion also seeks various alternative relief if their request for approval of the AHG DIP Proposal and AHG ARIO is not successful (the "Alternative Relief"). The Alternative Relief would entail changes to the Cargill DIP Facility and changes to the proposed KERP and other proposed terms of the ARIO dealing with the priority of certain charges, as well as the appointment of a Chief Restructuring Officer ("CRO").

[8] The AGH only opposes one aspect of the Solicitation Order, which is that it should not only provide for the court's authorization to immediately commence the Solicitation Process but it should also include a direction that the Solicitation Process be commenced immediately.

Cargill

[9] The other significant secured creditor of Tacora is Cargill International Trading Pte Ltd. ("Cargill"), with first and second ranking secured debt of almost $35 million.

[10] Cargill is party to various commercial arrangements and contracts with Tacora. Tacora sells 100% of the iron ore concentrate production at the Scully Mine to Cargill pursuant to an offtake agreement between Tacora, as seller, and Cargill, as buyer, dated April 5, 2017 and restated on November 9, 2018 (as amended from time to time, the "Offtake Agreement"). Pursuant to an amendment dated March 2, 2020, the term of the Offtake Agreement was extended to a life of mine contract such that Tacora is required to sell and Cargill is required to buy all iron ore concentrate produced at the Scully Mine while it remains operational.

[11] The sale of the iron ore concentrate is also subject to a stockpile agreement between Tacora, as seller, and Cargill, as buyer, dated December 17, 2019 (the "Stockpile Agreement"), which works in conjunction with the Offtake Agreement. The Offtake Agreement and other commercial arrangements between Cargill and Tacora have resulted in significant payments by Tacora to Cargill since 2019 despite Tacora's liquidity issues and financial challenges during this period.

[1] Although not in evidence, at the hearing counsel for the AHG represented the holdings of the AHG to account for approximately 86% of the total value of the Tacora senior secured notes.

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[12] In or around December 2022, Tacora required additional financing to fund operations through the liquidity challenges it was facing at that time. On January 3, 2023, Tacora, as seller, and Cargill, as buyer, entered into an advance payment facility agreement (as amended from time to time, the "APF Agreement"). Pursuant to the APF Agreement, Cargill provided Tacora with an advance payment facility (the "Advance Payments Facility") under which Cargill made advance payments under the Offtake Agreement in the total principal amount of $30,000,000 (the "Initial Advances") to Tacora. Until termination of the APF Agreement, Cargill is required to continue paying Tacora for iron ore concentrate under the Offtake Agreement and may not credit such deliveries against the outstanding balance of the Advance Payments Facility.

[13] Subsequently, on May 29, 2023, Tacora and Cargill entered into an Amended and Restated APF Agreement (the "Second APF Amendment") to provide Tacora with additional liquidity. The Second APF Amendment provided for a new facility under the Advance Payments Facility whereby Cargill would make margin advances ("Margin Advances") of up to $25,000,000 to Tacora. The Margin Advances were primarily made to finance margin payments payable to Cargill under the Offtake Agreement. The outstanding amount of Margin Advances fluctuate daily based on the Platts Index 62% price movement. The Margin Advances rank *pari passu* with the Senior Priority Note and senior to the Senior Notes and the Initial Advances. Pursuant to the Second APF Amendment, the maturity date of the Advance Payments Facility was extended to September 12, 2023.

[14] On June 23, 2023, Tacora entered into a further amendment to the APF Agreement (the "Third APF Amendment") to provide greater flexibility to Tacora on utilizing the new margin facility provided by the Second APF Amendment. Under the Third APF Amendment, Cargill, in its sole discretion, could make additional prepay advances ("Additional Prepay Advances" and together with the Margin Advances, the "Senior Priority Advances") to Tacora utilizing any availability under the $25,000,000 facility created by the Second APF Amendment. On June 29, 2023, Cargill made an Additional Prepay Advance in the amount of $3,000,000. Additional Prepay Advances are repayable upon demand and rank *pari passu* with the Senior Priority Notes and the Margin Advances, and senior to the Senior Notes and the Initial Advances. No further Additional Prepay Advances have been made by Cargill and the only Additional Prepay Advance made to Tacora has been repaid.

[15] To further enhance the company's liquidity position in the face of continued negative cash flow, Cargill and the company entered into a wet concentrate purchase and sale agreement (the "Wetcon Agreement") dated July 10, 2023, whereby Cargill agreed to purchase a stockpile of 172,000 tonnes of wet concentrate located at the Scully Mine from Tacora.

[16] In connection with discussions and negotiations between Tacora's stakeholders regarding a potential consensual recapitalization transaction, Cargill agreed to extend the maturity date of the Advance Payments Facility from time to time, most recently to October 10, 2023. At the October 24, 2023 hearing, Cargill agreed to further extend the maturity date to allow the court time to render its decision on the come-back motion and the AHG's cross-motion.

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[17] Tacora's former co-founder, Chief Operating Officer, and Chief Commercial Officer, Matt Lehtinen, was hired by Cargill in 2023 and has responsibility for Cargill's relationship with Tacora. There are Cargill employees on site on a day-to-day basis in connection with the management of the Scully Mine. Cargill has also had a representative on Tacora's board of directors ("Board") for many years. Mr. Leon Davies is a Cargill employee and was its Board appointee when the Offtake Agreement was last amended and throughout the DIP Process (defined below).

[18] Two Cargill entities are equity-holders in Tacora. Cargill is described as a "related party" under IFRS standards in Tacora's financial statements.

[19] Cargill Incorporated, an affiliate of Cargill, is the counter-party to the Cargill DIP Facility for which approval is sought under the ARIO.

[20] Cargill (in its various capacities as a stakeholder of Tacora) supports the ARIO and Solicitation Order sought by Tacora at this come-back hearing and opposes the relief sought by the AHG's cross-motion.

The Monitor and Other Noteholders

[21] The court-appointed monitor under the Initial Order, FTI Consulting Canada Inc. (the "Monitor"), supports the ARIO and Solicitation Order sought by the company, as does one of the company's Senior Secured Priority Noteholders, Crossingbridge Advisors, LLC (under a reservation of its rights more generally). The remaining noteholders (not accounted for in the AHG) have taken no position on the come-back motion or the cross-motion.

Other Stakeholders

[22] A number of other stakeholders were identified by Tacora in its initial CCAA filing.

[23] Tacora employs approximately 450 employees. Some are salaried (36%) and some are hourly (64%) and more than half of the employees are unionized. The current collective bargaining agreement is in effect until December 31, 2027. Most employees are located at the Scully Mine. Only 13 employees are located at the company's head office in Grand Rapids, Minnesota.

[24] Tacora also contracts with various local service providers that make available staff to assist Tacora with its operations on a regular basis. Certain of these contractors have staff at the Scully Mine during each shift worked by regular Tacora employees, performing either general labour or specialized tasks at the Scully Mine related to repair and maintenance.

[25] In February 2023, Tacora engaged Partners in Performance ("PIP"), a global management consulting firm, to initiate an operational stabilization and turnaround program at the Scully Mine for a period of 20 weeks, commencing on February 27, 2023. The term of PIP's consultancy agreement was extended. It has a team that are regularly on site at the Scully Mine to continue the operational stabilization and turnaround program and to assist Tacora develop and action a capital

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project plan to ramp up to 6 Mtpa capacity. Tacora anticipates enlisting PIP's continued support throughout its planned restructuring process.

[26] Cargill also provides on-site consultancy support to Tacora, historically at no cost to Tacora.

[27] Tacora is a critical customer for several businesses in Wabush who provide it goods and services and who in turn, provide employment to the local community. Tacora is also party to various equipment leases.

[28] Tacora has contracts with the Wabush Lake Railway, owned by Tacora and operated by Western Labrador Rail Services Inc. ("WLRS"), and with the QNS&L Railway, owned and operated by Quebec North Shore and Labrador Railway Company, Inc ("QNS&L"). QNS&L is a wholly owned subsidiary of the Iron Ore Company of Canada, a competitor that operates another mine in the Labrador iron ore trough. WLRS and QNS&L are needed for the transportation of Tacora's iron ore concentrate from the Scully Mine to the Port.

[29] Société Ferroviaire et Portuaire de Pointe Noire s.e.c. ("SFPPN") operates the Port used by Tacora (which is the multi-user port located in Sept-Îles, Quebec) that provides facilities to unload iron ore concentrate from trains delivered from the QNS&L Railway. The use of the Port and the provision of services by SFPPN is set out in a long-term operational agreement with an effective date of December 22, 2022.

[30] On November 17, 2017, Tacora entered into an amendment and restatement of consolidation of mining leases (the "MFC Royalty") with 0778539 B.C. Ltd. (formerly MFC Bancorp Ltd.) ("MFC"), pursuant to which the parties agreed to amend and restate a lease which provided Tacora with tenure and mining rights to certain premises constituting the Scully Mine in exchange for an ongoing royalty payment based on production.

[31] Tacora has various unsecured debt obligations to the Atlantic Canada Opportunities Agency in respect of financial assistance that has been provided to it through contribution agreements entered into as part of a national initiative to support regional recovery and stimulus. Tacora also has unsecured debt obligations to the Innu Nation pursuant to an impact and benefit agreement.

[32] It is evident that there are a number of unsecured creditors and parties with whom Tacora does business who have a stake in the outcome of Tacora's restructuring efforts. None of these other stakeholders appeared or took any position in respect of the relief sought by Tacora under the proposed ARIO and Solicitation Order.

Summary of Outcome

[33] The relief requested by Tacora under the proposed ARIO and Solicitation Order (with the one change requested by the AHG) is granted. Tacora has satisfied the court of the necessary requirements for these orders to be made and the requested relief to be granted. The AHG's Cross-Motion is dismissed.

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[34] As the court noted at the time of the approval of the Initial Order, this application was made by Tacora in the face of operational and liquidity challenges that it has been attempting to address since Q3 2022. It has not been able to do so to date, despite:

a. A strategic review process that was undertaken commencing in January 2023 in furtherance of which the applicant engaged Greenhill & Co. Canada Ltd. ("Greenhill") to assist it to, among other things, explore, review, and evaluate a broad range of alternatives including sale opportunities or additional investment into Tacora (the "Strategic Process").
b. Tacora's engagement of a mining operations consultant (PIP) to, among other things, implement operational initiatives to ramp up production at the Scully Mine in February 2023.
c. Various interim capital raises implemented to improve Tacora's liquidity position in collaboration with its primary secured creditors who agreed to defer various debt obligations over the preceding months.
d. Attempts since August 2023 to reach an agreement on a consensual restructuring and capitalization plan involving a third party, with the support and involvement of its primary secured creditors, the noteholders, and Cargill.

[35] Tacora's liquidity and operational challenges and the confluence of factors that have led it to apply for protection under the CCAA transpired over the past few years since the Scully Mine first became operational in 2019 and are detailed in the supporting materials filed. No one has suggested that Tacora is not in need of urgent interim financing and court protection given its current circumstances.

[36] The terms of the Cargill DIP Facility and its implications were considered by Tacora's Board, with the benefit of the advice and recommendations of the company's financial advisor and investment banker, Greehhill, and of the Monitor. The Cargill DIP Facility was determined to be the superior of the two options for DIP financing that were available to Tacora; the other alternative being the AHG DIP Proposal, the terms of which the company and its advisors determined were inferior, including and primarily from a financial and economic perspective.

[37] Each of the Cargill DIP Facility and the AHG DIP Proposal contain terms that benefit the commercial interests of the counterparties and that could reduce the company's flexibility and/or options in the context of the company's planned Solicitation Process (the Cargill DIP Facility with respect to the preservation of the Offtake Agreement pending a transaction arising from, or the termination of, the Solicitation Process, and the AHG DIP Proposal with respect to the provisions for a topping credit bid option and stalking horse agreement). These were accounted for in the deliberations over the two options.

[38] While the Cargill DIP Facility is not the preferred DIP financing option of the AHG, it does not materially prejudice their interests, nor were they treated unfairly or were their interests unduly disregarded in the DIP Process that led up to the company's acceptance of the Cargill DIP term sheet on October 8, 2023 and the execution of the Cargill DIP Facility.

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[39] For the reasons that follow, I have found the terms of the proposed ARIO and Solicitation Order to be fair and reasonably necessary for the continued operations of Tacora in the ordinary course of business to provide stability for the company and to allow it the breathing room that it needs to try to restructure its affairs so that it can continue as a going concern. These orders are approved.

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The Issues

[40] In general terms, what the court is concerned with on this come-back motion is whether the applicant has satisfied it of the requirements necessary to grant the ARIO (that includes the approval of the Cargill DIP Facility and DIP Charge) and the Solicitation Order.

[41] The issues raised for the court's consideration by the AHG cross-motion are whether the court should decline to approve the Cargill DIP Facility and replace it with the AHG DIP Proposal (under the AHG ARIO); or, whether the Alternative Relief should be ordered with corresponding amendments to the ARIO as proposed by Tacora. The issues relating to the DIP financing to be approved will be addressed first since they were the primary focus of the written and oral submissions.

Analysis

Should the Cargill DIP Financing be Approved?

[42] This *de novo* come-back hearing requires the court to consider whether the Cargill DIP Facility ought to be approved. Tacora bears the burden of the relief it seeks in this regard. Part of that burden involves dispelling the criticisms to the Cargill DIP Facility that the AHG has raised.

[43] The AHG submits that: (a) the process leading to the company's approval of the Cargill DIP Facility was inherently flawed and unfair; (b) the Cargill DIP Facility does not meet the factors in s. 11.2(4) of the CCAA, in that it seriously prejudices the senior secured noteholders; (c) the Cargill DIP Facility is being used for an improper purpose, to further leverage Cargill's own commercial interests, rather than benefit Tacora; and, in these circumstances, (d) the AHG asks the court to approve its proposed form of ARIO that includes the approval of the AHG DIP Proposal *in lieu* of the Cargill DIP Facility.

[44] These submissions will be addressed in turn. The second submission of the AHG requires the court to consider more broadly whether the applicant has satisfied its onus to demonstrate that it is appropriate for the court to approve the Cargill DIP Facility and Charge, having regard to s. 11.2 of the CCAA, in the context of which any prejudice to the only other secured creditors is one of the relevant factors.

a) <u>The DIP Process</u>

i. The Initiation of the DIP Process

[45] Greenhill was engaged by Tacora in January 2023 to act as financial advisor and investment banker to Tacora. It initially sought interested purchasers for Tacora, but there were no offers or expressions of interest. One potential strategic purchaser that entered into a letter of intent with Tacora and conducted due diligence later withdrew from the potential acquisition, including due to concerns about the Offtake Agreement.

[46] Greenhill turned its attention to efforts to obtain financing, and eventually directed its attention in or about late August and early September 2023 to the solicitation of DIP proposals (the "DIP Process"). Various milestones dates and other parameters were put in place for the receipt of DIP proposals. Greenhill received four proposals for DIP financing. One such proposal was not actionable, including because it specified that the renegotiation or termination of the Offtake Agreement was a precondition to the delivery of a DIP offer.

[47] Tacora and its advisors recognized that the Offtake Agreement presented some unique constraints and identified certain modifications to that agreement that would be desirable from Tacora's perspective, including: (a) changing the term of the Offtake Agreement from life of mine to renewal-based to provide Tacora "greater flexibility"; and (b) increasing Tacora's profit share under the Offtake Agreement. Cargill has not agreed to these or any other amendments to the Offtake Agreement.

[48] In the early part of the DIP Process Cargill submitted a non-binding DIP proposal, which expressly prevented the disclaimer of the Offtake Agreement. Cargill ultimately decided not to submit a bid capable of acceptance by the original proposal deadline that had been specified.

ii. The AHG DIP

[49] The AHG first submitted a non-binding DIP proposal on August 21, 2023 followed by a draft definitive DIP agreement on August 28, 2023. By this time, Tacora had no other actionable DIP proposals. The Board considered what the AHG was proposing, the advice and endorsement of the company's advisors, and the recommendation of the (at that time proposed) Monitor and determined that this was the best (and also the only) option available to the company at the time.

[50] In anticipation of Tacora's planned filing for CCAA protection on September 12, 2023, Tacora executed the AHG DIP on September 11, 2023 (the "AHG DIP") with the unanimous approval of the Board. The AHG DIP was sent to the court on September 11, 2023 with supporting affidavits sworn by Tacora's CEO and the managing director of Greenhill. It was provided to other key stakeholders late that evening in anticipation of the company's planned CCAA filing the following day. In that context, Cargill received a copy of the AHG DIP.

iii. The Suspension and Resumption of the CCAA Filing and Request for Further DIP financing proposals

[51] Just prior to the company formally making its CCAA filing, it was advised that the noteholders, Cargill, and a third party had reached an agreement in principle regarding a

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consensual restructuring of Tacora that obviated the need for a CCAA filing, so the filing did not proceed on September 12, 2023. To alleviate immediate cash flow concerns while those parties worked towards a binding agreement, Cargill agreed to make certain contractual payments that it had been withholding to protect what it described as its pre-filing contractual set-off rights (which the company disputed).

[52] Negotiations regarding a consensual restructuring ensued for a number of weeks. In the intervening time period, the company's funding needs changed, certain deadlines contemplated under the AHG DIP lapsed and there was a change in the composition of the members of the AHG that were prepared to provide the funding for the AHG DIP. Accordingly, while still holding out the prospect of a consensual restructuring deal, the AHG, of its own accord, sent to Tacora on September 28, 2023 a revised AHG DIP proposal to address these changed circumstances in the event of a CCAA filing.

[53] Having received a new DIP proposal from the AHG, Greenhill decided to reach out to Cargill on September 29, 2023 to see if it was willing to make a DIP proposal as well. Cargill was not told about the revised AHG DIP proposal. The AHG was not told about the reach out to Cargill.

[54] Initially, Cargill remained focused on achieving a definitive restructuring agreement. When that fell apart, Tacora was informed on October 4, 2023 that no binding agreement had been reached. In anticipation of this possibility, a hearing date had been scheduled for the initial CCAA application on October 6, 2023.

[55] Cargill[2] submitted a non-binding DIP proposal on October 5, 2023. At the request of the company, Cargill agreed that it would pay certain further outstanding invoices that it had been withholding to protect what it described as its pre-filing contractual set-off rights (which the company disputed) to provide cash flow to the company on the condition that the company agree not to make a CCAA filing prior to October 10, 2023. The company agreed to this.

[56] The company had been communicating with the AHG since receiving its September 28, 2023 proposed revised AHG DIP terms. On the evening of October 5, 2023, Greenhill asked both the AHG and Cargill to submit their respective best and final DIP offers by 5 p.m. on October 7, 2023. They were each made aware that the other had provided non-binding proposals.

[57] Cargill submitted a binding DIP proposal on October 7, 2023. Tacora asked for a higher amount of DIP financing, which Cargill agreed to on October 8, 2023.

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[2] The formal contracting party is an affiliate of Cargill, Cargill International. References in this endorsement to "Cargill" in the context of the DIP Process and ultimately the execution of the Cargill DIP Facility do not attempt to distinguish between the two Cargill entities. They are both called "Cargill" but shall be read as referring to the specific entity that was involved in accordance with the context of the events described.

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[58] The AHG continued to communicate with the company about the changes that it was proposing to make to the AHG DIP. It was also asked to consider making changes requested by the company. There was an exchange of emails that eventually resulted in the final revised draft AGH DIP Proposal being transmitted on Sunday October 8, 2023, which was accompanied by a redline version showing the changes to the September 11, 2023 AHG DIP. The AHG made it clear that they were prepared to stand behind the September 11, 2023 AHG DIP (that was never implemented) with necessary amendments to account for the delay in the CCAA filing etc. That continued to be their position at the hearing.

iv. The Decision to Execute the Cargill DIP Facility

[59] The October 7, 2023 Cargill DIP term sheet (with the increased funding amount that Cargill International agreed to on October 8, 2023) and the October 8, 2023 AHG DIP Proposal were compared and considered side by side at the Tacora October 8, 2023 Board meeting with the benefit of a detailed review and analysis prepared by Greenhill.

[60] Below is a summary of the comparison of costs, expenses and key terms and conditions of the AHG DIP Proposal to the Cargill DIP term sheet (ultimately accepted by the company and reflected in the Cargill DIP Facility). As a matter of convenience, this summary has been extracted from the Monitor's Pre-Filing Report dated October 9, 2023, which concluded that the Cargill DIP term sheet:

a. requires a significantly smaller DIP amount and DIP Charge, thereby reducing the potential prejudice to existing creditors;

b. has significantly lower costs, including lower aggregate interest, lower DIP fees and lower DIP Expenses. Greenhill's comparison indicated the cost of the Cargill DIP to be less than half the cost of the AHG DIP Proposal and that it represented an overall estimated $7 million in cost savings;

c. has significantly more favourable Permitted Variance parameters and similar tests under its terms, conditions and covenants;

d. provides for significantly less potential operational disruption through the continuation of the various existing Cargill arrangements, including the margin and hedging arrangements which would likely not be available under the AHG DIP; and

e. provides certainty in respect of the KERP.

[61] In addition to the comparison of the two DIP financing proposals that were available to the company on October 8, 2023, the Monitor compared the cost of the Cargill DIP Facility to that of other court approved interim financings, and concluded that: The cost of the Cargill DIP Facility appears to be within the range of costs, in terms of annualized interest and fees, for interim financings of similar size approved in other CCAA proceedings. The Monitor also expressed the

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view that the terms of the Cargill DIP Facility are within market parameters in respect of interest and fees.

[62] Even the AHG concedes that there are elements of the Cargill DIP Facility that are more favourable to the AHG DIP Proposal. The primary "flaws" that the AHG identifies stem from the treatment and implications of the Offtake Agreement and the fact that the noteholders' debt will be "primed" to the extent of the Cargill DIP Facility (which will be at least $75 million and possibly as much as $100 million). This latter consideration will be discussed in more detail in the sections of this endorsement that follow, dealing with the CCAA requirements and the claimed prejudice to the AHG. The AHG's concerns about the Offtake Agreement also tie into the third area of criticism regarding the ulterior purpose of Cargill's DIP Facility, which the AHG says is to protect that Offtake Agreement, and will also be discussed later in this endorsement.

[63] After going through the various features that rendered the Cargill DIP Facility superior to the AHG DIP Proposal, Mr. Bandhari of Greenhill testified in his second affidavit that it was for these reasons that the Board determined, following the advice and recommendations of the company's advisors, that the company should proceed with the Cargill DIP Facility. All of the Board members and both Greenhill and the Monitor concluded that the terms of the Cargill DIP term sheet were superior to the revised AHG DIP Proposal. This conclusion is not seriously challenged. As noted above, the AHG's challenges to the Cargill DIP Facility are on other grounds.

[64] It was for these reasons that on October 9, 2023 following the Board's approval, Tacora executed the Cargill DIP Facility.

v. The Board Process and Governance Concerns

[65] The Monitor expressed the view that "there is no better alternative to the [Cargill] DIP Financing Agreement at this time". The Monitor did not recommend the approval of the AHG DIP Proposal. The clear recommendations in both reports from the Monitor is a strong indicator of the fairness of both the process by which DIP financing was solicited, analyzed, and selected, and the terms of the Cargill DIP Agreement itself.

[66] The AHG suggests that the "*Soundair*" principles for approval of a sale (or sale process) should be applied by analogy to the court's consideration of the DIP Process and whether it was fair and reasonable in the circumstances. No authority or precedent was offered for this suggestion and the specific factors do not directly correlate. I find that analogy to be strained and unhelpful.

[67] However, I agree with the more general suggestion that, as part of the court's exercise of its discretion in approving the Cargill DIP Financing under the ARIO, the court can and should consider whether the DIP Process that the company and its advisors engaged in to solicit possible DIP financing options was fair and reasonable. The company also suggests that the court can and should consider whether the Board exercised its reasonable business judgment in its decision to accept the Cargill DIP agreement.

[68] The AHG points to what it describes as several serious process, governance, and substantive problems underlying the request by Tacora for the approval of the Cargill DIP Facility.

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The AHG says that the DIP Process was not fair and reasonable to them because of certain timing and mechanical aspects (discussed in the next section) but also because their interests were not given due consideration by the Board and the Board was tainted by the presence of the Cargill Board nominee, Mr. Davies, such that the Board cannot be said to have exercised objective, reasonable business judgment.

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[69] The AHG selectively focusses on the specific questions put to two of the witnesses who were cross-examined for this motion, divorced from the broader context of the rest of the evidence about the DIP Process and the factors considered by the Board and the company's advisors in the decision to move forward with the Cargill DIP Facility (summarized earlier in this endorsement). The AHG focusses on the evidence of:

a. Mr. Bandhari of Greenhill, that he did not give any advice to the Board in respect of the fact that the Cargill DIP would prime the senior secured noteholders to the tune of $75 million or more; and

b. Mr. Davies, who acknowledged that, while he understood that the AHG would be primed by the Cargill DIP, that [priming] was not something that he and the other directors spent a great deal of time talking about.

[70] From this, the AHG asks the court to infer that when the Board was exercising its business judgement due consideration was not given to the senior noteholders' interests, and in particular that their security would be "primed" by the Cargill DIP Facility by up to $75 million or more.

[71] This is not a reasonable inference to draw from the totality of the evidence. First, these specific statements do not support the suggested inference since the combination of the two statements is that at least one director (Mr. Davies) was aware of the "priming" implications and did not need to be told about that by Greenhill; and his evidence goes only so far as to say that a great deal of time was not spent on this topic; he does not say that it was not considered at all. Further, these specific statements are consistent with the general statements in the affidavits of Mr. Bandhari and the Monitor's Pre-Filing Report in which it is stated that the potential prejudice to existing creditors (the noteholders being the largest such group) was considered.

[72] The AHG also challenges the Board's process as inherently unfair and flawed from a governance perspective because of the role played by Mr. Davies who was the Cargill Board nominee and remained a Cargill employee throughout. He recused himself and did not vote on the approval of the Cargill DIP Facility when all of the other Board members unanimously voted in favour of it.

[73] Section 132(5) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 ("OBCA") addresses circumstances where directors are required to recuse themselves. None of the circumstances are present in this situation. Thus, Mr. Davies was not required to recuse himself. He was also not required to abstain from voting on the approval of the Cargill DIP Facility, but he did. The AHG suggests that because he abstained from voting, this is a concession of a conflict of interest that should have led him not only to abstain from voting but also to recuse himself from any discussions at the Board about the Cargill DIP Facility.

[74] Merely abstaining from voting does not create a legal conflict, especially one that the OBCA does not recognize. There is no evidence that Mr. Davies' presence at the Board meetings at which the Cargill DIP Facility was discussed tainted the views of the other Board members in any way. His presence at the earlier Board meeting at which the AHG DIP was approved did not result in any dissention over the earlier approval of that financing. There is no basis on which the court can or should infer that his presence at the Board meeting(s), in these circumstances, tainted the Board process so as to undermine the Board's business judgment to proceed with the objectively superior Cargill DIP Facility.

[75] The Board, having regard to relevant factors (including the potential prejudice to other stakeholders such as the senior secured noteholders) and acting on the advice of professional advisors, exercised its reasonable business judgment in good faith and without any reasonable inference of improper involvement of the Cargill Board nominee, in deciding to approve the Cargill DIP Facility on October 8, 2023. While the Board's independent decision to approve the Cargill DIP Facility is not determinative of the ultimate decision of the court about whether to approve the Cargill DIP Facility, it is a relevant consideration. See *Crystallex International Corp, Re,* 2012 ONCA 404, 293 O.A.C. 102, at para. 85, aff'g *Crystallex International Corp, Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 35.

vi. Other Fairness Concerns

[76] The AHG complains that there was an uneven playing field from a process perspective because Mr. Davies and others at Tacora were favouring Cargill in the DIP Process by passing on information to Cargill that gave it an unfair advantage. For this, the AGH relies upon inferences it asks the court to draw from certain exchanges between Tacora and Cargill representatives.

[77] The first exchange of text messages is between Tacora's CEO Mr. Broking and Mr. Davies, Cargill's Board nominee, on September 12, 2023 about a request for Cargill to make certain interim payments. In this text message exchange, Mr. Broking states "I love Cargill". The AGH relies upon these texts to suggest that there was an ongoing dialogue between Tacora and Cargill about the DIP proposals and a bias in favour of Cargill.

[78] Mr. Davies denies that he was involved in any discussions about the DIP financing proposals with any Cargill representatives aside from one specific conversation that he had on October 5, 2023 to see whether Cargill would consider making a DIP proposal and the direct follow up to that regarding the timing of Cargill's internal approval process for making and increasing its proposal. There is nothing in the record to indicate otherwise.

[79] Aside from the identified text message exchange, Mr. Davies' evidence, which was uncontroverted, was that: (i) he took his fiduciary duties as a Tacora director seriously; (ii) he had no involvement in Cargill's DIP proposal or its negotiation other than to encourage Cargill on behalf of Tacora to consider putting forward a DIP proposal; (iii) he shared no confidential Tacora information with Cargill; and (iv) he did not learn of the substance of Cargill's DIP proposal or the AHG's until they were both presented to Tacora's board on October 8, 2023.

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[80] Next, the AHG points to the acknowledgment of Tacora's CEO Mr. Broking that he spoke to Cargill representatives between October 5 and 10, 2023. However, his testimony was that these discussions were only about operational matters and he similarly denies having been involved in any direct communications with individuals at Cargill (or the AHG) about the DIP Process or proposed terms. Mr. Broking testified that he was not involved in negotiations of the DIP proposals, and did not see the DIP term sheets until they were provided to Tacora's board on October 8. The AHG seeks to have the court infer that he must be lying about this because of his practice of deleting his text messages, even though he was examined on texts produced by others and the documents produced by the company, none of which contradict his denial of any discussions with Cargill about the DIP.

[81] Mr. Bhandari testified more generally, that although Tacora and its advisors were in discussions with the AHG after September 11 about DIP matters, he provided no details of those discussions to Cargill, and he is not aware of Tacora or any of its advisors doing so either.

[82] The evidence obtained through the r. 39.03 examinations and cross-examinations undertaken by the AHG did not reveal any improper or inappropriate contact between the company's management or Board and Cargill, nor any favoritism in relation to having a Cargill DIP Facility. The conversations taking place with Cargill in this time period were no different in substance than the conversations taking place with the AHG. There is no evidence of any sharing of information with one about what the other was proposing or considering.

[83] The AGH also complains about the fairness of the timing of the request for their final and best DIP proposal over the Canadian Thanksgiving and American Columbus Day holiday weekend. Their position at the hearing is that they were unable to finalize an amended definitive DIP Proposal in that time frame. This is notwithstanding that the company continued to offer to make their advisors available on October 6 and 7, 2023 "to discuss any remaining issues in order for the Ad Hoc Group to make an informed decision on whether to make any revisions to their proposal".

[84] The inconvenience of the timing of this is not something that the company was in a position to control. It was a function of the timing of the breakdown in the negotiations towards a consensual restructuring on October 4, 2023. Both Cargill and the AHG were given the same amount of time to finalize and submit a definitive DIP financing proposal on October 7, 2023. The AHG had been working on theirs since September 28, 2023.

[85] The AHG further complains that the DIP Process was flawed and unfair because Cargill had seen their first AHG DIP Agreement and knew the terms it needed to beat in the October round, after having declined to submit a binding proposal back in September. However, that ignores the reality of the situation which is that there had to be a further round of DIP negotiations because the AHG DIP Agreement had lapsed. In fact, it was the AHG that initiated those discussions and initiated further negotiations at the end of September.

[86] The AHG knew what they had offered and knew what the company was asking for in terms of possible improvements. They were given the same time and opportunity to make a new DIP

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proposal as Cargill was on October 5, 2023. There was nothing unfair about the notice that AHG was given relative to the notice that Cargill was given for providing their DIP financing proposals. The company had to act quickly given the ongoing liquidity crisis it was facing. Absent a restructuring, it was clearly understood that the company would need to file for CCAA protection.

[87] The company put no constraints or restrictions on the AHG in terms of any further DIP proposal that they might wish to make. The company accepted, and put before the Board for consideration, the AHG DIP Proposal that was submitted on the morning of October 8, 2023 even though it was received after the deadline that had been imposed of 5 p.m. on October 7, 2023 and even though it did not come in the form of an offer that the company could accept.

[88] The AHG says that, on principle, they were not prepared to re-engage with the company on any terms other than what it considered to be "updates" to the AHG DIP. That was its explanation for not putting forward an "improved" DIP proposal over the Thanksgiving weekend or at any time prior to the October 24, 2023 come-back hearing. The need for updates implicitly recognizes that the AHG DIP had lapsed; yet, the AHG continued to assert in materials filed in advance of the come-back hearing that the AHG DIP signed on September 11, 2023 remained a binding and executable agreement on October 8, 2023.

[89] This position is untenable. The AHG itself proposed a new agreement that included not only new (updated) financial terms but also a new party (one noteholder departing and another added). The company and the AHG recognized by the end of September 2023 that the AHG DIP Agreement was no longer actionable or viable as a result of the time that had elapsed while both Cargill and the AHG were engaged in good faith efforts to try to reach a consensual restructuring.

[90] At the hearing, greater emphasis was placed by the AHG on a variation to the assertion of the continued existence of a binding AHG DIP, namely that they believed that they had an agreement that no further DIP proposals would be considered by the company from anyone else after their AHG DIP had been approved and accepted in September 2023. In other words, that the AHG had the exclusive right to be the DIP lender in any CCAA filing by the company. However, this belief is not said to be based on anything that the AHG was told by the company or its advisors or by the proposed Monitor. The AHG submitted no direct evidence on this point. The AHG DIP did not contain exclusivity for any future DIPs in a CCAA proceeding, nor did it provide a tail period.

[91] There is no objectively reasonable evidentiary basis for the asserted belief that the company would not consider any other DIP financing proposals. It appears to be based on the assertion that the September AHG DIP remained a binding agreement, an assertion that is untenable (as noted above) given that the AHG DIP was no longer capable of execution in October 2023 and the AHG had themselves acknowledged that a new agreement with amended terms was required.

[92] Tacora had the right (in fact, the obligation) to resume the DIP Process when the circumstances and timing had changed and it was planning for its CCAA filing in October 2023. It needed a binding DIP agreement to present to the court for that filing.

vii. The AHG's Proposed Run-Off DIP Process

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[93] Up until the come-back hearing, the AHG did not make any attempt after the Thanksgiving weekend, when they claim to have been under undue time pressure (and under the erroneous belief that Tacora had to negotiate solely with the AHG regarding the DIP financing), to make any new or different proposal with any materially new or improved terms, ostensibly because they did not want to lend credibility to what they considered to be a flawed DIP Process.

[94] At the come-back hearing, the AHG suggested a further alternative, that the court direct a short further run-off DIP process by which the company could solicit last and best DIP financing proposals from Cargill International, the AHG and any other interested party, for the Board to consider and make a final decision about (the "Run-Off DIP Process"). A precedent for this proposed further Run-Off DIP Process, in which each party would be given a further opportunity to submit (on a double blind basis) the best DIP proposal for the company's consideration, is said to be found in *Cystallex* in the context of the consideration of a DIP extension. While there is no reported decision containing this direction, it is said to be the process that is referenced by Newbould J. in *Crystallex International Corporation (Re)*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 21. However, there was not a similar immediacy to the company's cash concerns when the court directed the "run off" DIP process in that case.

[95] The company and the Monitor both raised concerns about stability and delay for the company and the need to finalize the ARIO, the DIP financing, the KERP and to begin the Solicitation Process. They are concerned that the company cannot tolerate the inevitable further uncertainty and instability that the suggested Run-Off DIP Process would entail. The opportunity to make a best and last DIP financing proposal was afforded on October 5, 2023 and has passed.

[96] These concerns are valid and were left largely unanswered. The proposed Run-Off DIP Process is not a realistic option for the company in its present circumstances and could interfere with the company's restructuring process.

[97] After the hearing, in an effort to address a concern raised by the court about there being no binding offer from the AHG that the company could accept if the court were to be inclined to grant the cross-motion and deny the request for approval of the Cargill DIP Facility, the AHG sent a new DIP proposal to the company on the morning of October 26, 2023 and asked that a case conference be convened on October 27, 2023 before the court released its decision. At the case conference, the AHG made the court aware of this offer and of an accompanying alternative to the Offtake Agreement with a new purchaser of the ore produced at the Scully Mine (the "New AHG DIP Proposal"). According to the submissions of counsel to the AHG, the New AHG DIP Proposal is similar to, but an improvement upon, the September AHG DIP. The members of the AHG behind the New AHG DIP Proposal are not the same as those behind either of the AHG DIP or the AHG DIP Proposal. The alternative offtake agreement that accompanied it is an entirely new feature.

[98] The company and the Monitor (and Cargill, although given its commercial self-interest, its concerns carry less weight on this issue) raised concerns about this New AHG DIP Proposal, which the AHG is asking the court to require the company and its Board to consider while the court's decision regarding the approval of the Cargill DIP Facility remains under reserve. The AHG did

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this without tendering any proposed evidence about this proposal and without a motion for the court to consider whether to receive any proposed "fresh" evidence. The company and the Monitor did not have sufficient time to properly consider and assess the new terms and undertake the complex comparative analysis that would be needed to understand the economic implications of the alternative offtake agreement that accompanied the New AHG Proposal. To do all of this would mean further uncertainty and delay for the company.

[99] Both the company and the Monitor indicated that the company would take the time to consider the New AHG Proposal but strenuously reiterated the earlier arguments, that the company needs the certainty of the approval now of the ARIO (including the DIP financing, and the KERP) and needs the court's approval of the Solicitation Order so that the Solicitation Process can get underway. The company no longer has the luxury of time. Its Stay Period is expiring. It has already gone below the minimum floor of cash that it is comfortable operating with and it is forecasted to run out of during the week after the hearing. The stability of the company's ongoing operations is dependent upon the certainty of the requested court orders and their implementation.

[100] To alleviate the concerns about delay and the company's immediate funding needs, the AHG suggested that they would make funds available to the company under the New AHG DIP Proposal without any exit or back stop fee, if Cargill was not willing to continue funding under the Cargill DIP Facility on an interim basis while the New AHG DIP Proposal (and any further proposal from Cargill) is considered.

[101] The court is concerned that this invites an open-ended process and will lead to delay and instability that could be prejudicial to the company's restructuring efforts. The AHG had the opportunity to submit the New AHG DIP Proposal before the come-back hearing. The presentation of this proposal after the hearing was explained to be with a view to addressing the court's concern about the lack of any binding offer that the company could accept if the court was otherwise inclined to grant the primary relief on the cross-motion. However, presenting this New AHG DIP Proposal and accompanying alternative offtake agreement while the court's decision was under reserve and without a proper record or any formal request for the introduction of this evidence falls outside of any recognized evidentiary or procedural mechanism. In these circumstances, consideration of the New AHG DIP Proposal could only be accommodated if the court were prepared to delay the release of its decision on the come-back motion and order the Run-Off DIP Process that the court has found (above) to be unrealistic for the company and potentially detrimental to its restructuring efforts.

[102] The company needs stability and needs to move into its Solicitation Process. The AHG already had its chance to put in its best DIP proposal and it submitted the AHG DIP Proposal which was considered and determined to be inferior to the Cargill DIP in a variety of respects. As the Monitor submitted, it is time to put a pin in the process and move forward. That is what the company did at the beginning of October when it completed its DIP Process in which each of Cargill International and the AHG had an opportunity to participate. The court is not prepared to order a re-do of that now through a further Run-Off DIP Process that will take at least a week if not longer. The company has been in a state of limbo for long enough.

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[103] That said, the court is encouraged by the prospect that there could be a better DIP proposal for the company. If so, the repayment and replacement or disclaimer of the Cargill DIP Facility remain open for consideration by the company in the future. As the company, the Monitor and Cargill have pointed out, the question of whether the Offtake Agreement can be disclaimed or replaced remains an issue for another day. But at the very least, it is acknowledged that there is the possibility for this to happen in the context of a transaction or restructuring arising out of the Solicitation Process (including a credit bid from the AHG submitted in that process) or in the context of the repayment and replacement of the Cargill DIP Facility. The cost of Cargill's exit fee under the Cargill DIP Facility is the cost of the stability and the timely implementation that the company requires now.

b) The CCAA Requirements For Approval of the Cargill DIP Facility and DIP Charge

[104] The court's authority to grant the requested priority DIP charge for the Cargill DIP Facility is found in s. 11.2 of the CCAA, and must be considered in light of the factors in s. 11.2(4) of the CCAA, which provide 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.

[105] These factors may be equally applicable in deciding who shall be the DIP lender and on what terms DIP financing ought to be provided. See *Great Basin Gold Ltd., Re*, 2012 BCSC 1459, 94 C.B.R. (5th) 228, at para. 14. These factors and how they are satisfied in this case are reviewed in the Monitor's Pre-Filing report and the company's affidavits and they need not each be reviewed in this endorsement.

[106] The AHG's challenges to the s. 11.2(4) criteria regarding the need for governance changes during the CCAA process and the AHG's loss of confidence in existing management, flow from the criticisms of the DIP Process previously discussed. They are not borne out on the record. This section of the endorsement focuses on the primary challenge of the AHG, namely its contention that it will be materially prejudiced as a result of the proposed Cargill DIP Facility and priming Charge.

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[107] The Cargill DIP Financing is conditional on the DIP Charge being granted. The only alternative funding option that would be available to the company would also require a DIP charge. Under the AHG DIP proposal, the DIP facility would have been substantially larger; the increased amount being necessary as the Advanced Payments Facility and other financing available from Cargill would no longer be available under the AHG DIP Proposal. Any prejudice to the secured creditors that may result from the granting of a DIP charge is therefore reduced under the DIP Financing Agreement as compared to the alternative AHG DIP Proposal.

[108] Material prejudice in the context of s. 11.2(4) requires consideration of how much the creditors are being primed by a priority DIP charge, not who is the priming creditor. On an objective test it is clear that the Cargill DIP Facility is far less prejudicial to creditors generally than the AHG DIP, including because the company will require significantly less financing due to the operational agreements already in place with Cargill.

[109] By letter dated October 6, 2023, the AHG communicated, amongst other things, certain concerns regarding the Applicant accepting DIP financing from the DIP Lender. Those stated concerns included potential prejudice to the AHG from such financing. The proposed Monitor took note of the concerns expressed, noting that: "[u]nder the Ad Hoc Group DIP proposal, the DIP facility would have been substantially larger" and, as a result, "[a]ny prejudice to the secured creditors that may result from the granting of a DIP charge is therefore reduced under the [Cargill] DIP Financing Agreement as compared to the alternative Ad Hoc Group DIP Proposal."

[110] The AHG complaint that the Senior Noteholders are being "primed" ignores the fact that the AHG DIP Proposal would prime the Senior Noteholders by a larger margin than the Cargill DIP Facility.

[111] Additionally, the AHG's argument ignores Tacora's other creditors, including Senior Noteholders who are not part of the AHG, trade creditors, employees, lessors and other unsecured creditors. Under the AHG DIP Proposal, the company will need to realize approximately $30 million more in connection with a restructuring transaction for these creditors to have the same recovery as under the Cargill DIP Facility due to the additional financing that will be required with the AHG DIP Proposal. Accordingly, it is clear that creditors broadly will be less prejudiced with the Cargill DIP Facility.

[112] A further instance of prejudice that the AHG identifies arises from the implications of the Offtake Agreement and the impediments that it could present to the restructuring process if interested third party purchasers or investors are dissuaded by its "life of mine" and other terms (as some already have expressed concerns about in the Solicitation Process and the earlier Strategic Process also undertaken by Greenhill prior to that). Consideration of this must begin with an acknowledgment that, while the AGH asserts that the Offtake Agreement is not commercially reasonable and that it unduly restricts the company's restructuring efforts, that agreement was in place prior to the issuance of the notes.

[113] This motion must proceed on the basis that the Offtake Agreement is, as of the date of the hearing of this motion, a valid and enforceable agreement to which the company is a party. It is

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not an entirely one-sided agreement, in that it provides a guaranteed customer and revenue stream for all of the output at the Scully Mine.

[114] The AHG has taken issue, in particular, with an event of default provision in the Cargill DIP Facility involving any termination, suspension or disclaimer of the Offtake Agreement (the "Offtake EOD"). Section 23(d) defines the Offtake EOD to be: The termination, suspension or disclaimer of the Existing Arrangements [including the Offtake Agreement], or the taking of any steps to terminate, suspend or disclaim (if permitted under the CCAA) any of the Existing Arrangements.

[115] However, this same Offtake EOD goes on to expressly indicate that an event of default shall NOT include: (i) the commencement and prosecution of the SISP (defined below), including the solicitation of an Alternative Offtake or Service Agreement, or (ii) taking any step or related action pursuant to a binding agreement entered into in respect of a Restructuring Transaction at or after the Bid Deadline, including executing such agreement, seeking court approval of such binding agreement or taking any steps in connection with consummating the Restructuring Transaction pursuant to such binding agreement in each case at or after the Bid Deadline, without prejudice to any rights that [Cargill] may have pursuant to section 32 (including subsection 32(9)(c)) of the CCAA or otherwise.

[116] Further, s. 29 of the Cargill DIP Facility requires that: The Borrower … (in consultation with the Monitor) shall pursue a sales and investment solicitation process (the "SISP") approved pursuant to a Court Order in respect of (a) potential Restructuring Transactions that may be available to the Borrower; and (b) offtake, service or other agreements in respect of the business of the Borrower ("Alternative Offtake and Service Agreements") that may be available to the Borrower. In fact, the solicitation process agreed to in the Cargill DIP Facility expressly contemplates that the company shall solicit "Alternative Offtake or Services Agreements" as part of the Solicitation Process and the Solicitation Process put forward by the company for court approval contemplates soliciting interest in the "Offtake Opportunity" as part of binding bids.

[117] Reading these provisions of the Cargill DIP Facility together, the Offtake EOD does not limit the company's ability to explore all value-maximizing alternatives, including restructuring transactions that involve either a new offtake agreement or no offtake agreement.

[118] While the company considered it to be of critical importance to its evaluation of the DIP proposals it received for it to be able to fully explore all alternatives available to it during the CCAA Proceedings, it also recognized that it would not be practical to terminate, suspend or disclaim the Offtake Agreement before the company had the means to sell its iron ore concentrate to one or more alternative customers.

[119] The practical restriction created by the Offtake EOD is that the company will not be able to enter a stalking horse agreement that contemplates the termination, suspension or disclaimer of the Offtake Agreement without either refinancing the Cargill DIP Facility or obtaining the Cargill DIP Lender's consent. The company understood this risk when evaluating the Cargill DIP Facility.

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[120] This is a thorn in the AHG's side because they made it known to the company that they intend to make a credit bid and might be interested in acting as a stalking horse bidder. While not in the original AHG DIP, the redline version of the AHG DIP Proposal submitted on October 8, 2023 indicates a new provision expressly allowing the AHG to make a stalking horse bid in the Solicitation Process. However, from the company's perspective and the perspective of the creditors as a whole (not the interests of a creditor who might also wish to be a potential purchaser), at the time that the Cargill DIP Facility was considered and approved, there had not been any advanced discussions regarding a stalking horse agreement. Under the Cargill DIP Facility, all parties will be able to participate fully in the solicitation process. In the meantime, should a stalking horse agreement be determined to be favourable, the company maintains the flexibility to refinance (repay and replace) the Cargill DIP Facility at any time.

[121] The terms of the Cargill DIP Financing do not materially prejudice the AHG in their capacity as creditors, either from the perspective of the priming of their existing security (which is less than it would be under their own AHG Financing Proposal) or from the perspective of the overall implications of the Offtake EOD and its practical implications for the restructuring process. The restriction on stalking horse agreements may be prejudicial to the AHG in their capacity as a prospective "credit bidder," but that is not of paramount concern to the interests of the stakeholders generally and is not a material prejudice to the AHG in their capacity as creditors of Tacora arising as a result of the Cargill DIP Facility and DIP Charge within the meaning of s. 11.2(4)(f) of the CCAA.

[122] In *Great Basin* (at para. 15), the court noted that when approving DIP financing it "must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the [Applicants] as a whole by enhancing the prospects of a successful restructuring". The company notes that certain provisions of the AHG DIP Proposal were considered and identified by the company to be restrictive and to provide advantages to the AHG, such as their ability to submit a "topping credit bid" (up to the amount of their total debt) after the completion of the Solicitation Process if the successful bid does not result in full payment of the AHG's pre-filing secured debt. In other words, the AHG would have a "last look" following the final bid deadline even if the AHG did not participate in the Solicitation Process.

[123] The company had a concern that this "last look" could have a chilling effect on prospective purchasers who would be put to the time and expense of the due diligence to make a bid. Another concern identified was that such a clause could cause any interested bidder to have discussions with the AHG regarding a transaction rather than the company, its advisors, and the Monitor, which could result in a loss of control and fairness in the process.

[124] Further, the AHG DIP Proposal would require the company to appoint two (2) new directors from a slate of five (5) directors put forward by the AHG, if requested. In *Quest University, (Re),* 2020 BCSC 318, 77 C.B.R. (6th) 117 the court recognized that a creditor's attempt to seek control through board appointments in connection with DIP financing was "unreasonable and inappropriate in the circumstances and it may significantly disadvantage other interests in this proceeding". Like the present situation, the creditor in *Quest University* had indicated an interest in purchasing the debtor's property.

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[125] On balance, I find the reasons and conclusions of the company, the Monitor and Greenhill that the Cargill DIP Facility is more favourable to the company and will better serve its stakeholders than the AGH DIP Proposal would, to be well founded.

[126] In terms of some of the other factors under s. 11.2(4) of the CCAA, the Cargill DIP Facility amount lines up with the company's cash flow forecasts for the Stay Period and provides the funding for the company's anticipated business and financial affairs that are to be managed during the CCAA proceedings. The company needs the Cargill DIP Facility to commence its Solicitation Process which is intended to enhance the prospects of a viable compromise or arrangement being made in respect of the company. The Monitor recommends the approval of the Cargill DIP Facility. I am satisfied, having considered the relevant factors, that the requirements under the CCAA for the court to approve the Cargill DIP Facility and DIP Charge have been satisfied.

c) Alleged Ulterior Objectives of Cargill

[127] Courts are required to carefully and closely scrutinize financing proposals that may advance the interests of one particular stakeholder (see *Quest University*, at paras. 97–99) and "be constantly vigilant against such strategies" (see *Great Basin*, at paras. 179–81).

[128] Both Cargill and the AHG have their own commercial interests that will inevitably influence their conduct in these CCAA Proceedings.

[129] A proposed extension of DIP financing was not approved in *Essar Steel Algoma Inc. et al, Re*, 2017 ONSC 3331, 48 C.B.R. (6th) 264, because of concerns that the DIP lenders were "imposing terms to assist their position as Term Lenders" who were party to a restructuring agreement, and that "their interests are now too closely aligned with what has been proposed and that the provision of DIP lending is now being too negatively affected" (see paras. 19–24). A DIP lender wearing various hats can give rise to concerns about the potential for mischief in the management and operation of the business for its own interest with less than due regard for the interests of the other secured creditors. See *Conexus Credit Union 2006 v. Voyager Retirement II Genpar Inc.*, 2021 SKQB 273, 94 C.B.R. (6th) 190.

[130] Cargill does wear various hats in this case but none of its activities to date have given rise to any foundation for the suggestion that it will (or will have the ability under the Cargill DIP Facility to) exert control over the business of the company or the Solicitation Process in a way that will give less regard to the interests of the other secured creditors.

[131] The AHG accuses Cargill of manipulating the process to "stave off" the CCAA filing on September 12, 2023 (that would have sought approval of the AHG DIP) and appears to be suggesting that the negotiations for a consensual restructuring were a ruse to give Cargill time to put in a DIP proposal of its own to protect its Offtake Agreement. There is no evidentiary foundation for this theory.

[132] It is further alleged by the AHG that the Cargill DIP Facility is being used for the improper purpose of protecting the Offtake Agreement. It is suggested that this conclusion can be reasonably inferred, as the court did in *Quest University* (at paras. 99–100).

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[133] The real concern that is expressed in the AHG's factum is that the current terms of the Offtake Agreement are not commercially reasonable, are considered to be prejudicial to Tacora, and are considered by the AHG to be prohibitive to an effective restructuring. The AHG does not like this agreement and would like Tacora to be able to rid itself of it. As a prospective purchaser, the AHG would no doubt prefer to be rid of the Offtake Agreement. This position exposes that the AHG is also commercially motivated, to try to get rid of a contractual burden of the company to advance its interests as a prospective purchaser.

[134] All participating stakeholders agree that the question of whether the Offtake Agreement is a commercially unreasonable contract and/or whether it can be disclaimed at all is not a question that is before the court to decide on this motion. The validity or enforceability of the Offtake Agreement is not properly before the court on this motion. If Cargill has arguments that the Offtake Agreement cannot be disclaimed those would be available to it irrespective of the DIP Facility terms.

[135] In the meantime, the AHG is concerned that Cargill is bootstrapping its position by building in the Offtake EOD that prevents its disclaimer except as part of the Solicitation Process. From the company's perspective, this may be realistically the most likely circumstance in the context of its restructuring in which it would want to disclaim the Offtake Agreement. But even if not so, the Offtake EOD can be eliminated if the Cargill DIP Facility is repaid. The inclusion of the Offtake EOD does not lead to the conclusion that the Cargill DIP Facility is being used for an improper purpose just because it recognizes the commercial realities of the company's existing contractual arrangements with Cargill.

[136] Various assertions are made by the AHG about the refusal by Cargill representatives to produce documents requested in r. 39.03 notices of examination. Even if the Cargill representatives who were examined are treated as "party" as opposed to non-party witnesses and subject to the usual rules of cross-examination (see *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174, at para. 11), the timing, scope and breadth of the document requests that accompanied their notices of examination were not proportionate. Further, many of the requests were for historic documents that relate to the Offtake Agreement, the very existence of which is what the AHG alleges is problematic.

[137] Based on the refusal to produce the requested documents in response to the broad requests, the AHG is asking the court to draw adverse inferences that they would have disclosed Cargill's true motives behind the Cargill DIP Facility to be to gain some advantage for itself under the Offtake Agreement. These witnesses were not obligated to produce all records responsive to the overly broad, discovery-like document requests set out in the notices of examination only delivered late in the evening on Monday, October 16, 2023 in advance of examinations scheduled for October 18 and 19, 2023. For such inferences to be drawn from a refusal to produce documents in these circumstances, there would first need to be some factual basis to which to tether the suggested inference, which there is not.

[138] The fact that Cargill has other commercial interests and contractual rights vis-à-vis Tacora does not mean that it is acting improperly for its own interest with less than due regard for the

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interests of the other secured creditors when it introduces a term into its proposed DIP that recognizes those other contractual interests but also acknowledges circumstances in which they might be compromised.

[139] While it is true that it is less "messy" to have a truly independent DIP lender in a CCAA restructuring, that is not always realistic or possible. It is often the parties who are already entrenched with the debtor who have the most incentive to see its restructuring efforts succeed. It is a balance. The court does need to be vigilant to ensure that a creditor wearing more than one hat does not take advantage of its position, but for the court to make a finding that a DIP facility from that party is tainted there would need to be something more than the type of speculation and innuendo that has been suggested here.

[140] The Offtake Agreement (among other agreements with Cargill) is the sole source of revenue for Tacora. Cargill has committed to purchasing 100% of the output of the Scully Mine under the Offtake Agreement. This is why Tacora has argued that it is unlikely that it would seek to disclaim, terminate, suspend, etc. that agreement, other than in the context of a transaction arising out of the Solicitation Process, which would be exempt from the restriction in the Cargill DIP Facility on such actions.

[141] In my view, the contractual terms that have been incorporated into the Cargill DIP Facility strike the right balance to counter what is otherwise just a speculative theory of the AHG regarding improper motivations.

d) Should the Court Approve the AHG ARIO that Includes the AHG DIP Proposal

[142] In light of all of the criticisms that it has raised to the Cargill DIP Facility, the AHG also asks the court to consider whether there is a more appropriate DIP financing option available to the company through the AHG DIP Proposal[3] that the court should approve (as requested by the primary relief on the cross-motion), with an invitation to the company to agree to the AHG DIP Proposal if it wants the CCAA protection to continue.

[143] However, this requested relief is dependent upon a finding that the AHG DIP Proposal is more favourable to Tacora and its stakeholders than the Cargill DIP Facility; whereas, for the reasons outlined earlier in this endorsement, the company and its advisors, and now the court, have found the opposite to be true: the Cargill DIP Facility is more favourable to Tacora and its stakeholders than the AHG DIP Proposal. Thus, there is no basis for granting this alternative relief. Accordingly, this aspect of the cross-motion (for the approval of the AHG ARIO) is dismissed.

[3] For reasons indicated earlier, the company and its advisors have not had the opportunity to consider the New AHG DIP Proposal and it is not properly for the court for consideration at this time.

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[144] In the context of the discussion about the request for the court to approve the AHG ARIO, which includes the AHG DIP Proposal, the court raised the question of its jurisdiction to make the order sought on the cross-motion, which is for an amended and restated initial order that approves alternative DIP financing to be provided by the AHG that the company would have to agree to. Similarly, the Alternative Relief sought by the AHG in respect of the Tacora proposed ARIO includes directions that would require changes to be made to the Cargill DIP Facility to remove the Offtake EOD. This relief appears to be asking the court to become involved in the contractual negotiations between parties and to impose contractual terms upon them. No authority was identified that addresses this jurisdictional question.

[145] The AHG suggested that the court has, in the past, and could in this case, simply indicate that approvals would be granted if these contractual arrangements are made and then leave it to the parties to decide whether those contractual terms will or will not be agreed to. The court was referred to *Nortel Networks Corp. (Re)*, 2010 ONSC 1708, 63 C.B.R. (5th) 44 for this proposition. That may be a tool available to the court in appropriate cases, but since I have concluded that the Cargill DIP Financing should be approved it does not arise in this case.

Should the Court Order any of the Alternative Relief Sought by the AHG on the Cross-Motion?

[146] That leaves the question of whether the court should order any of the Alternative Relief sought by the AHG. The various elements of that Alternative Relief are addressed in turn, with the conclusion that it is not necessary or appropriate to grant any of the Alternative Relief.

[147] The request for a CRO is not warranted or justified. There is precedent for appointing a CRO in a CCAA proceeding. See, for example, *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, 2019 ONSC 1215, 68 C.B.R. (6th) 269, at paras. 30–32. However, this is not typically done over the objection of the company. Further, in this case, this request is predicated on the assertion that the AHG was unfairly treated by management and the Board in the DIP Process, and that either Tacora's management or its Board is unreasonably impairing, or are likely to unreasonably impair, the possibility of a viable compromise or arrangement. These assertions have not been made out, for reasons outlined earlier in this endorsement.

[148] The AHG's complaint about "how management and the Board have run the restructuring thus far" is unparticularized (aside from the complaints about the DIP Process addressed earlier in this endorsement that have not been substantiated) and premature given that the CCAA proceedings were commenced less than a month ago. There is no reason to appoint a CRO at this time. Further, no CRO has been identified and no proposed mandate been formulated. At the hearing the AHG suggested that this request be deferred for further consideration after an appropriate person and mandate had been identified. If the court had been persuaded that there was a reason to consider appointing a CRO, that approach might have been appropriate, but since no justification for doing so has been identified, there is no reason to defer the request.

[149] The KERP should not require the AHG's approval. The AHG does not dispute that a KERP is necessary. The only concern noted by the AHG with respect to the proposed KERP is

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that "a significant portion of the KERP to be proposed by Tacora will go to executive management resident in Grand Rapids, Minnesota, rather than the non-executive and operation employees (primarily located in Wabush, Newfoundland) whose contributions will be crucial to keeping Tacora operating during the CCAA process." Tacora counters this concern by pointing out that approximately 80% of the Key Employees (27 of 34) covered by the KERP work directly at the Scully Mine in Wabush, Newfoundland, and senior management frequently travels to be on site at the Scully Mine.

[150] No specific counter-proposal for the KERP, or this aspect of it, has been advanced by the AHG. The company and its advisors are best situated to determine who the key employees are that it is at risk of losing during the CCAA process and the appropriate parameters for calculating the KERP payments that they will receive.

[151] The ancillary Post-Filing Credit Extension should not require the AHG's approval or Court approval. The current terms require the Monitor's approval for credit extensions that are built into the Cargill DIP Facility. If the Monitor has concerns then the court would expect those to be brought before the court and for consideration under the court's inherent and supervisory jurisdiction over the CCAA proceedings. But if the Monitor does not have concerns, requiring the company to come back to court for specific extensions would be an added and unnecessary expense.

[152] The Greenhill Priority Transaction Fee Charge should not be subordinated. Greenhill's fees, if earned, are entitled to a super priority. That is typically the basis on which financial advisors are incentivized to continue to work for companies involved in restructuring. Greenhill is already agreeing to defer much of its fees to coincide with the completion of a successful transaction, and to risk not receiving the deferred fees if there is no successful transaction. In the interim, while its success fee is deferred, it has agreed to be paid only a much smaller guaranteed monthly amount. It should not be put at further risk of not receiving its earned fees if there is a successful transaction by having its charge subordinated to the Senior Secured Priority Notes and ranked *pari passu* with the remaining Senior Secured Notes.

[153] The reasons for not granting the Alternative Relief are further elaborated upon as the corollary to the reasons for granting the corresponding provisions in the company's proposed ARIO, discussed in the next section of this endorsement.

Should the Court Approve the ARIO?

[154] I will now turn to address certain aspects of the ARIO that warrant specific consideration.

[155] The main feature for which approval is required is the Cargill DIP Facility and DIP Charge. All creditors likely to be affected by the Cargill DIP Facility and DIP Charge were served with notice of the come-back hearing and only the AHG opposes this approval. That opposition is addressed in the preceding section of this endorsement.

[156] The requested approval and authorization sought for the company to draw up to the maximum amount of the Cargill DIP Facility of $75 million and to increase the DIP Charge

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accordingly, is supported by the company's Cash Flow Forecast demonstrating the need for the full amount to pay obligations as they come due, continue operations, and undertake the Solicitation Process during the proposed extended Stay Period. The Monitor supports the approval of the Cargill DIP Facility and authorization to draw up to the maximum available principal amount. The requested increase to the maximum principal amount of the DIP Facility is fair and reasonable and, for reasons previously indicated, satisfies the criteria under ss. 11.2(1) and 11.2(4) of the CCAA.

[157] As previously indicated, the court has independently determined that the Cargill DIP Facility and DIP Charge should be approved with regard to the relevant factors under s. 11.2(4) of the CCAA. The support and recommendations of the Monitor and Greenhill are relevant factors to take into account, as is the Board's approval of the Cargill DIP Facility and DIP Charge. The court "may consider, but not defer to, and is not fettered by, the recommendation of the Board." See *Crystallex* (Ont. C.A.), at para. 85.

[158] The other provisions of the ARIO for which the Court's approval are sought are reasonable and appropriate in the circumstances, because:

a. The extension of the Stay Period from October 27, 2023 to February 9, 2024 is necessary and appropriate to allow the company's good faith pursuit of the Solicitation Process by which it hopes to identify a value maximization transaction for the benefit of Tacora stakeholders. The Solicitation Process contemplates a motion for court approval of a successful bid during the week of February 5, 2024 (subject to availability). The extension of the Stay Period to February 9, 2024 is supported by the Monitor and Cash Flow Forecasts that are, in turn, based on the Cargill DIP Facility.

b. Section 11 of the CCAA provides the court with authority to allow debtor companies to enter into arrangements to facilitate a restructuring, which may include the retention of expert advisors like Greenhill where necessary to help with the restructuring efforts. See *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371, 32 C.B.R. (6th) 236, at para. 27. Courts have approved the appointment of advisors in restructuring proceedings, and corresponding charges to secure such advisors' professional fees, where such advisors' knowledge and experience is critical to assisting the debtor with a successful restructuring or is necessary to assist the debtor with a liquidation sale. See *Target Canada Co (Re)*, 2015 ONSC 303, at para. 72. Greenhill's prior experience with the company, including Greenhill's involvement running the Strategic Process starting in March of this year, along with its extensive experience in matters of this nature, makes it well-suited to this mandate. The Monitor recommends that the court approve the Greenhill Engagement Letter create of the Transaction Fee Charge, as it is of the view that the continued engagement of Greenhill to assist in the implementation of the Solicitation Process will be beneficial to the estate and its stakeholders generally and to the efficient completion of the CCAA Proceeding. The Monitor has considered the fees provided for in the Greenhill Engagement Letter and is satisfied

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that they are within market parameters. The court accepts the Monitor's recommendations in this regard and the approval of the Greenhill Engagement Letter is not challenged. The Monitor supports the granting of the Transaction Fee Charge, which the court has also found to be reasonable and appropriate in the previous section of this endorsement.

c. The initial amount of the Directors' Charge was found when the court granted the Initial Order to be appropriately "limited to projected potential uninsured obligations and to what [was] fair and reasonable for the initial 10 day period having regard to the requirements of s. 11.51 of the CCAA and the need for continuity and to keep the directors in place". In connection with the request for the grant of the ARIO, Tacora seeks to increase the quantum of the Directors' Charge to $5,200,000. The proposed increase has been determined in consultation with the Monitor to reflect the increased potential scope of liability during these CCAA Proceedings. This increase is justified on the same basis as the Directors' Charge was considered to be appropriate when the Court granted the Initial Order. The Monitor supports Tacora's request to increase the quantum of the Directors' Charge, which it believes is reasonable and justified in relation to the quantum of the Directors' estimated potential liability.

d. The KERP was designed to incentivize Key Employees to continue their employment with Tacora in order to continue the business as a going concern and maximize value for all stakeholders through the proposed Solicitation Process. The KERP complies with the factors to be considered in the approval of such plans (*Just Energy Group Inc et al*, 2021 ONSC 7630, 95 C.B.R. (6th) 264), in that:

    i. It was developed by Tacora with significant input from the Monitor, and is comparable to other recent KERPs that have been approved in Canada. The Monitor supports approval of the KERP.

    ii. If the proposed KERP is not approved, the company's CEO believes that it is likely that the Key Employees would consider and pursue other employment opportunities.

    iii. The Key Employees have distinct and critical roles at Tacora and will allow the Company to continue operating in the ordinary course while also advancing the Solicitation Process. The company is concerned that finding qualified individuals to replace the Key Employees would be challenging, disruptive, costly, and time consuming.

    iv. The company believes that the KERP will facilitate and encourage the continued participation of Key Employees during these CCAA Proceedings. The KERP provides for the payment of up to $3,035,000 to 34 Key Employees (identified out of a work force of approximately 450

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employees), including seven corporate personnel (the executive team and the corporate finance team) and 27 Scully Mine personnel.

v. Individual bonuses for Key Employees range from 16% to 53% of their maximum potential annual compensation (with individual bonuses for Key Mine Employees ranging from 36% to 66% of their base salaries, and individual bonuses for Key Corporate Employees ranging between 49% and 107% of their base salaries), which will be forfeited if they resign or are terminated for just cause prior to the completion of a transaction pursuant to the Solicitation Process or the completion of the CCAA Proceedings.

vi. The Board of Directors unanimously approved the KERP. As a proposed beneficiary of the KERP, Mr. Broking did not participate in the vote approving the KERP.

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[159] The details of the KERP are set forth in Confidential Exhibit "C" to the Second Broking Affidavit. It contains sensitive personal and compensation information, which Tacora's CEO believes may cause harm to the Key Employees and could result in a distraction for employees if such information became public and generally accessible. Tacora requests a sealing order in relation to the confidential exhibit in order to protect the personal compensation information contained therein and avoid this distraction. To grant this relief, the court must be satisfied of the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as modified by *Sherman Estate v. Donovan*, 2021 SCC 25, 72 C.R. (7th) 223, at paras. 38 and 43, having regard to:

a. The important public interest in the openness of courts and whether it poses a serious risk to some other important public interest;

b. Whether the order sought is necessary to prevent the risk to the other identified public interest because alternative measures are not available; and

c. As a matter of proportionality, the benefits of the sealing order outweigh its negative effects.

[160] Confidential Exhibit "C" contains individual compensation information and the amount of the proposed KERP payments for each eligible employee. Employees have a reasonable expectation that their names and salary information will be kept confidential. Conversely, disclosing this information could create a distraction for key employees who need to be focused right now on the company's restructuring efforts. Protecting the sensitive personal compensation information of the employees is an important public interest that should be protected. The sealing order is necessary in order to protect the privacy rights of Tacora's employees while permitting the court to consider the details of the KERP. As a matter of proportionality, the benefits of sealing Confidential Exhibit "C" outweigh its negative effects.

[161] Courts have applied the *Sierra Club* and *Sherman Estate* tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents. See, for

example, *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347, 90 C.B.R. (6th) 102, at paras. 23–28; see also *Just Energy Corp, Re*, 2021 ONSC 1793 at paras. 123–24. Courts have previously granted sealing orders in respect of individual compensation arrangements relating to key employee retention plans. See *Bridging Finance*, at paras. 23–28; *Golf Town Canada Holdings Inc (Re)*, Initial Order issued September 14, 2016 [Court File No. CV-16-11527-00CL] at para. 64; *Acerus Pharmaceuticals Corporation et al (Re)*, Amended and Restated Initial Order issued February 3, 2023 [Court File No. CV-23-00693595-DDCL].

[162] Certain documents were agreed as between the parties to be designated as confidential for purposes of the examinations. Some of the documents were referred to during the examinations and a very few of them were referred to in the factums filed on these motions. This is real time litigation and the 3 C's of the Commercial List encourage parties to find practical solutions to allow cases to move forward expeditiously, as was done here through the agreement to a confidentiality protocol. The court was advised that, with the possible exception of one profit figure, none of the information from the confidential exhibits is relevant to the issues before the court. The confidentiality designations are primarily in respect of personal information.

[163] Thus, the practical solution that was adopted by the parties, of redacting the references to these exhibits in the materials filed with the court, was appropriate. Leave is granted for those filed materials to remain in redacted form. I do not believe that I have made reference in this endorsement to any of the redacted confidential information, but I invite counsel to alert the court immediately if there are any concerns in that regard.

Should the Court Approve the Solicitation Order?

[164] The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a solicitation process prior to or in the absence of a plan of compromise and arrangement. See *Nortel Networks Corporation (Re)*, 55 CBR (5th) 229, at paras. 47–48.

[165] Section 36 of the CCAA sets out certain factors to be considered by the Court in approving a sale. Section 36 does not directly address the factors a court should consider when determining whether to approve a solicitation process; however, such criteria can be evaluated in light of the considerations that will ultimately apply when seeking approval of a sale transaction, including whether the process is reasonable in the circumstances, whether the Monitor approved the process, and the extent to which the creditors were consulted. See *Brainhunter Inc (Re)*, 2009 CanLII 72333 at paras. 16–17.

[166] In *Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107, 33 C.B.R. (6th) 60, at paras. 20–21, the court considered the following additional factors in approving a CCAA SISP:

a. the fairness, transparency and integrity of the proposed process;

b. the commercial efficacy of the proposed process in light of the specific circumstances; and

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c. whether the sales process will, in the circumstances, optimize the chances of securing the best possible price for the assets for sale.

[167] The *Walter Energy* factors have been cited with approval in subsequent decisions, including the recent CCAA proceedings of *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1631 at para. 9 and *Bron Media Corp (Re)*, 2023 BCSC 1563 at para. 41.

[168] The Solicitation Process was developed by Greenhill in consultation with the Monitor, and provided to the company's secured creditors for feedback. The Solicitation Process will be run by Greenhill with assistance from the company's counsel and with the oversight of the Monitor.

[169] The Monitor has recommended that this court approve the Solicitation Process, as it believes the Solicitation Process: (a) provides for a broad, open, fair and transparent process; (b) provides for an appropriate level of independent oversight; (c) should encourage and facilitate bidding by interested parties; (d) is reasonable in the circumstances; and (e) should not discourage parties from submitting offers.

[170] In these circumstances, it is appropriate for the court to approve the Solicitation Process and grant the Solicitation Order, with the change requested by the AHG that the court not only authorizes but also direct the company and its advisors to immediately commence the Solicitation Process.

Final Disposition

[171] For the foregoing reasons, the ARIO and Solicitation Order shall issue in the forms signed by me today.

Kimmel J.

Date: October 30, 2023

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TAB 12

CITATION: *Indiva Limited et al.*, 2024 ONSC 3426
COURT FILE NO.: CV -24-722044-00CL
DATE: 20240613

2024 ONSC 3426 (CanLII)

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN BANKRUPTCY

RE: *Indiva Limited et al.*, Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Mike Shakra, Thomas Gray and Milan Singh-Cheema*, Counsel for the Applicants

Lance Williams and Ashley Bowron, Counsel for SNDL Inc. (secured creditor and proposed DIP lender)

Marc Wasserman, Martino Calvaruso and Tiffany Sun, Counsel for PricewaterhouseCoopers Inc. (PwC)

Michael McTaggart, PwC, Proposed Court Appointed Monitor

HEARD: June 13, 2024

ENDORSEMENT

[1] The Applicants, Indiva Limited, Indiva Amalco Ltd., Indiva Inc., Vieva Canada Limited and 2639177 Ontario Inc., bring this Application for relief under the *CCAA*.

[2] Today, they seek first day relief in the form of an order:

a. declaring that the Applicants are companies to which the CCAA applies;

b. appointing PwC as Monitor;

c. approving a DIP Facility up to a principal amount of $900,000;

d. a stay of proceedings for an initial period of not more than 10 days;

e. relief from securities law requirements to call an annual meeting of shareholders, and in respect of certain securities reporting obligations; and

f. granting an Administration Charge up to a maximum of $400,000, a DIP Lender's Charge up to a maximum of $900,000 plus interest, fees and expenses, and a

[19] DIP financing may be approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.

[20] It is important that an applicant meet the criteria in section 11.2(1) as well as those in section 11.2(4). (See CanWest *Publishing Inc., Re*, 2010 ONSC 222 ("*CanWest*") at paras. 42-44.)

[21] I am satisfied that the Applicants are facing a liquidity crisis and the Cash Flow Statement appended to the Pre-Filing Report of the Proposed Monitor shows that financing even on an interim basis is required to fund these proceedings. I am satisfied that the proposed advances during the initial 10 day stay period are reasonably necessary for the continued operations of the Applicants during that short period.

[22] I observe that both the Proposed Monitor and SNDL as senior secured creditor are supportive of the DIP Facility, and corresponding charge. I also observe that the Proposed Monitor is of the view that the economic terms of the DIP Facility are appropriate, reasonable in the circumstances, and consistent with market rates and other terms. I specifically observe that the interest rate is relatively high, although only incrementally so as against the existing financing facility already in place. The DIP Facility and corresponding charge are approved.

[23] The Court has jurisdiction to grant an administration charge under section 11.52 of the *CCAA*. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor. (See *CanWest*, at para. 54.)

[24] The administration charge sought for the initial 10-day period meets this test and is appropriate. It is supported by the Proposed Monitor.

[25] The Court has jurisdiction to grant a directors' charge under section 11.51 of the *CCAA*, provided notice is given to the secured creditors who are likely to be affected by it. To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise. They seek a priority directors' charge, ranking subordinate to the administration charge.

[26] The Monitor supports the Applicants' request for the directors' charge. I am satisfied it is appropriate here.

[27] The directors' charge is approved.

[28] The charges do not prime the security interest of any creditor not on notice of today's hearing.

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TAB 13

CITATION: *Pride Group Holdings Inc. et al.*, 2024 ONSC 2026
COURT FILE NO.: CV-24-00717340-00CL
DATE: 20240409

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CKEDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRIDE GROUP HOLDINGS INC. and those entities listed in Schedule "A" hereto

RE: Pride Group Holdings Inc., et al., Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Leanne Williams, Rachel Nicholson and Puya Fesharaki*, for the Applicants
Raj Sahni, for the Directors and Officers
Olivia Mann-Foster, for Paccar Entities
Jeffrey Levine, for Roynat Inc. and The Bank of Nova Scotia
Stuart Brotman, for The Lending Syndicate
Shaun Parsons, for TD Equipment Finance Canada
John Salmas, for Bank of Montreal
Marc Wasserman, Harvey Chaiton and Blair McRadu, for Mitsubishi HC Capital
Brendan Bissell, for Versafinance US Corp.
Edmond Lamek, for Triumph Business Capital
Rania Hammad and Lee Nicholson, for MOVETRUST and Boat Capital LP
Elaine Gray and Kim Gage, for Daimler Truck Financial Services Canada Corporation and Daimler Truck Financial Services USA LLC
John MacDonald and Tracy Sandler, for RBC as Financial Service Agent
Caroline Descours, for Regions Bank, Regions Equipment Finance Corporation and Regions Commercial Equipment Finance LLC
Jamey Gage and Trevor Courtis, for Bennington Financial Corp.
Heather Meredith, for National Bank of Canada
Pamela Huff, Chris Bur, Daniel Loberto and Kevin Wu, for the Monitor, Ernst & Young Inc.

HEARD: April 5, 2024

ENDORSEMENT

[1] This is the comeback hearing directed by Chief Justice Morawetz in the Endorsement and Initial Order of March 27, 2024.

[2] The Applicants seek an amended and restated initial order (the "ARIO") that, among other things:

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e. there is a commitment fee of $200,000.

[24] The DIP Facility is to be secured by a Court-ordered charge (the "DIP Lenders' Charge"), and it requires that an Intercompany Advances Charge also be granted to secure all payments made after the date of the ARIO by one Pride Entity to another in favour of the entity advancing such amount.

[25] I am satisfied that the DIP Facility is necessary to maintain for the time being the business of the Applicants as a going concern, and that the terms are appropriate and competitive in the circumstances. I am also satisfied that the proposed DIP Lenders' Charge should be approved. It is, not surprisingly, a condition of the DIP Facility.

[26] This Court has jurisdiction pursuant to section 11.2 of the *CCAA* to approve interim financing and grant a corresponding charge in an amount that the Court considered appropriate.

[27] DIP financing will be ordered where the benefits of financing to all stakeholders outweigh potential prejudice to some creditors. Even where it can be established that a creditor may be prejudiced, this factor is only one factor to be considered in equal measure with the other factors set out in section 11.2(4): *Re AbitibiBowater Inc.*, 2009 QCCS 6453 at paras. 16 and 37; *League Assets Corp. (Re),* 2013 BCSC 2043 at para. 51; and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49(f).

[28] For all of the above reasons, I am satisfied that the factors set out in section 11.2(4), and the section 11.2(1) factors enumerated by the court in *CanWest Publishing Inc.*, 2010 ONSC 222, have been satisfied here. Clearly, the DIP Facility will enhance the prospects of a viable compromise or arrangement being made. Notice has been given to secured creditors and service has been effected on all known affected parties. The Monitor supports both the DIP Facility and the corresponding DIP Lenders' Charge.

[29] Finally, the DIP Lenders' Charge will not prime any valid and enforceable security interest of third-party financiers in specific vehicle and lease collateral or any valid and enforceable mortgage in favour of a third-party mortgagee, which rank in priority to the Syndicate Lenders' Security.

[30] No viable restructuring is possible without the DIP Facility, and the business of the Pride Entities is already in serious jeopardy. Additional and immediate funding is critical. The quantum of that funding has been calculated in good faith by the Applicants with the active involvement of the Monitor. Given the number of lenders with security interests in assets of the Pride Group, the state of its operations and its books and records (which impair any due diligence by any third party lender), as well as the significant involvement of the Syndicate Lenders in the discussions leading up to the CCAA filing and their willingness to provide interim financing, it is far from clear that there would be any other viable alternatives, let alone any alternatives on commercially competitive terms.

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TAB 14

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775

Date: 20111107
Docket: S117098
Registry: Vancouver

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

And

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

And

In the Matter of Pacific Shores Resort & Spa Ltd., Westerlea Sales Consulting Ltd., Aviawest Resorts Inc., Ocean Place Holdings Ltd., Fairfield Ventures Inc. and Parkside Project Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	D.K. Fitzpatrick
Appearing on behalf of the Monitor:	S. Dvorak
Counsel for Fisgard Capital Corporation:	A.A. Frydenlund S. Stephens
Counsel for Unsecured Loan Holders:	D. Toigo
Counsel for Water's Edge Rental Pool Creditors:	K.S. Campbell
Counsel for bcIMC Construction Fund Corp.:	C.D. Brousson
Place and Date of Hearing:	Vancouver, B.C. November 2 and 4, 2011
Place and Date of Judgment:	Vancouver, B.C. November 7, 2011

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> (*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.

[49] I will address each of the factors listed in s. 11.2(4):

a) at this time the petitioners are seeking to continue the stay for a further five weeks until December 11, 2011, which is not an inordinate amount of time given the ambitious task ahead of them. Nevertheless, in my view it is essential that they be given this breathing room to explore restructuring options. The parties and the Monitor can assess their progress by that time to determine whether a continuation from that time forward is appropriate.

b) regarding management, as I have stated above, in my view the current management of the business is acting in good faith and with due diligence. They appear to be in the best position to potentially come to a solution given their expertise and the complexities involved. They have taken immediate steps to address cash flow difficulties in terms of the operational costs. I would also add that no party has submitted that the present management team be replaced by, for example, a Chief Restructuring Officer or that the Monitor should be granted further powers to address any deficiencies in that respect.

c) it goes without saying that bcIMC does not support current management. However, a substantial number of other stakeholders do support the management team, including BCC, who has a significant financial stake in the matter given its second mortgage on Parkside Resort. Fisgard does

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not support management either. However, I am of the view that this position should be discounted substantially given that it is fully secured on Pacific Shores Resort.

d) the DIP financing is necessary in the circumstances to allow the Group's operations to continue. Without it, this proceeding cannot go forward. In that respect, it will enhance the prospects of a viable compromise or arrangement.

e) I have already discussed the nature and value of the Group's assets. Allowing the Group to continue can only serve to maintain the existing goodwill in the Group's business. It is well acknowledged that a receivership would have disastrous consequences in relation to the ability to market the units.

f) material prejudice is the most substantial argument of bcIMC and Fisgard in opposition to the DIP financing. I accept that the imposition of the charge may prejudice them in the event that the assets are not sufficient to pay their first mortgages, although that seems more unlikely in respect of Fisgard. Nevertheless, the materiality of the charge is questionable, particularly since the secured lenders have expressed an intention to continue the operations of Pacific Shores and Parkside Resorts respectively – which would in turn result in any receiver obtaining priority borrowings and which would erode the security in the same manner as DIP financing. The DIP financing will allow operations to continue, which will maintain the goodwill and enhance values in the meantime. In these circumstances, I am satisfied that the benefits of DIP financing outweigh any potential prejudice to the secured creditors, particularly bcIMC: see *United Used Auto & Truck Parts Ltd. (Re)* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), Tysoe J. at para. 28.

I would note that material prejudice to secured creditors is only one factor and is to be considered in equal measure with the others listed in

2011 BCSC 1775 (CanLII)

s. 11.2(4). It is not, as submitted by Fisgard, the case that as a matter of law the court cannot impose DIP financing over the objections of a secured creditor if there is prejudice to that secured creditor, particularly in light of the statutory test.

g) I would note that the Monitor in its first report, dated October 31, 2011, agrees that the current offer of Fisgard is the most favourable to the petitioners and the Monitor supports the granting of an Order approving DIP financing and the imposition of a DIP charge for that purpose.

2011 BCSC 1775 (CanLII)

Conclusions

[50] I wish at this time to address the argument of Fisgard that a *CCAA* proceeding is not appropriate in respect of these Resorts since they are real estate developments.

[51] There are numerous cases which have considered this issue including *Cliffs Over Maple Bay*; *Encore Developments Ltd. (Re)*, 2009 BCSC 13, 52 C.B.R. (5th) 30; and *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145, 52 C.B.R. (5th) 47, to name a few. Yet those cases are clearly distinguishable from the present circumstances. In those cases, there were undeveloped or partially completed real estate projects and the courts found that it was more appropriate for the secured creditors to realize on those assets in the usual manner.

[52] In *Forest & Marine*, at para. 26, the Court of Appeal clearly drew the distinction between that situation and one where there is an active business being carried on within a complicated corporate group. The latter situation is exactly what we are dealing with here.

[53] Despite the setbacks in their business, the petitioners wish to continue their operations within the *CCAA* for the purpose of developing and presenting a plan to their creditors. This is consistent with the fundamental purpose of the *CCAA* as has been expressed in many cases of this court and our Court of Appeal: see, for

TAB 15

CITATION: Field Aviation Company et al, 2026 ONSC 3498
COURT FILE NO.: BK-26-03382861-0032/ BK-26-03382853-0032
DATE: 20260612

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

2026 ONSC 3498 (CanLII)

RE: In the Matters of the Notices of Intention to Make a Proposal of Field Aviation Company Inc. and Field Aviation East Ltd.

BEFORE: Justice J. Dietrich

COUNSEL: *Rachel Nicholson, Ines Ferreira*, for Field Aviation Canada Inc., Field Aviation East Ltd.,

Sean FitzPatrick, for AM Union District 140,

Bevan Brooksbank, Ryan Laity, for UK Research and Innovation,

Joseph Latham, David Wiseman, for Wells Fargo Bank, National Association,

Edmond Lamek, for Draken Europe,

Mike Noel, for PAL Aerospace Ltd.,

Kevin Caldwell, for Riveron Management Services, LLC,

Danny Duy Vu, for Bombardier Inc., in the Montréal Proceeding (Court File No: 500-17-107954-193),

Maureen Ward, for Aerotek ULC o/a Aerotek and Actalent, in the Brampton Proceeding (Court File No. CV-26-00003636-0000)

Noah Goldstein, Dean Pearlman, for the Proposal Trustee, AlixPartners Restructuring Inc.,

Michael S. Shakra, Thomas Gray, of the Proposal Trustee, AlixPartners Restructuring Inc.,

HEARD: June 12, 2026

ENDORSEMENT

Introduction

reasonable in the circumstances and not opposed by any person. The proposed Administration Charge is appropriate in the circumstances is approved.

[33] The Field Entities also seek approval of a Director's Charge in the amount of $725,000. The Court has authority to grant the Directors' Charge under section 64.1 of the BIA and may order that this charge rank in priority over the claim of any secured creditor of the Field Entities. I am satisfied that the Director's Charge is appropriate here, given that the continued involvement of the remaining directors and officers, who provide highly specialized skillsets, is critical to a successful SISP or any proposal under the BIA and the directors have indicated they are not prepared to continue to serve unless protected by the Directors' Charge. Further, the Proposal Trustee supports the proposed Directors' Charge and is satisfied, based on the estimates provided in the First Report of potential liabilities, that the amount of such charge is appropriate.

[34] In deciding whether to grant a SISP Order, the Court is to consider the factors which a court will take into account when considering the approval of a proposed sale: see *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 at para 6 [***CCM Master v blutip***]. In an NOI proceeding this includes the factors set out in s. 65.13 of the BIA (see above). As well, as set out in *Danier Leather Inc (Re),* 2016 ONSC 1044 at para 22-24, when approving a sales process involving a stalking horse agreement, the Court has considered the following four factors: Is a sale transaction warranted at this time? Will the sale benefit the whole "economic community"? Do any of the debtors' creditors have a bona fide objection to a sale of the business? Is there a better viable alternative?

[35] The implementation of the SISP is the primary purpose of these NOI Proceedings. It is a condition of obtaining funding under the DIP Term Sheet. The SISP Milestones were developed based on the amount of funding under the DIP Facility and in consultation with Wells, the CRO and the Proposal Trustee. The timelines are short, however, they are consistent with other court-approved one phase SISP timelines (see for example: Order of Justice J Dietrich dated February 17, 2026, *Re JointCraft Inc*, Court File No. BK-26-003318323-0031 at Schedule "A", para 7; Order of Justice Cavanagh dated April 9, 2024, *Re Hempsana Inc*, Court File No. BK-24-03054351-0031 at Schedule "B", para 3; Order of Justice Cavanagh dated August 26, 2024, *Re Wholly Veggie Inc*, Court File No. BK-24-03115669-0031 at Schedule "A", para 11; Order of Justice Cavanagh dated October 28, 2022, *Re Flowr Corporation*, Court File No.CV-22-00688966-00CL at Schedule "A", para 6; and Order of Justice Kimmel dated June 1, 2023, *Re Chalice Brands Ltd*, Court File No. CV-23-00699872-00CL at Schedule "A", para 3.

[36] The Stalking Horse Bid will establish a floor price for the SISP, thereby guaranteeing some recovery for the Field Entities' stakeholders. At the same time, the SISP will subject the Field Entities to an open marketing process that permits higher and better offers to replace the Stalking Horse Bid. The SISP will also allow certain Field Canada employees to maintain their employment working on the Draken Program, while leaving open the possibility of a going concern transaction that preserves jobs moving forward. The Proposal Trustee, CRO and Wells support all aspects of the SISP. The Stalking Horse Agreement was negotiated at arm's length between sophisticated parties. The two transactions contemplated under the

2026 ONSC 3498 (CanLII)

TAB 16

CITATION: Danier Leather Inc. (Re), 2016 ONSC 1044
COURT FILE NO.: 31-CL-2084381
DATE: 20160210

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.

BEFORE: Penny J.

COUNSEL: *Jay Swartz* and *Natalie Renner* for Danier

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

Linda Galessiere for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

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[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

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Re Brainhunter, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.,* 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.,* 2010 SCC 60 at para 24; *Re Indalex Ltd*., [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd*., 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

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