Court File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

MOTION BRIEF OF THE MONITOR
(**Motion for CCAA Termination Order**)

DATE OF HEARING: NOVEMBER 10, 2021, AT 9:00 A.M.
BEFORE THE HONOURABLE MR. JUSTICE KROFT

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THE QUEEN'S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

MOTION BRIEF OF THE MONITOR

INDEX

PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. The Notice of Motion with the Proposed Order attached as Appendix "1";

2. Thirty-Fourth Report of the Monitor dated November 3, 2021 (the "Thirty-Fourth Report"); and

3. Such further and other materials as counsel may advise and this Court may permit.

PART II STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

Tab

1. QBR 2.03, 3.02(1), 16.04, 16.08, 37.06(6) and 37.08(2)

2. *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (hereinafter "CCAA") s. 11.

3. *Cline Mining Corporation, Re*, ONSC [Comm List], Toronto Court File No. CV14-10781-00CL, order of Morawetz J. dated July 30, 2015

4. Manitoba Court of Queen's Bench Model Receiver Discharge Order

5. *Walter Energy Canada Holdings Inc, Re*, 2018 BCSC 1135

6. *Bul River Mineral Corp, Re*, 2015 BCSC 113

PART III LIST OF POINTS TO BE ARGUED

1. This motion is for Orders:

   (a) validating and abridging the time for service of the Notice of Motion and supporting materials such that the motion is properly returnable on November 10, 2021, at 9:00 a.m. and dispensing with further service; and

   (b) terminating these CCAA Proceedings, granting the requested releases and extending the stay to the CCAA Termination Time subject to the conditions set out herein; and

   (c) approving the Thirty-Fourth Report and the activities described therein.

2. The key points to be argued on this motion are as follows:

   (a) *Validating Service:* An order validating and abridging the time for service should be granted because the service effected and notice provided has been sufficient to bring these proceedings to the attention of the recipients;

   (b) *Termination Of Proceedings*: The Applicants have achieved the purpose of these proceedings through a sale of substantially all of their Assets and near-complete implementation of the Plan of Arrangement, and these CCAA proceedings should therefore be terminated on the terms set out in the Order; and

   (c) *Approving Reports and Activities*: The stakeholders have had a reasonable opportunity to review and take issue with the Thirty-Fourth Report and the activities described therein. The Report should be approved.

A. Validating Service

3. Notwithstanding the ordinary requirements of service under the QBR, this Court has authority to abridge the time requirements, to validate defective service or even dispense with service where necessary in the interest of justice.

(**Tab 1** – QBR 2.03, 3.02(1), 16.04, 16.08, 37.06(6) and 37.08(2))

4. The Notice of Motion was served on all parties listed in the service list (prepared in accordance with paragraph 66 of the Initial Order) on November 3, 2021.

5. It is respectfully submitted that the service effected and notice provided has been sufficient to bring these proceedings to the attention of the recipients and it is appropriate in the circumstances for this Honourable Court to validate service and proceed with the hearing of the relief requested.

B. These Proceedings Should Be Terminated and the Releases Granted

6. The Applicants have achieved the purpose of these CCAA proceedings by concluding a sale for substantially all of their assets, and distributing the sale proceeds first to the creditors and subsequently to the Unitholders through the implementation of their court-approved Plan of Arrangement. Although there have been delays and the Monitor still awaits a number of Clearance Certificates from CRA, the final steps required to fully implement the Plan are at hand. Upon the Monitor filing the Case Completion Certificate, these proceedings should be terminated and the Monitor and the Chief Process Supervisor (7088418 Canada Inc. o/a Grandview Advisors (the "**CPS**")) should be discharged on the terms outlined in the Order (the "**Termination Order**").

7. The CCAA does not provide a mechanism for formally declaring the end of CCAA proceedings. However, courts regularly grant applications to terminate CCAA proceedings where the proceedings have achieved their intended purpose.

(**Tab 3** – See *Re Cline Mining Corporation*, ONSC, Toronto Court File No. CV14-10781-00CL, order of Morawetz J. dated July 30, 2015)

8. Such is the case here. The Applicants' Plan has been substantially implemented and their assets and business sold. All Plan Implementation Steps have been completed except for:

(a) Receipt from the CRA of three of the required Clearance Certificates remain outstanding; and

(b) Steps 19 to 23 of the Schedule B Steps in the Plan. Steps 19 to 22 require no time to complete: these steps include setting off intercompany debts between AGI and AGIF, repaying any AGI-AGIF Payables, the return of capital by AGI to AGIF, and deeming the satisfaction of proven claims against AGIF (which have already been paid). Step 23 is the Final Distribution to Unitholders.

9. Within two business days following receipt of the remaining outstanding Clearance Certificates, the Monitor will notify the Service List and post notice on the Website to confirm that the Clearance Certificates have been received. The Monitor will then complete the remaining Post-Plan Implementation Date Transactions and Schedule B Steps and make the Final Distribution.

10. The CCAA Termination Order contemplates that once the Final Distribution is made, the Monitor will serve upon the Service List a certificate (the "**Case Completion Certificate**") certifying that the Final Distribution has been made, which will signify that it is the appropriate time to terminate these CCAA Proceedings as the administration of these Proceedings has been completed. This is similar to the discharge process for Court appointed Receivers where the discharge and release is granted conditionally upon filing of a Receiver's Certificate once any outstanding duties have been attended to.

(**Tab 4** - Manitoba Court of Queen's Bench Model Discharge Order)

11. This proposed process reduces the costs to the estate as the Monitor is not required to incur the costs associated with another appearance before the Court to terminate the CCAA Proceedings.

12. As is common practice in CCAA proceedings, the Termination Order provides for the comprehensive release and, where appropriate, discharge of parties (the "**Released Parties**") including:

(a) *The Restructuring Support Parties*: the Monitor and its affiliates and its counsel, the CPS, and all external auditors, financial advisors, and legal counsel;

(b) *The Arctic Glacier Released Parties*: The Arctic Glacier Parties, the Trustees, the Directors, and the Officers, and all present or former

employees who filed or could have filed indemnity claims against the Applicants or the Directors and Officers; and

(c) *The Derivative Released Parties*: any person claiming to be liable derivatively through any of the foregoing persons.

13. The releases are reasonable and appropriate in the circumstances of the Termination Order. Given the length of time it has taken to implement the Plan, the Monitor is of the view that it is appropriate to ensure that the releases in the CCAA Termination Order parallel those in the Plan.

14. The Court is empowered to grant the releases pursuant to its authority under section 11 of the CCAA. Releases in favour of the debtors, their restructuring support parties, and derivative claimants are "typically granted" in CCAA proceedings.

(**Tab 5** – *Re Walter Energy Canada Holdings Inc*, 2018 BCSC 1135 ["*Walter*"] at para 33)

15. This Court has already approved releases substantially similar to those provided for in the Termination Order. The releases in the Termination Order are nearly identical to the releases approved by the Applicants' creditor and this Court in the Applicants' Plan of Arrangement. The releases in the Plan cover all activities through the implementation of the Plan; the Termination Order ensures that such releases continue to be effective regarding all activities related to these CCAA proceedings up to the termination date.

16. The releases reflect the substantial contributions made by the Released Parties to the successful outcome of these CCAA proceedings. Courts have held that such releases will be appropriate consideration for parties, including debtors and their advisors, who have made necessary and tangible contributions to the outcome of CCAA Proceedings.

(**Tab 6** – *Re Bul River Mineral Corp*, 2015 BCSC 113 at paras 83-88; *Walter* at paras 33-34)

17. The Applicants submit that the other terms of the CCAA Termination Order are reasonable and consistent with the relief needed to bring these lengthy CCAA proceedings to a close. It is appropriate to grant the CCAA Termination Order at this time because:

(a) the Applicants have achieved their stated purpose of identifying a purchaser for substantially all of their assets and business and distributing the sale proceeds to creditors;

(b) in keeping with the restructuring goals of the CCAA, the Purchaser is now operating the Applicants' former business as a going concern;

(c) the Applicants have completed the Claims Process and the Unitholder Claims Process and all claims identified through the Claims Process and the Unitholder Claims Process have been resolved;

(d) the vast majority of the proceeds of sale have been distributed to the Unitholders;

(e) a Final Distribution of the sale proceeds will be completed, pursuant to the terms of the Applicants' Plan;

(f) the Applicants have duly complied with their obligations and carried out their responsibilities under the CCAA and the Orders of this Court; and

(g) the Monitor has filed its Thirty-Fourth Report outlining its compliance with its duties.

C. Approval Of Monitor's Reports And Activities

18. In accordance with the practice that has developed, the stakeholders have had a reasonable opportunity to review and take issue with the Thirty-Fourth Report and the activities described therein and, absent any significant objection, the Report should be approved by this Honourable Court.

CONCLUSION

19. It is respectfully submitted that this Honourable Court ought to grant the proposed order as it is consistent with the underlying purposes of the CCAA and will benefit the Applicants' estate and stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2021.

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TAB 1

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

EXTENSION OR ABRIDGMENT

General powers of court

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where order may be made

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Exception

16.04(1.1) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

M.R. 11/2018

Effective date of service

16.04(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

Service dispensed with

16.04(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date the order is signed, for the purpose of the computation of time under these rules.

VALIDATING SERVICE

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

M.R. 11/2018

Exception

16.08(2) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

Time for service

37.06(6) Where a motion is made on notice, the notice of motion shall be served at least four days before the date on which the motion is to be heard.

Immediate hearing where urgent, etc.

37.08(2) In a case of urgency or where otherwise appropriate, the judge or master may proceed to hear the motion.

TAB 2

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

TAB 3

Court File No. CV14-10781-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE REGIONAL	)	**THURSDAY, THE 30TH**
	)	
SENIOR JUSTICE MORAWETZ	)	**DAY OF JULY, 2015**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

Applicants

CCAA TERMINATION ORDER

THIS MOTION made by Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "**Applicants**") for an Order, *inter alia*, (a) terminating these proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"); and (b) discharging FTI Consulting Canada Inc. ("**FTI**") as the Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Matthew Goldfarb sworn July 24, 2015 (the "**Goldfarb Affidavit**"), filed, the Sixth Report of the Monitor dated July 24, 2015 (the "**Sixth Report**"), filed, the affidavit of Paul Bishop sworn July 24, 2015 (the "**Bishop Affidavit**"), filed, the affidavit of Michael De Lellis sworn July 24, 2015 (the "**De Lellis Affidavit**"), filed, and on hearing the submissions of counsel for each of the Applicants, the Monitor and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Bradley Wiffen sworn July 28, 2015, filed:

SERVICE

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

TERMINATION OF CCAA PROCEEDINGS

2. **THIS COURT ORDERS** that the CCAA Proceedings are hereby terminated.

3. **THIS COURT ORDERS** that the Directors' Charge (as defined in the Initial Order of this Court granted December 3, 2014 (the "**Initial Order**")) and, subject to the payment in full of all amounts owing to the beneficiaries of the Administration Charge (as defined in the Initial Order), the Administration Charge shall be and are hereby terminated, released and discharged.

APPROVAL OF ACTIVITIES

4. **THIS COURT ORDERS** that the activities and conduct of the Monitor prior to or on the date hereof in relation to the Applicants and these CCAA proceedings are hereby ratified and approved.

5. **THIS COURT ORDERS** that the Fifth Report of the Monitor dated May 27, 2015, the Sixth Report and the activities and conduct of the Monitor described in each of such reports, are hereby approved.

APPROVAL OF FEES AND DISBURSEMENTS

6. **THIS COURT ORDERS** that the fees and disbursements of the Monitor in the amount of $33,807.89 (for the period from March 16, 2015 to July 19, 2015 inclusive, and including Harmonized Sales Tax) and the Monitor's fees and disbursements, estimated not to exceed $10,000, to complete its remaining duties and the administration of these CCAA Proceedings through to the date hereof, all as set out in the Bishop Affidavit and the Sixth Report, are hereby approved.

7. **THIS COURT ORDERS** that the fees and disbursements of Osler, Hoskin & Harcourt LLP, in its capacity as counsel to the Monitor ("**Osler**"), in the amount of $64,026.18 (for the period from February 29, 2015 to July 24, 2015 inclusive, and including Harmonized Sales Tax) and Osler's fees and disbursements, estimated not to exceed $7,500, in connection with the completion by the Monitor of its remaining duties and the administration of these CCAA Proceedings through to the date hereof, all as set out in the De Lellis Affidavit and the Sixth Report, are hereby approved.

DISCHARGE OF THE MONITOR

8. **THIS COURT ORDERS AND DECLARES** that the Monitor has duly and properly satisfied, discharged and performed all of its obligations, liabilities, responsibilities and duties in compliance and in accordance with the CCAA Proceedings, the terms of the Applicants' plan of compromise and arrangement, as may be further amended, restated, modified or supplemented from time to time, all Orders of this Court made in the CCAA Proceedings, the CCAA or otherwise, save and except as set out in paragraph 13 hereof.

9. **THIS COURT ORDERS AND DECLARES** that FTI is hereby discharged as Monitor effective immediately and shall have no further duties, obligations or responsibilities as Monitor, save and except as set out in paragraph 13 hereof.

10. **THIS COURT ORDERS** that the Monitor, Osler and each of their respective affiliates and officers, directors, partners, employees and agents (collectively, the "**Released Parties**") are hereby released and discharged from any and all claims that any person may have or be entitled to assert against the Released Parties, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of this Order in any way relating to, arising out of or in respect of the CCAA Proceedings or with respect to their respective conduct in the CCAA Proceedings (collectively, the "**Released Claims**"), and any such Released Claims are hereby released, stayed, extinguished and forever barred and the Released Parties shall have no liability in respect thereof, provided that the Released Claims shall not include any claim or liability arising out of any gross negligence or willful misconduct on the part of the Released Parties.

11. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against any of the Released Parties in any way arising from or related to the CCAA Proceedings, except with prior leave of this Court on at least seven days' prior written notice to the applicable Released Parties and upon further Order securing, as security for costs, the full indemnity costs of the applicable Released Party in connection with any proposed action or proceeding as the Court hearing the motion for leave to proceed may deem just and appropriate.

12. **THIS COURT ORDERS** that, notwithstanding any provision of this Order and the termination of the CCAA Proceedings, nothing herein shall affect, vary, derogate from, limit or amend any of the rights, approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, any other Order of this Court in the CCAA Proceedings or otherwise, all of which are expressly continued and confirmed.

GENERAL

13. **THIS COURT ORDERS** that, notwithstanding the discharge of FTI as Monitor and the termination of the CCAA Proceedings, the Court shall remain seized of any matter arising from these CCAA Proceedings including in respect of the Unresolved Claim (as defined in the Goldfarb Affidavit), the IRS Claim (as defined in the Goldfarb Affidavit), and any other matters arising from or that are incidental to these CCAA Proceedings, and each of the Applicants, FTI and any interested party that has served a Notice of Appearance in these CCAA Proceedings, shall have the authority from and after the date of this Order to apply to this Court to address matters incidental to these CCAA Proceedings notwithstanding the termination thereof. Following the termination of these CCAA Proceedings, FTI is authorized to take such steps and actions as it deems necessary to complete or address matters ancillary or incidental to its capacity as Monitor, including in respect of the Unresolved Claim and the IRS Claim, and FTI is authorized to continue to act as foreign representative of these CCAA Proceedings in the United States until the completion of the Chapter 15 Proceedings (as defined in the Goldfarb Affidavit). With respect to FTI completing or addressing any such ancillary or incidental matters or acting as foreign representative: (i) the Applicants shall pay FTI and its counsel their respective reasonable fees and disbursements incurred in connection therewith at their standard rates and charges; and (ii) FTI shall continue to have the benefit of the provisions of the CCAA, all Orders made in the CCAA Proceedings, or otherwise, including the Administration Charge and all

rights, approvals, protections and stays of proceedings in favour of FTI in its capacity as Monitor.

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

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JUL 30 2015

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

Applicants

Court File No.: CV14-10781-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

CCAA TERMINATION ORDER

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Lawyers for the Applicants

TAB 4

THE QUEEN'S BENCH
WINNIPEG CENTRE

THE HONOURABLE	)	WEEKDAY, THE #
	)	
JUSTICE	)	DAY OF MONTH, 20YR

B E T W E E N:

PLAINTIFF

Plaintiff,

- and –

DEFENDANT

Defendant.

DISCHARGE ORDER

THIS MOTION**,** made by [RECEIVER'S NAME] in its capacity as the Court-appointed receiver (the "Receiver") of the undertaking, property and assets of [DEBTOR] (the "Debtor"), for an Order discharging the Receiver and other relief was heard this day at _____, Manitoba.

ON READING the Report of the Receiver dated _____ **[add any other supporting materials]**, and on hearing the submissions of counsel for the Receiver, no one else appearing although served as evidenced by the Affidavit of [NAME] sworn [DATE], filed[1]:

1. THIS COURT ORDERS that the activities of the Receiver, as set out in the Report, are hereby approved.

[1] This model order assumes that the time for service does not need to be abridged.

2. THIS COURT ORDERS that the fees and disbursements of the Receiver and its counsel, as set out in the Report, are hereby approved.

3. THIS COURT ORDERS that, after payment of the fees and disbursements herein approved, the Receiver shall pay the monies remaining in its hands to [NAME OF PARTY][2].

4. THIS COURT ORDERS that upon payment of the amounts set out in paragraph 3 hereof and upon the Receiver filing a certificate substantially in the form attached hereto as Schedule A to this Order certifying that it has completed the other activities described in the Report, the Receiver shall be discharged as Receiver of the undertaking, property and assets of the Debtor, provided however that notwithstanding its discharge herein (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein, and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of [RECEIVER'S NAME] in its capacity as Receiver.

5. THIS COURT ORDERS AND DECLARES that [RECEIVER'S NAME] is hereby released and discharged from any and all liability that [RECEIVER'S NAME] now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of [RECEIVER'S NAME] while acting in its capacity as Receiver herein, save and except for any gross negligence or wilful misconduct on the Receiver's part. Without limiting the generality of the foregoing, [RECEIVER'S NAME] is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings, save and except for any gross negligence or wilful misconduct on the Receiver's part[3].

6. THIS COURT ORDERS AND DECLARES that no action or other proceeding shall be commenced against the Receiver, including its officers, directors, employees, solicitors and agents

[2] This model order assumes that the material filed supports a distribution to a specific secured creditor or other party.

[3] If this relief is being sought, stakeholders should be specifically advised, and given ample notice.

and assigns in any way arising from or related to its capacity or conduct as Receiver, except with prior leave of this Court on notice to the Receiver, and upon such terms as this Court may direct.

_____

I, [NAME], of the firm of [NAME] hereby certify that I have received the consents as to form of the following parties:

[INSERT]

As directed by the Honourable [INSERT]

SCHEDULE A

THE QUEEN'S BENCH
WINNIPEG CENTRE

E T W E E N:

PLAINTIFF

Plaintiff,

- and –

DEFENDANT

Defendant,

RECEIVER'S DISCHARGE CERTIFICATE

A. _____ was appointed Receiver ("Receiver") of all of the assets, property and undertaking of the Defendant [INSERT NAME OF DEBTOR] ("Debtor") pursuant to an Order of the Court of Queen's Bench dated _____ ("Receivership Order");

B. Pursuant to the Discharge Order of this Court pronounced _____ ("Discharge Order") the Receiver has paid out any net realizations as directed by the Discharge Order and completed the administration of the Debtor's estate;

C. Unless otherwise indicated the Receiver's Certificate shall have the same meaning as given to them in the Discharge Order.

THE RECEIVER CERTIFIES the following:

1. The Receiver has paid the net proceeds in accordance with the Discharge Order and in particular:

[INSERT PARTICULARS OF PAY OUT]

2. The Receiver has completed the outstanding activities described in the Report and completed its administration of the Debtor's estate.

DATED at _____, Manitoba, this ____ day of _____, 2020.

_____ in its capacity as Receiver of _____

Per:_____

TAB 5

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2018 BCSC 1135

Date: 20180709
Docket: S1510120
Registry: Vancouver

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

And

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

And

In the Matter of a Plan of Compromise and Arrangement of New Walter Energy Canada Holdings, Inc., New Walter Canadian Coal Corp., New Brule Coal Corp., New Willow Creek Coal Corp., New Energybuild Holdings ULC

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Marc Wasserman Patrick Riesterer
Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	Tevia Jeffries
Counsel for Warrior Met Coal, LLC	Matthew Nied
Counsel for the United Steelworkers, Local 1-424:	Stephanie Drake
Counsel for KPMG Inc., Monitor:	Peter Reardon Vicki Tickle

Place and Date of Hearing/Judgment with Reasons to Follow:	Vancouver, B.C. July 3, 2018
Place and Date of Written Reasons:	Vancouver, B.C. July 9, 2018

INTRODUCTION

[1] This is the final chapter of these *Companies' Creditors Arrangement Act,* R.S.C. 1985, c C-36, as amended (the “CCAA") proceedings.

[2] These proceedings began approximately two-and-a-half years ago. The realizations from the significant assets of the petitioners, now called the “New Walter Canada Group”, consisted primarily of coal mining assets located in British Columbia and the United Kingdom.

[3] The main issue within the proceedings was the distribution of asset recoveries in light of various claims advanced by the stakeholders. Those stakeholders include the unionized workers in British Columbia, represented by the United Steelworkers, Local 1-424 (the “USW”), the United Mine Workers of America 1974 Pension Plan and Trust (the “1974 Plan”) and Warrior Met Coal, LLC (“Warrior”).

[4] After significant contested proceedings, appeals filed and extensive negotiations between the New Walter Canada Group and all stakeholders, assisted by the CRO and the Monitor, a settlement was reached in September 2017. The provisions of the Settlement Term Sheet, as defined and approved in accordance with my earlier reasons should be read with these reasons: *Walter Energy Canada Holdings, Inc. (Re),* 2017 BCSC 1968 (the “Settlement Reasons”).

[5] After the completion of further procedures in these *CCAA* proceedings, the petitioners now apply for a Sanction Order. In these reasons, I have capitalized certain terms, as set out in various court orders and related documents, including the plan.

BACKGROUND

[6] On December 7, 2015, this Court granted an Initial Order in favour of the initial corporate group comprising the petitioners, called “Old Walter Canada Group”, pursuant to the *CCCA*. The stay granted in the Initial Order has been extended numerous times in this proceeding and presently expires December 31, 2018.

[7] The realization procedures undertaken and results achieved by Mr. Aziz, the CRO, have been very successful. At present, the Monitor estimates that approximately $61.5 million will be available in December 2018 for distribution to the stakeholders.

[8] On August 16, 2016, this Court granted a Claims Process Order to establish a claims process to be implemented by the Old and New Walter Canada Groups.

[9] As stated above, in September 2017, the New Walter Canada Group, the 1974 Plan and Warrior agreed to a Settlement Term Sheet that resulted in a full and final settlement of most of the outstanding issues among these stakeholders in these *CCAA* proceedings: Settlement Reasons at paras. 11-30. The Settlement Term Sheet is a complex document, but can be generally summarized as providing for:

(a) payment in full of Proven Claims of Affected Creditors;

(b) payment of $13 million to the 1974 Plan in full satisfaction of its claim against the New Walter Canada Group within these proceedings;

(c) payment of $75,000 to the USW in respect of its costs in these proceedings; and

(d) a substantial distribution to Warrior in respect of its Deemed Interest Claim in full satisfaction of that Claim.

[10] On October 6, 2017, the Settlement Term Sheet was approved by this Court, after considering in particular that the Affected Claims (which included those advanced by the USW) were to be paid in full: Settlement Reasons at paras. 31-42.

[11] The implementation of the Settlement Term Sheet was conditional upon the completion of the claims process to identify any further claims. On August 15, 2017, this Court granted a Claims Process Amendment Order to identify remaining Restructuring Claims and Directors/Officers Claims that had not yet been solicited.

[12] That further claims process has now been completed and the New Walter Canada Group and the Monitor have determined that there are sufficient funds to make the distributions contemplated in the Settlement Term Sheet after establishing certain reserves for Disputed Claims and other matters. In particular, it is anticipated that there will be sufficient Available Funds to pay the Affected Creditors in full, pay the 1974 Plan Settlement Amount and pay the USW Settlement Amount with significant sums remaining to pay a large amount to Warrior in respect of its Deemed Interest Claim.

[13] On May 28, 2018, the New Walter Canada Group filed its Original Plan, as developed by it in consultation with the Monitor and certain stakeholders. On May 31, 2018, the New Walter Canada Group obtained a Meeting Order granting leave to file the Original Plan and authorizing certain amendments to the Original Plan, pursuant to s. 4 of the *CCAA*.

[14] A somewhat unusual aspect of the Meeting Order was that the New Walter Canada Group's class of unsecured creditors (including the Affected Creditors and Warrior) would be deemed to hold meetings and deemed vote their Claims in favour of the Original Plan or, if amended, any later filed plan. I considered that this was an expeditious manner to proceed since the Settlement Term Sheet provided for payment in full to the Affected Creditors and in light of Warrior's agreement to the Settlement Term Sheet. On May 21, 2014, such a deeming provision was granted by Justice Spivak in a *CCAA* meeting order where the affected creditors were similarly to be paid in full under the plan filed in those proceedings (*Re Arctic Glacier Income Fund*, The Queen's Bench, Winnipeg Centre, File No. CI 12-01-76323).

[15] The essential terms of the Original Plan were to implement what was contained in the Settlement Term Sheet, including payment in full of Proven Claims owed to Affected Creditors.

[16] The Meeting Order authorized the New Walter Canada Group to call the Creditors Meetings and outlined the notice that was to be provided to creditors regarding the meetings. On June 22, 2018, in advance of the deemed meetings, the

New Walter Canada Group amended the Original Plan, as I will describe in more detail below (the "Amended Plan"). The materials establish that the notice procedures in respect of the Amended Plan have been followed. The notice provisions included specific mailings to the Affected Creditors, specific notice to Warrior, posting of materials on the Monitor's website and newspaper notices.

[17] The notice to Affected Creditors included a request that any person with a concern regarding the Amended Plan should advise the Monitor of such concerns by June 25, 2018. Twelve such Affected Creditors did provide responses, but no person took exception to the substance of the Amended Plan or the meeting and voting process set out in the Meeting Order. For the most part, the responses were to express frustration in the delay of distribution.

[18] On June 27, 2018, the deemed meetings and voting took place:

(a) the consolidated class of creditors, comprised of all of the Affected Creditors, including Warrior with respect to its Shared Services Claim (the "Affected Creditors Class") was established to vote on the Amended Plan. The Affected Creditors Class were deemed to have met and voted unanimously in favour of a resolution to approve the Amended Plan; and

(b) Warrior was the only creditor entitled to vote its Deemed Interest Claim and it was deemed to have voted in favour of a resolution to approve payment of that Claim in accordance with the Amended Plan.

DISCUSSION

[19] Section 6(1) of the *CCAA* provides this Court with express jurisdiction to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the plan.

[20] The general requirements for court approval of a *CCAA* plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

See *Canadian Airlines Corp.,* 2000 ABQB 442 at para. 60, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9; *Sino-Forest Corp.,* 2012 ONSC 7050 at para. 51, leave to appeal denied, 2013 ONCA 456; *Bul River Mineral Corporation*, 2015 BCSC 113 at para. 40; *TLC The Land Conservancy of British Columbia, Inc.*, 2015 BCSC 656 at para. 47.

a) Has there been strict compliance with statutory requirements?

[21] I am satisfied that there has been strict requirements with all provisions of the *CCAA*. This is supported by the evidence of Mr. Aziz, the CRO, including that found in his most recent affidavit #23 sworn June 26, 2018.

[22] In addition, in its Nineteenth Report dated June 27, 2018, the Monitor states that to the best of its knowledge, the petitioners have met all *CCAA* requirements and complied with all court orders granted in this proceeding.

[23] Further, s. 6 of the *CCAA* has been complied with in terms of a sanction order being only available if the plan contains certain specified provisions concerning crown claims, employee claims and pension claims:

a) the Amended Plan satisfies the requirements of s. 6(3) because it provides that the Monitor shall, within six months after the Plan Sanction Date, pay in full, on behalf of the New Walter Canada Group, to Her Majesty in Right of Canada or any province all amounts of any kind that could be subject to a demand under s. 6(3) of the *CCAA* that were outstanding on the Filing Date and which have not been paid by the Plan Implementation Date;

b) the Amended Plan does not provide for payment of any "Employee Priority Claims" or "Pension Priority Claims" pursuant to ss. 6(5) and 6(6) of the *CCAA* because no such claims exist; and

c) the Amended Plan complies with s. 6(8) of the *CCAA* in that the New Walter Canada Group are distributing all their available assets to or on behalf of their creditors. No distribution is to be made on account of equity claims.

b) Has anything been done that is not authorized by the *CCAA*?

[24] Again, no issues arise in this respect. No stakeholder has raised any such concerns.

[25] Throughout these proceedings, the Monitor has updated the Court on the progress of the proceedings and its review of the activities of the petitioners, citing no irregularities. Indeed, on each stay extension application, the Monitor has advised that, in its view, the petitioners were acting in good faith and with due diligence throughout the course of these proceedings. See *Canwest Global Communications Corp. Re,* 2010 ONSC 4209 at para. 17.

c) Is the Amended Plan fair and reasonable?

[26] In the Settlement Reasons at paras. 31-42, I found the Settlement Term Sheet to be fair and reasonable. As the Amended Plan simply implements the terms of that document, it must necessarily follow, with one minor exception discussed below, that the Amended Plan is also fair and reasonable.

[27] This is not a restructuring plan by which the New Walter Canada Group is to re-emerge. The Amended Plan is simply a means by which the monies realized from the asset dispositions by the petitioners and the CRO will be distributed to the stakeholders. In that circumstance, in addition to the other benefits outlined in the Settlement Reasons:

(a) the Amended Plan will result in full payment of Proven Claims owed to Affected Creditors, which comprise the vast majority of the New Walter Canada Group's creditors. By any measure, such a result in an insolvency proceeding is rarely achieved;

(b) the Amended Plan will also resolve the heavily contested claim advanced by the 1974 Plan. The compromise of that claim at $13 million has been accepted by the 1974 Plan, a sophisticated litigant who no doubt has fully assessed the merits of doing so after receiving legal advice; and

(c) similarly, Warrior, another sophisticated litigant, has agreed to a compromise of its claim as against the Available Net Proceeds, having agreed that the settlement amount for the 1974's Plan's claim is to come from that fund, rather than detract from the full payment to the Affected Creditors.

[28] The only issue that arose in relation to the fairness and reasonableness of the Original Plan related to the releases provided for in Article 9, and specifically Article 9.1 entitled "CCAA Plan Releases".

[29] At the hearing on May 31, 2018, when the Meeting Order was sought, I questioned the New Walter Canada Group's counsel as to the appropriateness of the broad range of releases in the Original Plan and the naming of some of the releasees set out in Article 9.1. For example, the Original Plan provided for a general release in favour of the Financial Advisor, PJT Partners LP, despite that entity having only a limited role in the sales and solicitation process. In addition, there was an amorphous reference to an "auditor, financial advisor …. consultant, and agent" of the primary releasees, being the petitioners, the Monitor, the CRO and Directors and Officers of the petitioners

[30] In *Bul River*, I discussed the court's jurisdiction to approve a plan of arrangement that includes releases and relevant considerations in terms of whether such releases are fair and reasonable:

> [77] The *CCAA* does not contain any express provisions either permitting or prohibiting the granting of releases, including third party releases, as part of a plan of compromise or arrangement. Nevertheless, there is authority to the effect that the court may approve releases found in a plan of arrangement while exercising its statutory jurisdiction under the *CCAA*. The leading decision is *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (CanLII), leave to appeal to S.C.C. refused (2008), 390 N.R. 393 (note). At paras. 40-52 of *Metcalfe*, a plan containing third party releases was sanctioned. At para. 46, the court stated that such jurisdiction may be exercised where the releases are "reasonably related to the proposed restructuring".
>
> [78] The approach in *Metcalfe* was adopted in *Canwest* at paras. 28-30. The court in *Canwest* noted that third party releases should be the exception and not requested or granted as a matter of course: para. 29.
>
> [79] In *Kitchener Frame Ltd. (Re)*, 2012 ONSC 234 (CanLII), although in the context of a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the court summarized the requirements that would justify third party releases:
>
> > [80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify third-party releases are:
> >
> > a) the parties to be released are necessary and essential to the restructuring of the debtor;
> >
> > b) the claims to be released are rationally related to the purpose of the Plan … and necessary for it;
> >
> > c) the Plan ... cannot succeed without the releases;
> >
> > d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan...; and
> >
> > e) the Plan … will benefit not only the debtor companies but creditors generally.
>
> [80] *Metcalfe* has been applied in numerous decisions where third party releases have been approved: see, for example, *Sino-Forest Corp. (Re)*, 2012 ONSC 7050 (CanLII) at paras. 70-77; *SkyLink Aviation Inc. (Re)*, 2013 ONSC 2519 (CanLII) at paras. 30-33. In British Columbia, see *Angiotech Pharmaceuticals, Inc. (Re)*, 2011 BCSC 450 (CanLII) at para. 12, where the court sanctioned a plan that included releases in favour of various persons, including the monitor, financial advisors and the interim lender.
>
> [81] It remains the case that any person proposing releases in a plan of arrangement, and any party seeking a court order sanctioning or even supplementing such releases, must ensure, from the outset, that a proper rationale exists for them.

[31] In his affidavit, Mr. Aziz describes that, arising from concerns expressed by the Court, the Original Plan was amended to considerably narrow not only those persons who will be released, but also the scope of some releases. He states that,

broadly speaking, the Amended Plan now provides for full and final releases for three groups of releasees:

(a) The New Walter Canada Group Parties: the New Walter Canada Group, the Directors, the Officers, and all present and former Employees who filed or could have filed indemnity claims against the Old Walter Canada Group or the New Walter Canada Group, and all affiliates and legal counsel thereof;

(b) The Restructuring Support Parties: the Monitor, KPMG Inc., and its affiliates; the CRO; Philip L. Evans Jr., in his capacity as consultant to the Old and New Walter Canada Groups; the Financial Advisor, but only with respect to its activities regarding the sale and investor solicitation process conducted in connection with the SISP Order; and, all affiliates, partners, members and legal counsel thereof; and

(c) The Derivative Released Parties: any person claiming to be liable derivatively through any of the foregoing persons.

[32] The Monitor considers the releases contained in the Amended Plan to be fair and reasonable in the circumstances.

[33] I conclude:

a) the Restructuring Support Parties have made necessary and tangible contributions to this *CCAA* proceeding. As noted by all counsel, courts have routinely sanctioned releases in favour of third parties such as the monitor, legal counsel, financial advisors, and other parties retained to advise the petitioner(s) or the Court throughout the conduct of a *CCAA* proceeding and who, by doing so, contribute to the success of a *CCAA* proceeding;

b) the narrowing of the releases has resulted in a more focussed basis for the releases such that they are more rationally connected to the purposes of the *CCAA* and the Amended Plan given their respective contributions

toward this successful restructuring. For example, the release in favour of the Financial Advisor has been limited to its activities conducted in connection with the SISP Order. In addition, the Amended Plan is consistent with the scope of protections for the Financial Advisor set out in the SISP Order. The releases previously proposed for the "financial advisors, auditor, agents and consultants" were eliminated. The Amended Plan retained a release only for one consultant, Mr. Evans, who assisted the Old and New Walter Canada Groups throughout the sales process. Mr. Evans also assisted the New Walter Canada Group with respect to the Unresolved Claim and will continue to do so; and

c) the releases in favour of the New Walter Canada Group Parties are also typically granted. In addition, the Amended Plan does not release or discharge any petitioner from any Excluded Claim, any Director from any Claim that cannot be compromised pursuant to s. 5.1(2) of the *CCAA*, any releasee other than the petitioners and the Directors and Officers from liability for gross negligence or willful misconduct, or any releasee from any obligation created by or existing under the Amended Plan or any related document.

[34] The final factor raised by the New Walter Canada Group is that no stakeholder registered any objection to the releases in the Amended Plan. In this case, that factor can not be taken too far, where sophisticated parties agreed to those releases in both the Original Plan and Amended Plan and perhaps less sophisticated creditors were not concerned given that they expect full payment.

[35] It remains the case that, when exercising its jurisdiction, the Court must consider the appropriateness of any releases at two different junctures: firstly, whether it is appropriate to approve the filing of a plan, typically when a meeting order is sought (such as happened here); and secondly, when there is an application for a sanction order. In the latter circumstance, the court may determine that

releases are not fair and reasonable despite a plan having been approved by the creditors in accordance with the *CCAA* procedures.

[36] All of this is to say that it is incumbent upon the drafters of any *CCAA* plan to consider, *at the outset of that exercise*, the appropriateness of any releases sought and whether the necessary support is either before the court or can be put before the court at both junctures mentioned above. This will avoid any concerns or issues that may later develop either from a stakeholder or from the court while exercising its jurisdiction under the *CCAA* to provide oversight and safeguard all interests, whether formal objections are raised or not.

[37] I find that the releases in the Amended Plan are appropriate in the circumstances and do not detract from the overall fairness and reasonableness of the Amended Plan.

CONCLUSION

[38] The Sanction Order is granted on the terms sought, including that:

a) the Amended and Restated Plan of Compromise and Arrangement of the New Walter Canada Group dated June 22, 2018 is sanctioned and approved;

b) the New Walter Canada Group and the Monitor are authorized to take all steps necessary to implement the Amended Plan; and

c) the New Walter Canada Group and the Monitor are authorized to take such steps as may be necessary following the Plan Implementation Date to make distributions and complete such transactions as are contemplated by the Amended Plan, to seek an orderly wind-down or other process acceptable to the New Walter Canada Group for Energybuild, to complete the Claims Process, and to address any other matters that arise in connection with the *CCAA* Proceedings.

"Fitzpatrick J."

TAB 6

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bul River Mineral Corporation (Re),* 2015 BCSC 113

Date: 20150127
Docket: S113459
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 the *Business Corporations Act*, R.S.A. 2000, c. B-9

And

In the Matter of
Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation and Purcell Basin Minerals Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners, except Purcell Basin Minerals Inc.:	Jonathan B. Ross
Counsel for the Monitor, Deloitte Restructuring Inc.:	Tevia R.M. Jeffries
Counsel for Purcell Basin Minerals Inc. and CuVeras LLC:	William C. Kaplan, Q.C. Helen M.E. Sevenoaks Peter Bychawski

Place and Date of Hearing:	Vancouver, B.C. November 18, 2014
Place and Date of Oral Order/Result Given:	Vancouver, B.C. November 18, 2014
Place and Date of Judgment	Vancouver, B.C. January 27, 2015

INTRODUCTION

[1] The application is brought pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). This long-standing restructuring has been ongoing for over three and a half years now and, after much effort, the petitioners prepared a plan of compromise and arrangement, dated September 25, 2014, which was subsequently amended by the amendment addendum no. 1, dated October 29, 2014 (as amended, the "Plan"). The Plan has received a positive response from the petitioners' creditors and shareholders.

[2] The petitioners, including the newly-added party, Purcell Basin Minerals Inc. ("Purcell"), now apply for an order sanctioning the Plan. The petitioners also apply for an order extending the stay of proceedings to December 12, 2014 in order to allow for the implementation of the Plan.

[3] At the conclusion of the hearing, the orders sought were granted with reasons to follow. These are those reasons.

BACKGROUND

[4] Much of the background of this matter has been described in earlier reasons for judgment: *Bul River Mineral Corporation (Re)*, 2014 BCSC 645 and 2014 BCSC 1732. For the purposes of today's application, I will briefly summarize the facts.

[5] Ross Stanfield, who has since died, was the driving force behind the Stanfield Mining Group (the "Group"), which comprised all of the petitioners, save for Purcell. The Group carried on the business of developing a mining property situated near the Bull River in British Columbia, known as the Gallowai Bul River Mine (the "Mine"). The principal ore at the Mine is copper, although gold, silver and possibly feldspar deposits are also located in the area.

[6] The Group was effectively controlled by Mr. Stanfield, and later his estate (the "Estate"), by reason of holding all, or virtually all, of the voting common shares in the Group's parent companies, the petitioners Zeus Mineral Corporation ("Zeus Mineral") and Fort Steele Mineral Corporation ("Fort Steele Mineral"). The two

principal companies involved in the development and operation of the Mine on behalf of the Group are the petitioners Bul River Mineral Corporation ("Bul River") and Gallowai Metal Mining Corporation ("Gallowai"). Zeus Mineral and Fort Steele Mineral own the common shares in Bul River and Gallowai.

[7] Mr. Stanfield's dream of developing the Mine gave rise to concerted efforts to obtain funding from a large number of individuals beginning around the mid-1990s. This sales program would ultimately prove to be successful in raising over $220 million from approximately 3,500 individual investors. Those investors participated in the Group by way of preferred and sometimes common shares issued by Bul River and Gallowai.

[8] On May 26, 2011, this Court granted an initial order pursuant to the *CCAA* (the "Initial Order"). The stay of proceedings granted in the Initial Order has been extended by this Court from time to time. The course of the restructuring has not been, at times, without difficulty. The fundamental problem faced by the Group at the outset was whether it could be shown that there were proven resources at the Mine that would support the conclusion that the Mine was viable. In order to continue minimal operations at the Mine and also proceed with this development work, interim financing was necessary. Ultimately, that financing was provided by CuVeras LLC ("CuVeras") and CuVeras continues to financially support the Group to this time.

[9] CuVeras' involvement went beyond interim financing. In November 2011, CuVeras and the original petitioners signed a letter of intent. That document was replaced by a further letter of intent in March 2012 which addressed a possible restructuring. Following the resolution of a dispute concerning these arrangements, a letter of agreement was signed between the parties on May 23, 2014 (the "Letter of Agreement").

THE CLAIMS PROCESS

[10] On August 19, 2011, the court approved a claims process order authorizing the petitioners to conduct a claims process for the determination of any and all claims against the Group. The details of the claims process were discussed in *Bul*

River Mineral Corporation (Re), 2014 BCSC 1732 at paras. 25-28. What is important for the purposes of this application is that the claims process was to identify claims of not only trade creditors, but also equity investors of the petitioners (save for Purcell) holding preferred or common shares.

[11] The claims bar date, as amended, being October 26, 2011, has long since passed. Only a small number of claims were disputed. Following the issuance of the court's reason in relation to two of those claims (*Bul River Mineral Corporation*, 2014 BCSC 1732 at paras. 58-167), I was advised by counsel that all remaining disputed claims were settled. No creditor or shareholder has objected to the claims now admitted, whether by settlement or otherwise.

THE PLAN

[12] On May 28, 2014, this Court approved the Letter of Agreement, which laid the foundation upon which the Plan was later drafted.

[13] On September 25, 2014, the Plan was filed. The Plan sets out that Purcell is the corporate vehicle by which the restructuring is to be implemented. Fundamental to the restructuring is a compromise, settlement and payment of the claims so that the Group can emerge from the *CCAA* proceedings and bring the Mine into commercial production.

[14] At present, the petitioners (save for Purcell) are controlled by the Estate through a numbered company holding 100% and 99.9%, respectively, of the Class A voting common shares in Zeus Mineral and Fort Steele Mineral. Mr. Stanfield's grandson and sole beneficiary, George Timothy Hewison, controls that company. In addition, Lilieu Stanfield is the holder of one Class A voting common share. As stated above, Bul River and Gallowai, separately or together, own the shares of many other petitioners.

[15] There are a number of corporate petitioners within the Group, referred to as the "Estate Companies", although their status is unclear. No one seems to know if they are operating entities or if they hold any assets. In any event, the Estate

Companies are owned and controlled by the Estate and have been included in the Plan out of an abundance of caution.

[16] The corporate steps toward implementation of the Plan are as follows:

a) the Class A voting common shares held by the Estate in Fort Steele Mineral, Zeus Mineral and the Estate Companies are to be transferred to Purcell for $1.00;

b) as a result of these transactions, Purcell will hold all of the Estate's Class A voting common shares in these entities and thereby control Fort Steele Mineral and Zeus Mineral (and thereby Bul River, Gallowai and their respective subsidiaries);

c) the only other Class A voting common share held by Lilieu Stanfield will be cancelled;

d) all other securities, including all Class C, D, F and G preferred shares issued by Bul River and Gallowai, will be exchanged for shares in Purcell and then such preferred shares will be cancelled. All Class B and E shares will also be cancelled. As a result, the only shareholder of the various petitioners in the Group will be Purcell; and

e) Fort Steele Mineral, Zeus Mineral and Purcell will be amalgamated.

[17] As a result of these steps, Purcell and its shareholders (i.e., holders of "Purcell Shares") will then have the sole interest in Bul River and Gallowai, their subsidiaries, and the Estate Companies.

[18] The Plan contemplates two classes of creditors voting on the Plan:

(a) trade creditors, holding debt claims (the "Trade Creditors"); and

(b) preferred share claimants, holding Class C, D, F and G preferred shares in Bul River and Gallowai (the "Preferred Share Claimants").

[19] The Plan involves the distribution of Purcell Shares in satisfaction of the claims of the Trade Creditors and the Preferred Share Claimants, as well as entitlements to other persons involved in the restructuring, being CuVeras, Highlands Pacific Partners LLP ("Highlands"), and the Lacey Group.

[20] The entitlements of these other persons arise from the Letter of Agreement as follows:

a) CuVeras

As interim lender in the *CCAA* proceedings and sponsor of the Plan, CuVeras is entitled to notes payable by Purcell, defined as "Purcell Notes", in payment of the financing amounts (principal, interest and fees). This avoids the need to raise cash on the closing, whether by new investment or otherwise. Accordingly, the interim financing will be paid out and discharged as a result of the issuance of these Purcell Notes. CuVeras is also entitled to additional compensation pursuant to the Letter of Agreement by way of Purcell Shares equal to the principal value of the interim financing loans outstanding as at closing of the Plan (presently anticipated to be approximately $9.5 million which will represent 48.7% of the equity).

b) Highlands

Highlands, the manager of CuVeras, as interim financier in the *CCAA* proceedings, is entitled to Purcell Notes representing 7% of the enterprise value of Purcell and 2% of the Purcell Shares (reduced from 7% as discussed below). Those entitlements are a fee to compensate Highlands for its administration of the interim financing loan, its sponsorship of the Plan, its role in raising the exit financing and for the services it has provided to the Group over the course of its involvement in these proceedings.

c) The Lacey Group

The Lacey Group has been involved in the proceedings since the fall of 2011 when it advanced funds to the Group to repay the first interim lender. In addition, the Lacey Group has organized the CuVeras investor group, retained Highlands and was instrumental in funding CuVeras' sponsorship of the Plan. The Lacey Group was also involved in negotiating the Letter of Agreement, negotiating the Plan with CuVeras and the petitioners and raising the exit financing. Pursuant to the Letter of Agreement, the Lacey Group is to receive 15% of the Purcell Shares.

[21] The Plan contemplates, as required by the *CCAA*, that the Trade Creditors will be "paid in full". I will discuss this issue in more detail below.

[22] As mentioned above, there are a large number of preferred shareholders. Each of the four classes of preferred shares has a different share value. The Plan has ascribed redemption values to the various classes of shares to create a "Preferred Share Exchange Ratio", as follows: (i) Class C - $40, (ii) Class D - $25, (iii) Class F - $50, and (iv) Class G - $75.

[23] The Plan contemplates that each Preferred Share Claimant will receive a share class entitlement by a *pro rata* share entitlement to the Purcell Shares issued through the implementation of the Plan. Once the distributions to the other stakeholders have been determined (variable upon the amount of principal outstanding as at the closing date on the CuVeras interim loan) the total equity entitlement of the Preferred Share Claimants will be determined. Thereafter, a calculation will be made to determine their respective *pro rata* entitlement to the Purcell Shares. At present, it is anticipated that the Preferred Share Claimants will receive 20.3% of the equity, which represents a recovery of 4-5 cents on the dollar of claims.

[24] The Plan also contemplates a particular treatment for the holders of Class B non-voting common shares. Many of the Class B shareholders subscribed to their

shares at a time prior to the issuance of preferred shares on the assumption that their investment would enjoy priority over subsequent equity issuances. However, the Class B shareholders rank subsequent in priority to the preferred shareholders in the distribution of the assets of the petitioners who issued such shares. Accordingly, on a liquidation basis, the Class B shareholders would receive nothing. Arising from this background, it was Mr. Hewison's view, on behalf of the Group, and the view of the court-appointed monitor, Deloitte Restructuring Inc. (the "Monitor"), that this warranted, on the basis of fairness, that some consideration be paid to the Class B shareholders under the Plan.

[25] In these circumstances, Highlands gratuitously agreed to contribute 3% of its equity entitlement to Purcell Shares (originally 7%) to be distributed to the Class B shareholders so that no other stakeholders would be prejudiced. Additionally, Class B shareholders can participate at a higher level if there are "Surplus Shares" available under the Plan.

[26] Notwithstanding the fact that the Class B shareholders are receiving this gratuitous consideration under the Plan, the Plan did not provide that Class B shareholders could vote on the Plan. No issues arise from this circumstance as it is readily conceded that the Class B shareholders have no monetary interest in the Group that is being transferred to Purcell under the Plan.

[27] The Plan addresses the mechanism by which it is to be implemented. One of the challenges identified early on in these proceedings was the state, or rather disarray, of the original petitioners' records with respect to their shareholders. It was readily apparent that many of the records were out of date and likely incomplete or inaccurate.

[28] Given that the Plan contemplates a restructuring of the shareholdings and the issuance of new shares in Purcell, it was necessary to ensure that accurate information was on hand to ensure entitlement to shares being cancelled and entitlement to Purcell Shares being distributed under the Plan.

[29] Under the Plan, the Trade Creditors and the Preferred Share Claimants are required to deliver to Purcell a duly completed and executed "Share Direction Form". These forms provide confirmation of each eligible claimant's name, address and other information required by Purcell to create and maintain a share registry. The form also indicates each claimant's debt or equity entitlement under the Plan. This information is to be checked as against the information in the creditor list, as confirmed through the claims process, to ensure proper distribution.

[30] The deadline for the Trade Creditors and the Preferred Share Claimants to provide their Share Direction Form to Purcell is January 5, 2015. I am satisfied that this deadline should provide ample opportunity for claimants to complete the Share Direction Form and deliver it as required. In addition, directions were given by the court at the time of the hearing for further advertisement and notice to the claimants in terms of the requirement to deliver the Share Direction Form by the deadline.

[31] Given the state of the records, the petitioners and Purcell rightly anticipate that a number of the claimants will not provide the Share Direction Form, for any number of reasons. Corporate claimants may have gone out of business and individuals may have died and estates wound up. Others may not be interested in pursuing their claims. In that event, the Plan provides for the transfer of such "Surplus Shares" as follows: firstly, to the Class B shareholders to a maximum of 10% of the equity of Purcell; and secondly, the balance of any Surplus Shares to be distributed to the Preferred Share Claimants *pro rata* based on their existing entitlements under the Plan.

THE MEETING

[32] On September 30, 2014, the court granted an order adding Purcell as a petitioner and also granted a further order authorizing the petitioners to file the Plan and convene, hold and conduct meetings of creditors to vote in respect of the Plan. Those meetings took place on October 29, 2014 in Richmond, BC.

[33] At the meetings, the Plan was considered by the Trade Creditors and the Preferred Share Claimants. At that time, minor amendments to the Plan were tabled,

after due notice was given of the amendments. These amendments were considered by the Monitor to not prejudice the interests of the stakeholders.

[34] The Plan was overwhelmingly approved by the Trade Creditors and the Preferred Share Claimants by the requisite double majority vote. Of the Preferred Share Claimants, 1,438 votes were cast in favour (value $114,412,897) and one voted against (value $213,519). Of the 93 eligible Trade Creditors, 34 votes were cast in favour (value $965,682) and no votes were cast against the Plan.

POST-MEETING MATTERS

[35] Originally, the amount of the Trade Creditors' claim was $1,439,492. The Plan contemplated that 9% of the Purcell Shares would be allocated to the Trade Creditors, which was anticipated to be a premium since that amount would have been notionally valued at 7% of the illustrative enterprise value of Purcell.

[36] After the meeting, Purcell became aware that the claim of one creditor, Sun Life Assurance Company, had been incorrectly calculated as $175,235, instead of approximately $605,950. To address this issue, Highlands has agreed to allocate 2% of its original allocation (7%) to the Trade Creditors, such that the Trade Creditors will now receive 11% of the Purcell Shares.

[37] At the time of the hearing, all indications were that the petitioners would have sufficient cash on closing (anticipated to be December 9, 2014) to fund requirements under the Plan. The funds available on closing were intended to be used to satisfy the professional charges under the Administration Charge (as defined in the Initial Order), what are described as "Unaffected Claims", and also post-closing debts. In addition, the evidence established that funds were available to support operations into early 2015 when the corporate transactions were to be completed.

[38] By the time of the hearing, Purcell had made progress in terms of raising the exit financing. As of November 15, 2014, Purcell had raised approximately $700,000 in equity financing with additional subscriptions in progress of approximately $500,000. These amounts were being raised by Purcell toward meeting the

requirement of confirming $1.7 million in exit financing. The amounts raised are being held pending closing and Purcell expects to satisfy that condition. If this target is not met, the agreements in place provide that the monies raised to date will be returned to investors but, more likely, the monies needed will be raised through the subscription of shares.

DISCUSSION

[39] The statutory authority upon which the Plan may be sanctioned is s. 6(1) of the *CCAA*:

> **6.** (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
>
> > (*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company[.]

[40] Even if the requisite double majority vote is obtained, as it has been here, the court has discretion as to whether the plan of arrangement will be sanctioned. In *Canwest Global Communications Corp. (Re),* 2010 ONSC 4209 at para. 14, Pepall J. (as she then was) stated that the criteria to be satisfied are:

> (a) there must be strict compliance with all statutory requirements;
>
> (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
>
> (c) the Plan must be fair and reasonable.

Has there been Compliance with Statutory Requirements?

[41] In previous court orders granted in these proceedings, this Court declared that the petitioners (other than Purcell) qualified as debtor companies under s. 2 of the *CCAA* and that the total claims against them exceeded $5 million.

[42] In addition, paragraph (d) of the definition of "Unaffected Claim" in the Plan is such that any claim arising under ss. 6(3), 6(5) and 6(6) of the *CCAA* is not affected by the Plan. All Unaffected Claims are intended to be paid on closing.

[43] The only substantial issue that arises from the Plan is whether it has been shown that the Trade Creditors' claims are being "paid in full" such that the equity claims of the Preferred Share Claimants can be paid also. This requirement arises from the *CCAA*, s. 6(8):

> No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[44] The Trade Creditors are owed approximately $1.87 million. It seems straightforward that a cash payment to these creditors on closing would be sufficient to meet the requirements of s. 6(8) in respect of them being "paid in full". However, it is equally apparent here that there is no restructuring that can be achieved that would result in the generation of that amount of cash.

[45] The Plan is, as I have stated above, designed to deliver a percentage (11%) of shares in the new entity, Purcell, to the Trade Creditors in satisfaction of their claims.

[46] The preliminary question is whether issuance of shares to creditors can satisfy the requirement under s. 6(8).

[47] Counsel for the petitioners has indicated that they have been unable to find any case in which a court has considered the question as to whether the issuance of shares to creditors can satisfy the requirements of s. 6(8) of the *CCAA*. I have been referred to certain decisions that tangentially refer to plans being sanctioned in these circumstances: *Cheng v. Worldwide Pork Co.,* 2009 SKQB 186 at para. 19; *Scaffold Connection Corp. (Re)* (2000), 24 O.S.C.B. 106 at item 11 (Ont. Securities Comm.).

[48] The authorities suggest that shares can constitute the necessary payment to creditors. *Black's Law Dictionary*, 10th ed., does not provide a definition of the phrase "paid in full"; however, the word "pay" can support several definitions:

> pay, *n.* 1. Compensation for services performed, salary, wages, stipend, or other remuneration given for work done.
>
> …
>
> 2. The act of paying or being paid. 3. Someone considered from the viewpoint of reliability and promptness in meeting financial obligations. 4. Metaphorically, retribution or punishment.
>
> pay, *vb.* 1. To give money for a good or service that one buys; to make satisfaction <pay by credit card>. 2. To transfer money that one owes to a person, company, et <pay the utility bill>. 3. To give (someone) money for the job that he or she does; to compensate a person for his or her occupation; compensate <she gets paid twice a month>. 4. To give (money) to someone because one has been ordered by a court to do so <pay the damages>. 5. To be profitable; to bring in a return <the venture paid 9%>.
>
> [Emphasis added].

[49] In *People's Loan & Deposit Co. v. Grant* (1890), 18 S.C.R. 262 at 266, Ritchie C.J. (Strong, Fournier, Gwynne and Patterson JJ. concurring) discussed the (lack of) distinction between "paid", "fully paid" and "satisfied", indicating that if something is paid then it is necessarily satisfied:

> What possible difference is there between "until paid" and "until fully paid and satisfied?" If the money secured is "paid" is it not "fully paid?" And if the debt is" paid" is it not "satisfied?" The debt cannot be "paid" without being "fully paid and satisfied"; the terms "paid" and "fully paid and satisfied" are equivalent terms, the meaning being precisely the same, the only difference being that in the one case one word, and in the other four are used to express the same idea.

[50] Accordingly, if a debt is satisfied, it must be equally paid. As the Plan indicates, and as the Trade Creditors have agreed, they are to receive Purcell Shares in satisfaction of their debt, such that the debt is to be "paid in full".

[51] In the tax context, the court in *Johnson v. Canada*, 2010 TCC 321, citing *Gibson v. R.*, [1996] 1 C.T.C. 2105, held that the phrase "amount paid" in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) means more than the transfer of money alone. The court in *Johnson* stated:

> [15] Therefore, the phrase "amount paid" would include payments made by means of a transfer of a right or thing where the value of the right or thing can be expressed in terms of an amount owing, and is not limited to a transfer or delivery of money alone.

[52] One might argue that, since the value of Purcell Shares will likely fluctuate over time, the court would not be in a position to say that the debt owing to the Trade Creditors will have been "paid in full" by the transfer of those Purcell Shares. However, the volatility, or potential volatility, of share prices is not determinative as to whether, at closing, the payment "in full" will have occurred.

[53] In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, the Court was dealing with the appropriate standard of review to be applied in commercial arbitrated decisions made under the *Arbitration Act*, R.S.B.C. 1996, c. 55. The initial agreement being disputed was an agreement providing for the payment of finder's fees in shares. The parties disagreed as to the date on which to price the shares for payment and entered arbitration to resolve the dispute. The Court commented on the basis upon which such fees were to be paid in shares:

> [117] … There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.
>
> [118] By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated [in the appeal from the arbitration award indexed at 2011 BCSC 597 at para. 70]:

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.

[54] The petitioners concede, quite rightly, that Purcell's equity value on exiting the *CCAA* proceeding is difficult to quantify. In the future, the Purcell Shares will depend on a number of variables, including the price of copper that will apply over the operating life of the Mine.

[55] The petitioners have developed a number of studies including the Moose Mountain Scoping Study dated October 29, 2013 (the "Moose Mountain Study") which forecasts the pre- and post-tax value of the Mine based on certain projections of copper prices (US$3.70 per pound). The Plan provides an illustrative calculation of the way in which the Plan will operate and it imputes values based on the Moose Mountain Study. It was on this basis that the Plan originally provided for 9% of the Purcell Shares to be allocated to the Trade Creditors. Based on the copper price, an enterprise value of $19.5 million was established. This gave rise to a valuation for the Purcell Shares to be allocated to the Trade Creditors of $1,756,080 in respect of $1.43 million in debt. The premium was to compensate the Trade Creditors for the short-term illiquidity of the Purcell Shares to be allocated to them.

[56] That initial allocation has since required adjustment by reason of a change in the underlying assumption as to the price of copper. In addition, the amount of the Trade Creditors' claims has increased, as noted above, and is now approximately $1.87 million, rather than $1.43 million. This latter circumstance resulted in the Trade Creditors entitlement rising to 11% of the Purcell Shares, rather than 9%.

[57] It must be recognized at the outset that all valuations for the Mine, and hence the Purcell Shares, are conditional upon two fundamental events: firstly, Purcell's

access to funding to take the Mine to production; and secondly, a successful program that takes the Mine to permitting and production. Without those events occurring, all of the stakeholders who receive Purcell Shares will receive nothing and those holding Purcell Notes, being CuVeras and Highlands, will likely be the only parties to recover anything.

[58] It will be apparent that establishing value in the Purcell Shares will benefit both the Trade Creditors and the Preferred Share Claimants equally. At first blush, this would seem to offend the requirement that the Trade Creditors be paid *before* the Preferred Share Claimants. However, it remains the case that if full value for the Trade Creditors is established, then it is a reasonable conclusion that they will be paid. In short, if the plans for the Mine do not succeed, then none of the stakeholders benefit; conversely, if those plans succeed, then all benefit.

[59] Accordingly, I agree with the petitioners that satisfaction of the s. 6(8) requirement must be tied to the valuation of the Mine now such that the court must be able to reasonably conclude at this time that the valuation of the Purcell Shares to be received by the Trade Creditors will be sufficient to pay them "in full". This valuation or "enterprise value" is based on the Mine going into production such that a stream of income will be received over a seven year period (from 2016 to 2023) arising from the established or indicated ore reserves.

[60] The most current evidence as to the pricing of copper over the course of the project is found in the affidavit of Richard Goodwin, sworn November 15, 2014. Mr. Goodwin is a mining engineer and he reviewed a number of sources. At the outset, he acknowledged the difficulty in forecasting metal prices into the future, including variables arising from the fluctuation in the US/CDN dollar exchange rate. He indicates that the consensus is that copper will be priced in the range of US$3.20 per pound, and sometimes above, into the future. Mr. Goodwin also indicates that copper is predicted to improve over the present pricing of US$3.04 "for the near term" and "remain strong for the duration of the project."

[61] At US$3.20 per pound, Purcell would have an enterprise or equity value of $17.2 million after deducting the Purcell Notes. The Trade Creditors entitlement to the resulting equity value of $17.2 million would be 9.03%. Accordingly, the petitioners assert that the Trade Creditors' proposed 11% interest in the equity of Purcell maintains the cushion, based upon that calculation.

[62] There is no certainty in these projected values. However, after considering the evidence, in my view, there is a basis upon which to now reasonably conclude that there will be sufficient value in the Purcell Shares in the future with which to satisfy the debt owing to the Trade Creditors "in full". As the Court observed in *Creston Moly*, those values may increase or decrease based on actual events, but that does not detract from the valuation today for the purposes of satisfying the s. 6(8) requirement. It is of some importance that, knowing of this uncertainty, all of the Trade Creditors who voted on the Plan agreed to accept the Purcell Shares under the Plan and the inherent uncertainty that comes with them.

[63] Finally, the Monitor states that, to the best of its knowledge, the petitioners have complied with all requirements of the *CCAA*.

[64] Accordingly, I conclude that the petitioners have satisfied all statutory requirements arising under the *CCAA* for the sanctioning of the Plan.

Have the Petitioners Acted Contrary to the *CCAA*?

[65] Madam Justice Pepall observed in *Canwest* at para. 17 that, in making a determination as to whether any unauthorized steps have been taken by the petitioners, the court should rely on the evidence put forward by the parties and the reports of the monitor.

[66] Here, there is no suggestion by anyone that the petitioners have so acted. In its sixteenth report dated October 31, 2014, the Monitor confirms that the petitioners "have acted and continue to act in good faith and with due diligence." Further, the Monitor states that, to the best of its knowledge, the petitioners have not breached

any of the orders granted in these proceedings nor done or purported to do anything that is not authorized by the *CCAA*.

[67] I conclude that this requirement is satisfied.

Is the Plan Fair and Reasonable?

[68] The exercise of the court's discretion in this regard should be "informed by the objectives of the *CCAA*, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons": *Canwest* at para. 20.

[69] Relevant factors to be considered are set out in *Canwest* at para. 21 and include:

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

[70] I have already outlined the voting on the Plan which was overwhelmingly in favour of it. No creditor or other stakeholder now opposes the Plan.

[71] It is manifestly clear that if the petitioners' current assets and operations were liquidated through bankruptcy or receivership proceedings, the Trade Creditors would recover substantially less and likely none of the amounts owing to them.

[72] The Monitor states in its sixteenth report that, in the event of liquidation, it is not anticipated that stakeholders would receive a return on their debt or equity given the priority charge for the CuVeras interim financing and the Administration Charge granted in the Initial Order. Mr. Hewison agrees. Even in the unlikely event that the Trade Creditors recovered something after payment of realization costs, the

Preferred Share Claimants would receive nothing. The same can, of course, be said for the Class B shareholders who are anticipated to receive some Purcell Shares through the Plan.

[73] The Monitor states that the Plan is in the best interests of all of the petitioners' stakeholders.

[74] As I have outlined above, the Plan provides for distributions to CuVeras, Highlands and the Lacey Group. Brendan MacMillan, the president of CuVeras and managing director of Purcell swore an affidavit on November 18, 2014 providing evidence in support of those distributions, which supplements the already substantial evidence before the court as to the involvement of those entities in moving this proceeding along toward a successful restructuring. Mr. MacMillan outlines the substantial efforts of himself, Mike Moretti and Peter Lacey over the last three years in terms of negotiations, funding and fundraising, all of which has resulted in the petitioners being able to bring forth the Plan. Overall, I am satisfied with the level of compensation allocated to these entities for their efforts. Again, the positive vote by the stakeholders is reflective of their support for these payments.

[75] There is no suggestion that the original petitioners had any other commercially viable alternatives to the implementation of the Plan. Nor is there any evidence or suggestion that the implementation of the Plan would be oppressive or unfair to any of those petitioners' stakeholders.

[76] Finally, there is the matter of releases which are provided for in the Plan. Section 7.3 of the Plan provides for releases of certain claims: claims by the petitioners (other than Purcell) against legal counsel, financial advisors and the Monitor and its legal counsel; claims by various persons including those having an "Affected Claim" against the petitioners, the Monitor and CuVeras; and claims by the petitioners (other than Purcell) and stakeholders who benefit under the Plan against the Estate.

[77] The *CCAA* does not contain any express provisions either permitting or prohibiting the granting of releases, including third party releases, as part of a plan of compromise or arrangement. Nevertheless, there is authority to the effect that the court may approve releases found in a plan of arrangement while exercising its statutory jurisdiction under the *CCAA*. The leading decision is *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, leave to appeal to S.C.C. refused (2008), 390 N.R. 393 (note). At paras. 40-52 of *Metcalfe*, a plan containing third party releases was sanctioned. At para. 46, the court stated that such jurisdiction may be exercised where the releases are "reasonably related to the proposed restructuring".

[78] The approach in *Metcalfe* was adopted in *Canwest* at paras. 28-30. The court in *Canwest* noted that third party releases should be the exception and not requested or granted as a matter of course: para. 29.

[79] In *Kitchener Frame Ltd. (Re)*, 2012 ONSC 234, although in the context of a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the court summarized the requirements that would justify third party releases:

> [80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify third-party releases are:
>
> a) the parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) the claims to be released are rationally related to the purpose of the Plan … and necessary for it;
>
> c) the Plan ... cannot succeed without the releases;
>
> d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan...; and
>
> e) the Plan … will benefit not only the debtor companies but creditors generally.

[80] *Metcalfe* has been applied in numerous decisions where third party releases have been approved: see, for example, *Sino-Forest Corp. (Re)*, 2012 ONSC 7050 at paras. 70-77; *SkyLink Aviation Inc. (Re)*, 2013 ONSC 2519 at paras. 30-33. In British Columbia, see *Angiotech Pharmaceuticals, Inc. (Re)*, 2011 BCSC 450 at

para. 12, where the court sanctioned a plan that included releases in favour of various persons, including the monitor, financial advisors and the interim lender.

[81] It remains the case that any person proposing releases in a plan of arrangement, and any party seeking a court order sanctioning or even supplementing such releases, must ensure, from the outset, that a proper rationale exists for them.

[82] After some discussion at the hearing, the scope of the releases sought was clarified and, in some instances, restricted, beyond what had been originally sought in the court order. In particular, the release in favour of CuVeras was restricted to claims arising from the repudiation of the second letter of intent, which was the only apparent issue that had arisen between the parties. In addition, the release was clarified to exclude matters relating to fraud, wilful misconduct or gross negligence.

[83] The releases in favour of the Monitor were also the subject of some discussion at the hearing, particularly arising from the reasoning of the court in *Aveos Fleet Performance Inc.*, 2013 QCCS 5924 at paras. 20-38. Here, the draft order was amended to remove (i.e., not restate) any protections that were already afforded to the Monitor under the Initial Order which continued to apply. Finally, the provision in the draft order by which leave is required before any action is commenced against the Monitor and which referenced the ability to seek and obtain security for costs in respect of any future lawsuit was amended. Access to justice issues arise in that respect and, in my view, such a provision should not fetter the discretion of the court in that regard in terms of requiring or not requiring that such security be posted in the event of such an application.

[84] The remaining release to be addressed is that in favour of the Estate. The Estate, either through Mr. Hewison or the numbered company, owns the Class A common voting shares in Fort Steele Mineral, Zeus Mineral and the Estate Companies, as noted above. The release in favour of the Estate is being provided under the Plan in consideration for its agreement to transfer the Class A voting common shares to Purcell for $1.00. The release applies to any claims, suits or

actions that could be commenced against them by the petitioners and the various stakeholders (including the Trade Creditors and the Preferred Share Claimants) who benefit under the Plan. The release relates to any matter relating to the business and affairs of the petitioners (save for Purcell), the *CCAA* restructuring or the claims arising in the restructuring that are being compromised.

[85] I am satisfied that this third party release in favour of the Estate is appropriate. Firstly, the Plan could not be implemented with the transfer of the Class A common voting shares. Failing the Estate's willingness to transfer these shares for $1.00 in consideration of such a transfer, the petitioners indicate that the alternatives to address this situation would be more lengthy, complex and, perhaps, not even viable. Further, the Estate is not looking to receive any compensation for this transfer of shares beyond the release, so all other stakeholders will benefit in Purcell as the restructured entity.

[86] This release in favour of the Estate will affect potential claims against the Estate for any breaches of fiduciary duty by Mr. Stanfield. These claims would include claims by the Preferred Share Claimants and others in respect to representations made by him and perhaps others as part of the share fundraising efforts. Only one action was commenced against the Group and Mr. Stanfield, and it was dismissed. Despite the many years since it was apparent that preferred shareholders claims were not being met, no other actions were commenced prior to the *CCAA* filing. Mr. Stanfield's estate received probate in 2011 and no other claims appear to have surfaced.

[87] In any event, no stakeholder has objected to the releases sought despite the Monitor having specifically notified the Trade Creditors and the Preferred Share Claimants of the nature of and reasons for granting the releases in a letter dated October 1, 2014. This notification was forwarded to persons on the service list and the materials were also subsequently posted on the Monitor's website.

[88] In my view, all the releases set out in the Plan, and as set out in the sanction order, now amended, are rationally connected to the Plan and are necessary to its

implementation. I conclude that an application of all of the *Metcalfe* criteria supports approval of the releases, including that in favour of the Estate.

[89] I conclude and find that the Plan is fair and reasonable.

CONCLUSION AND DISPOSITION

[90] In conclusion, I am satisfied that the petitioners are in compliance with the requirements of the *CCAA* and that they have not acted contrary to the *CCAA* or any court orders granted in these proceedings.

[91] Finally, I am satisfied that the Plan is fair and reasonable. It represents years of steady and persistent efforts by the various participants, including Mr. Hewison, Mr. MacMillan and Mr. Lacey, in what were sometimes difficult and uncertain circumstances. Even so, they persevered and have now delivered to the various stakeholders who benefit under the Plan a chance to recover value where otherwise no recovery would be made. The stakeholders have decidedly endorsed those efforts and are prepared to participate in this new venture in accordance with the Plan.

[92] The order is granted sanctioning the Plan on the terms discussed at the conclusion of the hearing. In addition, the stay of proceedings is extended, as requested.

"Fitzpatrick J."