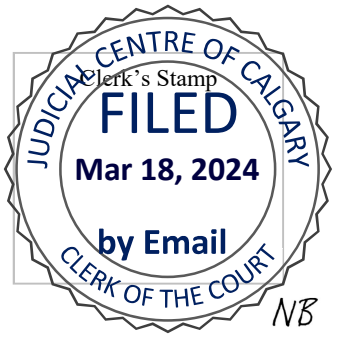
COM March 25, 2024



COURT FILE NUMBER	2401-01422
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
APPLICANTS	GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Barristers & Solicitors Brookfield Place, Suite 2700 225 6 Ave SW Calgary, AB T2P 1N2 Solicitors: Randal Van de Mosselaer / Julie Treleaven Telephone: (403) 260-7000 Facsimile: (403) 260-7024 Email: RVandemosselaer@osler.com / JTreleaven@osler.com File Number: 1247318

APPLICATION BEFORE THE HONOURABLE JUSTICE GILL ON MARCH 25, 2024 AT 2:00 PM ON THE COMMERCIAL LIST

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the applicants, Griffon Partners Operation Corp., Griffon Partners Holding Corp., Griffon Partners Capital Management Ltd., Stellion Limited, 2437801 Alberta Limited, 2437799 Alberta Limited, 2437815 Alberta Limited, and Spicelo Limited ("**Spicelo**") (collectively, the "**Applicants**").

2. The Applicants seek an Order, *inter alia*:

   (a) abridging the time for service of notice of this Application (if necessary), deeming service of notice of this Application to be good and sufficient, and declaring that there is no other person who ought to have been served with notice of this Application;

   (b) extending Spicelo's Stay Period, as defined in paragraph 14 of the Amended and Restated Initial Order granted in these proceedings by the Honourable Justice Johnston on February 7, 2024 (the "**ARIO**"), up to and including April 17, 2024, or such other date as this Court may deem appropriate; and

   (c) granting Alvarez & Marsal Canada Inc. ("**A&M**"), in its capacity as Monitor (as such term is defined below), enhanced powers with respect to Spicelo (the "**Enhanced Powers**") to:

      (i) to take possession of and exercise control over Spicelo's present and after-acquired assets, property and undertakings (the "**Property**"), and any and all proceeds, receipts and disbursements arising out of or from the Property, which shall include the Monitor's ability to abandon, dispose of, or otherwise release any interest in any of Spicelo's real or personal property, or any right in any immoveable;

      (ii) to receive, preserve and protect Spicelo's Property, or any part or parts thereof;

      (iii) to manage, operate and carry on the business of Spicelo, including the powers to enter into any agreements, incur any obligations in the ordinary

course of business, cease to carry on all or any part of the business, or cease to perform any contracts of Spicelo;

(iv) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel, financial advisors, investment dealers, the Transaction Agent (as such term is defined below) and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's Enhanced Powers conferred by the ARIO;

(v) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the business of Spicelo or any part or parts thereof;

(vi) to receive and collect all monies and accounts now owed or hereafter owing to Spicelo and to exercise all remedies of Spicelo in collecting such monies, including, without limitation, to enforce any security held by Spicelo;

(vii) to settle, extend or compromise any indebtedness owing to or by Spicelo;

(viii) to execute, assign, issue and endorse documents of whatever nature in respect of any of Spicelo's Property or business, whether in the Monitor's name or in the name and on behalf of Spicelo, for any purpose pursuant to the ARIO;

(ix) to undertake environmental or workers' health and safety assessments of the Property and operations of Spicelo;

(x) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to Spicelo, the Property or the Monitor (in relation to the exercise by the Monitor of the Enhanced Powers), and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further

that nothing in the ARIO shall authorize the Monitor to defend or settle the action in which the ARIO was made unless otherwise directed by this Court;

(xi) to market any or all of Spicelo's Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Monitor in its discretion may deem appropriate;

(xii) to sell, convey, transfer, lease or assign or otherwise enter into transactions respecting Spicelo's Property or any part or parts thereof out of the ordinary course of business with the approval of this Court and in each such case notice under subsection 60(8) of the Personal Property Security Act, RSA 2000, c. P-7 or any other similar legislation in any other province or territory shall not be required.

(xiii) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey Spicelo's Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(xiv) to report to, meet with and discuss with such affected persons as the Monitor deems appropriate all matters relating to Spicelo's Property, business, and these proceedings, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;

(xv) to register a copy of the ARIO and any other orders in respect of Spicelo's Property against title to any of Spicelo's Property;

(xvi) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Monitor, in the name of Spicelo;

(xvii) to enter into agreements with any trustee in bankruptcy appointed in respect of Spicelo, including, without limiting the generality of the foregoing, the

ability to enter into occupation agreements for any property owned or leased by Spicelo;

(xviii) to exercise any shareholder, partnership, joint venture or other rights which Spicelo may have; and

(xix) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

II. FACTS AND BACKGROUND

3. On August 25, 2023, the Applicants filed Notices of Intention to File a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**NOI Proceedings**"). On February 7, 2024, the Honourable Justice B. Johnston granted the Applicants an Initial Order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") converting the NOI Proceedings into the present CCAA proceedings. Further information regarding the Applicants, the reasons leading to these CCAA proceedings and the Applicants' intended restructuring plans is provided in the Affidavit of Daryl Stepanic sworn January 29, 2024 (the "**First CCAA Affidavit**").

> Affidavit of Daryl Stepanic, sworn March 15, 2024 (the "**Stepanic Affidavit**") at para 4.

4. Pursuant to the terms of the Initial Order, Alvarez & Marsal Canada Inc. was appointed Monitor of the Applicants (the "**Monitor**"), and an initial stay of proceedings until February 16, 2024 was granted (the "**Initial Stay**").

> Stepanic Affidavit at para 5.

5. On February 7, 2024, after granting the Initial Order, the Honourable Justice B. Johnston granted the Applicants' application for the ARIO. Pursuant to the ARIO, the Initial Stay was extended to March 6, 2024.

> Stepanic Affidavit at para 6.

6. On March 6, 2024, the Applicants brought an application (the "**Stay Extension Application**") to the Court of King's Bench Alberta (the "**Court**") for an Order extending the Stay Period up to and including April 17, 2024. Prior to the hearing of the Stay Extension Application, the Applicants and Trafigura Canada Limited ("**Trafigura**") and Signal Alpha C4 Limited ("**Signal**" and together with Trafigura, the "**Lenders**") agreed that the Stay Period for Spicelo would be extended to and including March 26, 2024, and the Stay Period for all other Applicants other than Spicelo would be extended to and including April 17, 2024. The Court then granted an Order granting the Applicants' Stay Extension Application, with the Stay Period for Spicelo extended to March 26, 2024, and all other Applicants to April 17, 2024.

   Stepanic Affidavit at para 7.

7. Since the granting of the Stay Extension Application, the Applicants have worked diligently and in good faith towards concluding the Sale and Investment Solicitation Process (the "**SISP**") for the benefit of their stakeholders. The Applicants have, among other things:

   (a) worked in conjunction with the Monitor and Alvarez & Marsal Canada Securities ULC (the "**Transaction Agent**") to finalize the Successful Bid (as such term is defined in the SISP); and

   (b) worked in conjunction with the Monitor and the Transaction Agent to prepare materials for the Court to approve the Successful Bid, which is currently scheduled to be heard on April 2, 2024.

   Stepanic Affidavit at para 8.

8. Further information regarding the Applicants, the Monitor, and the Transaction Agent's involvement with the SISP since the Initial Order and ARIO is provided in the First Report of the Monitor dated February 28, 2024.

   Stepanic Affidavit at paras 9.

III. ISSUES

9. This Bench Brief addresses the following issues:

   (a) This Court should grant an extension of the Stay Period for Spicelo; and

   (b) This Court should grant the Monitor Enhanced Powers as an alternative to Receivership Proceedings.

IV. LAW AND ARGUMENT

A. The Stay Period Should be Extended for Spicelo

10. Section 11.02(2) of the CCAA provides this Court with a broad jurisdiction to extend a stay of proceedings:

> 11.02 (2) Stays, etc. — other than initial application. A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> 11.02 (3) Burden of proof on application. The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

CCAA, s 11.02(2) **[Tab 1]**.

11. A stay of proceedings is appropriate where it maintains the status quo and provides the debtors the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

Target Canada Co (Re), 2015 ONSC 303 at para 8 **[Tab 8]**.

12. With respect to section 11.02(3), the good faith and due diligence requirements provided for by that subsection include observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the CCAA process.

North American Tungsten Corporation Ltd. (Re), 2015 BCSC at para 25 citing *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 70 **[Tab 7]**.

13. In this instance, the Applicants, including Spicelo, require additional time to conclude the SISP. It is in the parties' best interest to ensure the stay of proceedings continues beyond March 26, 2024, until such time as the Applicants can, with the assistance of the Monitor and Transaction Agent, return to court seeking approval of the Successful Bid under the SISP and then close that transaction, so as to maintain stability and to reduce the risk of creditors taking advantage of self-help remedies.

Stepanic Affidavit at para 10.

14. As discussed above, the Applicants hope to return to court on April 2, 2024 to seek approval of a transaction pursuant to the SISP, and therefore seek a stay of proceedings against Spicelo and its property until April 17, 2024, to provide stability and maintain the status quo in respect of the Applicants collectively until the necessary agreements for the Successful Bid have been executed, the transaction approved by this Court, and the transaction closed. Spicelo has acted, and is acting, in good faith and with due diligence, with absence of an intent to defraud.

Stepanic Affidavit at paras 11-12.

The Monitor should be granted Enhanced Powers

15. With the conclusion of the SISP approaching, it appears likely that a shortfall owing to the Lenders will still exist after the SISP proceeds are paid to the Lenders under their security. For this reason, the Applicants are seeking enhanced powers for the Monitor in order to

allow the Monitor to carry out many of the functions, duties and powers that would normally be carried out by the director of Spicelo, or a Receiver appointed over Spicelo, to ensure an orderly and efficient liquidation of Spicelo's assets (or so much thereof as may be necessary) to pay the Lenders their outstanding indebtedness in full.

Stepanic Affidavit at para 14.

16. Specifically, Spicelo is proposing that the Monitor, as court officer, be granted enhanced powers to convert Spicelo's common shares held in the capital of Greenfire Resources Inc. (the "**Greenfire Shares**") into the common shares of the newly combined company, Greenfire Resources Ltd. ("**New Greenfire**") and subsequently market and sell the New Greenfire shares as necessary to ensure that the Lenders' indebtedness is repaid in full pursuant to their security under the Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022.

Stepanic Affidavit at para 15.

17. It is clear that this Court has the jurisdiction to expand the powers of a monitor beyond what has been explicitly provided for in Section 23 of the CCAA and the standard model orders.

CCAA, ss 11, 23(1)(k) **[Tab 1]**.

18. Indeed, in recent years, courts have routinely granted the monitor expanded powers where it has been appropriate in the circumstances.

Arrangement relatif à Bloom Lake General, 2021 QCCS 2946 [*Bloom Lake*] **[Tab 3]**.
Ernst & Young Inc v Essar Global Fund Limited, 2017 ONCA 1014 **[Tab 4].**

19. It has become accepted that the monitor's powers may be expanded to the extent of allowing it to function as a "super monitor" under the CCAA. Such enhanced powers should be granted in furtherance of the remedial objectives of the CCAA, one of which is the maximization of creditor recovery.

Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc), 2020 QCCA 659 at paras 61-62, 68 **[Tab 2]**.

20. This is also consistent with the Court's analysis in *Bloom Lake*, where it affirmed that the Court may grant such powers as is necessary and appropriate to enable the monitor to fulfill its duties to, among other things, "further the valid purpose of the CCAA".

Bloom Lake at para 73 **[Tab 3]**.

21. Courts have provided super monitor powers, including to assume managerial control of the business while having direct powers over the assets, property and undertakings of the debtor company, particularly where it is necessary for such powers to be granted for the monitor to fulfill its statutory or other duties under the CCAA and initial order, or it is necessary to assist with the maximization of value and return to creditors.

Bloom Lake at para 73 **[Tab 3]**.
In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co (Endorsement) of Conway J. dated May 12, 2023 at para 13 **[Tab 6]**.
Harte Gold Corp (Re), 2022 ONSC 653 at paras 91-93 **[Tab 5]**.

22. Note that it is not only in the context of a pursuit of a restructuring plan when expanded powers may be granted. This was specifically addressed by the Court in *Bloom Lake*:

> The Court may add that the fact that we find ourselves in the context of CCAA proceedings involving the liquidation of the CCAA Parties as opposed to their restructuring does not matter.
>
> Liquidating CCAA proceedings have been accepted in practice and case law with an expanded view of the role of the monitor under such circumstances.

Bloom Lake at paras 92-93 **[Tab 3]**.

23. As discussed in further detail below, the Enhanced Powers granted to the Monitor are equivalent to the powers a receiver would have. However, dealing with the Spicelo assets within the CCAA proceedings (rather than in separate and competing Receivership proceedings) is preferrable for many reasons, most importantly to preserve value in Spicelo for the benefit of all stakeholders, which includes the Spicelo shareholder. The Monitor is already familiar with the Applicants and the relevant issues. There is nothing to be gained

by introducing another professional services firm to act as Receiver and another set of professional fees at this stage.

24. Crucially, the Lenders cannot point to any significant prejudice they would face by granting Enhanced Powers to the Monitor as opposed to appointing a receiver. As previously determined by this Court, and admitted by the Lenders in the affidavit of Dave Gallagher sworn in the NOI Proceedings on September 19, 2023, the Lenders are over-collateralized and thus will be paid out in full in any event.

Enhanced Powers as an Alternative to Receivership Proceedings

25. The Lenders argue that they should be permitted to appoint a receiver over Spicelo. They advanced the same argument during the NOI Proceedings on September 22, 2023, and in these CCAA proceedings on February 6, 2024.

26. The Applicants are concerned that this would be prejudicial to the Applicants and to the SISP process, for the following reasons:

    (a) A&M (the Monitor) has already been involved in the CCAA proceedings as Monitor for a month, and prior to these CCAA proceedings acted as proposal trustee in the NOI Proceedings for five months. As such, A&M is very familiar with the Applicants and the relevant issues. There is nothing to be gained by introducing another professional services firm and another set of professional fees at this stage. Importantly, A&M would have the exact same powers as a receiver, and (like a receiver) would be a court officer. Therefore, there is no reason to prefer a receiver, particularly when bringing in a new firm would incur significant costs (costs which, it should be noted, would not be borne by the Lenders because of their over-collateralized position);

    (b) as of the date of the Stepanic Affidavit, the SISP process is not complete. Given this, it is important that all the Applicants' assets be dealt with under these CCAA proceedings and be in the control of the Applicants (or A&M as "super-monitor"), rather than having some assets controlled by the Applicants/A&M, and other assets

controlled by a receiver appointed by the Lenders. Splitting up control of the assets in this way could create serious uncertainty and prejudice in concluding a transaction; and

(c) appointing A&M as "super-monitor" is the logical next step under the SISP. The SISP contemplated the marketing of the GPOC assets, and specifically excluded the Spicelo assets and shares from a sale process. Therefore, having the super-monitor take possession of and market the New Greenfire shares for sale, now that the SISP has been run, is the logical next step in the process of liquidating the Applicants' assets and paying the Lenders what they are owed in full.

Stepanic Affidavit at para 16.

27. Although the Lenders' views on this issue should be taken into consideration, the Lenders' views are not determinative – especially given that they are over collateralized and so their interests should not be primarily affected (it appears that they are going to be paid out in full in any event). There is considerable value in Spicelo beyond the Lenders' debt, which then engages the interests of other Spicelo stakeholders. Value needs to be preserved for the benefit of all stakeholders, in particular, the Spicelo shareholder.

28. This analysis was confirmed by this Court when the Lenders brought an application on September 22, 2023 to appoint a receiver over Spicelo. The Court did not grant the application to appoint a receiver at that time, explaining that the Lenders are not materially prejudiced because of their over-collateralized position. The Lenders continue to be over-collateralized, and thus they would not be materially prejudiced by appointing A&M as Monitor with Enhanced Powers instead of granting a receivership over Spicelo.

29. This Court subsequently reconfirmed this analysis on February 6, 2024, when the Lenders' reapplied to appoint a receiver over Spicelo. The Court did not grant this second application to appoint a receiver, explaining that the balance of convenience favoured letting the SISP run its course and that the appointment of a receiver at that time was neither just nor convenient.

30. In the intervening months nothing has materially changed, except that the Applicants and the Monitor have spent a lot of time and effort finalizing the Successful Bid under the SISP.

31. Since the Lenders were unsuccessful in their previous attempts to appoint a Receiver there is no reason for a different result here. The SISP process is nearing an end, and the Lenders will soon be paid out in full (between the SISP proceeds and the proceeds from the sale of the Greenfire Shares).

V. CONCLUSION AND RELIEF SOUGHT

32. For the foregoing reasons, the Applicants respectfully submit that this Court should grant the Applicants' Application in the form of the draft Order attached as Schedule "B" to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of March, 2024.

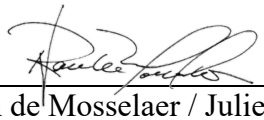

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TABLE OF AUTHORITIES

TAB	AUTHORITY
Legislation	
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
Jurisprudence	
2.	*Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)*, 2020 QCCA 659
3.	*Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946
4.	*Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014
5.	*Harte Gold Corp (Re)*, 2022 ONSC 653
6.	*In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co* (Endorsement) of Conway J. dated May 12, 2023
7.	*North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376
8.	*Target Canada Co (Re)*, 2015 ONSC 303

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to December 31, 2023

Last amended on April 27, 2023

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Form of applications

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

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

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

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

General power of court

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

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

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

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

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

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

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

Pouvoir général du tribunal

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

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

Redressements normalement nécessaires

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

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

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

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

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

2005, c. 47, s. 128.

Droits des fournisseurs

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

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

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

2005, ch. 47, art. 128.

Stays, etc. — initial application

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

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

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

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

Suspension : demande initiale

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

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

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

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

Stays, etc. — other than initial application

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

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

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

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

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

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

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Security or charge relating to director's indemnification

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

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

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priority

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

Priorité

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

Restriction — indemnification insurance

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

Restriction — assurance

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

Negligence, misconduct or fault

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Négligence, inconduite ou faute

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

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

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

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

d) tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas a) à c).

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

22.1 Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Monitors

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

Contrôleurs

Attributions

23 (1) Le contrôleur est tenu :

a) à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à l'égard de la demande initiale visant une compagnie débitrice :

(i) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,

(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :

(A) de rendre l'ordonnance publique selon les modalités réglementaires,

(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

b) de réviser l'état de l'évolution de l'encaisse de la compagnie, en ce qui a trait à sa justification, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

c) de faire ou de faire faire toute évaluation ou investigation qu'il estime nécessaire pour établir l'état des affaires financières et autres de la compagnie et les causes des difficultés financières ou de l'insolvabilité de celle-ci, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

d) de déposer auprès du tribunal un rapport portant sur l'état des affaires financières et autres de la compagnie et contenant les renseignements réglementaires :

(i) dès qu'il note un changement défavorable important au chapitre des projections relatives à l'encaisse ou de la situation financière de la compagnie,

(ii) au plus tard quarante-cinq jours — ou le nombre de jours supérieur que le tribunal fixe — après la fin de chaque trimestre d'exercice,

(iii) à tout autre moment fixé par ordonnance du tribunal;

d.1) de déposer auprès du tribunal, au moins sept jours avant la date de la tenue de l'assemblée des créanciers au titre des articles 4 ou 5, un rapport portant sur l'état des affaires financières et autres de la compagnie, contenant notamment son opinion sur le caractère raisonnable de la décision d'inclure dans la transaction ou l'arrangement une disposition prévoyant la non-application à celle-ci des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, et contenant les renseignements réglementaires;

e) d'informer les créanciers de la compagnie du dépôt du rapport visé à l'un ou l'autre des alinéas b) à d.1);

f) de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement;

f.1) afin de défrayer le surintendant des faillites des dépenses engagées par lui dans l'exercice de ses attributions prévues par la présente loi, de lui verser, pour dépôt auprès du receveur général, le prélèvement réglementaire, et ce au moment prévu par les règlements;

g) d'assister aux audiences du tribunal tenues dans le cadre de toute procédure intentée sous le régime de la présente loi relativement à la compagnie et aux assemblées de créanciers de celle-ci, s'il estime que sa présence est nécessaire à l'exercice de ses attributions;

h) dès qu'il conclut qu'il serait plus avantageux pour les créanciers qu'une procédure visant la compagnie

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

i) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers;

j) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

k) d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

Non-responsabilité du contrôleur

(2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)b) à d.1), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

2005, ch. 47, art. 131; 2007, ch. 36, art. 72.

Right of access

24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

2005, c. 47, s. 131.

Droit d'accès aux biens

24 Dans le cadre de la surveillance des affaires financières et autres de la compagnie et dans la mesure où cela s'impose pour lui permettre de les évaluer adéquatement, le contrôleur a accès aux biens de celle-ci, notamment les locaux, livres, données sur support électronique ou autre, registres et autres documents financiers.

2005, ch. 47, art. 131.

Obligation to act honestly and in good faith

25 In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

2005, c. 47, s. 131.

Diligence

25 Le contrôleur doit, dans l'exercice de ses attributions, agir avec intégrité et de bonne foi et se conformer au code de déontologie mentionné à l'article 13.5 de la *Loi sur la faillite et l'insolvabilité*.

2005, ch. 47, art. 131.

Powers, Duties and Functions of Superintendent of Bankruptcy

Attributions du surintendant des faillites

Public records

26 (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, a public record of prescribed information relating to proceedings under this Act. On request, and on payment of the prescribed fee, the Superintendent of Bankruptcy must provide, or cause to be provided, any information contained in that public record.

Registres publics

26 (1) Le surintendant des faillites conserve ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, un registre public contenant des renseignements réglementaires sur les procédures intentées sous le régime de la présente loi. Il fournit ou voit à ce qu'il soit fourni à quiconque le demande tous renseignements figurant au registre, sur paiement des droits réglementaires.

TAB 2

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-028436-194, 500-09-028474-195, 500-09-028476-190
(500-11-049838-150)

DATE: May 21, 2020

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
PATRICK HEALY, J.A.
LUCIE FOURNIER, J.A.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

No.: 500-09-028436-194

HOME DEPOT OF CANADA INC.
APPELLANT – Impleaded Party
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.)
RAYMOND CHABOT INC.
RESPONDENTS/ INCIDENTAL RESPONDENTS
and
HOME HARDWARE STORES LIMITED
IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party
and
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin Inc.)
MATÉRIAUX LAURENTIENS INC.
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
INTACT INSURANCE COMPANY

L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL- SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS
JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

No.: 500-09-028474-195

GROUPE BRM INC. (Formerly known as Gestion BMR inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.)
MATÉRIAUX LAURENTIENS INC.
INTACT INSURANCE COMPANY
APPELLANTS – Impleaded Parties
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.
RAYMOND CHABOT INC.
RESPONDENTS/INCIDENTAL RESPONDENTS

and

HOME HARDWARE STORES LIMITED

IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party

and

CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
L'UNIQUE GENERAL INSURANCE INC.
LA CAPITAL GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRES-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
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PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL-SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
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SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters

IMPLEADED PARTIES – Impleaded Parties

RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
APPELLANTS – Impleaded Parties
v.
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PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
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SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

JUDGMENT

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[1] On appeal from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier), that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act* ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[2] For the reasons of Justice Schrager, J.A., with which Justices Healy and Fournier, JJ.A., concur, **THE COURT**:

In the file 500-09-028436-194

[3] **DISMISSES** the appeal with legal costs;

[4] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-028474-195

[5] **DISMISSES** the appeal with legal costs;

[6] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-28476-190

[7] **DISMISSES** the appeal with legal costs;

[8] **DISMISSES** the incidental appeal without legal costs.

MARK SCHRAGER, J.A.

PATRICK HEALY, J.A.

LUCIE FOURNIER, J.A.

Mtre Hubert Sibre
Mtre Rosemarie Sarrazin
MILLER THOMSON
For Home Depot of Canada Inc.

Mtre Pierre Goulet
For Groupe BMR Inc., Groupe Patrick Morin Inc., Matériaux Laurentiens, Intact Compagnie d'assurance inc.

Mtre Julie Himo
Mtre Dominic Dupoy
Mtre Arad Mojtahedi
NORTON ROSE FULBRIGHT CANADA
For Rona Inc., Royal & Sun Alliance Insurance Company of Canada

Mtre Jocelyn Perreault
Mtre Gabriel Faure
McCARTHY TÉTRAULT
Mtre Antoine Melançon
LAPOINTE ROSENSTEIN MARCHAND MELANÇON
For Raymond Chabot inc.

Mtre Éric Savard
LANGLOIS AVOCATS
For Desjardins General Insurance Inc., The Personal General Insurance Inc., Intact Insurance Company, L'unique General Insurance Inc., La Capital General Insurance Inc., Promutuel Insurance Bagot, Promutuel Insurance Boréale, Promutuel Insurance Bois-Francs, Promutuel Insurance Chaudières-Appalaches, Promutuel Insurance L'estuaire, Promutuel Insurance Deux-Montagnes, Promutuel Insurance Lac Au Fleuve, Promutuel Insurance Outaouais, Promutuel Insurance La Vallée, Promutuel Insurance Montmagny-L'islet, Promutuel Insurance Portneuf-Champlain, Promutuel Insurance Réassurance, Promutuel Insurance Rive-Sud, Promutuel Insurance Vallée Du Saint-Laurent, Promutuel Insurance Vaudreuil-Soulanges, Promutuel Insurance Verchères-Les-Forges, Promutuel Insurance Lanaudière, Royal Sun Alliance Insurance Company

of Canada, Aviva Insurance Company of Canada

Mtre Alexandre Bayus
GOWLING WLG (Canada)
For Home Hardware Stores Limited

Date of hearing: March 11, 2020

REASONS OF SCHRAGER, J.A.

[9] These are appeals from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier),[1] that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act*[2] ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[10] The Appellants (sometimes hereinafter the "**Retailers**") oppose the Plan because it authorizes the Respondent Raymond Chabot Inc. (the "**Monitor**") to take legal proceedings against them on behalf of creditors of Aquadis International Inc. ("**Aquadis**" or the "**Debtor**"). Most of the creditors are insurers by way of subrogation in the rights of policy holders whose homes were damaged due to the allegedly defective faucets sold by Aquadis.

[11] The appeals are concerned with the scope of the powers that may be conferred on the Monitor.

[12] The Monitor was authorized to exercise the rights of creditors rather than those of the Debtor. While some reported judgments may present certain analogies, the present case appears to be unique in Canadian jurisprudence.

[13] There are also procedural issues raised against the Appellants' challenge of the specific clause in the Plan of Arrangement. As will be explained below, the Respondents argue primarily that these appeals are an indirect challenge of the *CCAA* judge's November 2016 order to vary the Monitor's powers (the "**November 2016 Order**").

I. FACTS AND PROCEDURAL HISTORY

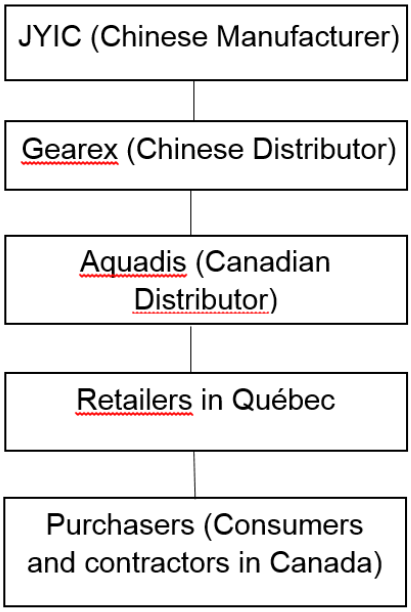
[14] The case arises from the sale of faucets that were allegedly affected by manufacturing defects and the subsequent claims arising from the resulting water damage suffered by purchasers of the product.

[15] Aquadis imported and distributed bathroom products, including faucets.

[16] Jing Yudh Industrial Co. ("**JYIC**") is a China-based manufacturer of various valve products. The faucets in question were manufactured by JYIC and sold to a Chinese

[1] Judgment in appeal.
[2] *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36.

distributor, Gearex, which, in turn, sold them to Aquadis. The latter resold the faucets to various retailers in Quebec. These include the Appellants Rona Inc. ("**Rona**"), BMR Group Inc. ("**BMR**"), The Home Depot of Canada ("**Home Depot**"), Matériaux Laurentiens and Home Hardware Stores Limited ("**Home Hardware**"). The Appellants ultimately resold the faucets to Quebec-based consumers or contractors. The flowchart in the Appellants' factum, appropriately translated, represents the chain of distribution as follows:



[17] It should be noted that the Retailers are not creditors in the insolvency proceedings in that they did not file proofs of claim. Rona sought leave to file two years after the deadline set forth in the court-approved claims protocol. Such leave was denied by the *CCAA* judge on March 13, 2019.[3]

[18] Claiming water damage caused by faulty faucets, many consumers sought compensation from their insurers, who upon payment were subrogated in the rights of their insureds.

[19] The insurers then instituted legal proceedings against Aquadis, the aggregate of which claims exceeded Aquadis' insurance coverage. Faced with this multitude of recourses, Aquadis obtained stays of proceedings through the filing of a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*[4] ("*BIA*") in June 2015, which was continued under the *CCAA* pursuant to an initial order made on

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3 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2019 QCCS 1396.

4 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

December 9, 2015. Raymond Chabot Inc. was appointed Monitor and granted the powers of the board of directors given the resignation of all members of the board. Legal proceedings instituted against Aquadis or anyone in the distribution chain (i.e., the Retailers) were suspended in accordance with the provisions of the *CCAA*. At the time, approximately 20 actions regrouping several hundred consumers' claims were pending before the courts of Quebec and two other provinces.[5]

[20] On January 6, 2016, the Superior Court issued an order regarding the filing and processing of creditors' claims.

[21] On November 9, 2016, the Monitor sought an order to amend its powers "to conclude transactions or, failing that, to take proceedings against persons having resold or installed defective products purchased from Aquadis, such as distributors, retailers and general contractors". Rona was the only Appellant that was notified of the motion giving rise to such order as it was the only one that had requested to be entered on the service list.

[22] On November 14, 2016, the Court granted the application to vary the Monitor's powers and thus granted the Monitor the right to commence or continue any action for and in the name of Aquadis' creditors having any connection with defective faucets. This is the November 2016 Order referred to above.[6]

[23] That judgment was not appealed nor was there an attempt to seek its revision in the lower court or in the present appeal.

[24] Following the issuance of the November 2016 Order, the Monitor began negotiations with the Retailers that stretched over a period of two years with a view to arriving at a "global settlement" in virtue of which the Retailers would contribute to a litigation pool in exchange for full releases from any liability arising as a result of the sale of any defective faucets.

[25] On December 19, 2016, the Monitor initiated legal proceedings against JYIC and Gearex to enforce the rights of Aquadis regarding the defective faucets. Settlements were reached with some of JYIC's and Gearex's insurers generating the receipt of over $7 million ($4.7 million net of fees and costs) in consideration of full releases. However,

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5 In virtue of arts. 1728, 1729 and 1730 *C.C.Q.*, each group in the supply chain would have a recourse against relevant parties above them at each step in the chain.

6 The November 2016 Order is in these terms:

> initier ou continuer toute réclamation, poursuite, action en garantie ou autre recours des créanciers de 9323-7055 Québec inc. (anciennement connue sous le nom d'Aquadis International inc., « Aquadls ») au nom et pour le compte de ces créanciers contre des personnes opérant au Canada découlant, directement ou indirectement, ou ayant un lien ou pouvant avoir raisonnablement un lien, direct ou indirect, avec un défaut de fabrication affectant des biens vendus par Aquadis, avec l'accord préalable du comité des créanciers constitue par le paragraphe n° 24 de l'Ordonnance initiale (le « Comite des créanciers »). (Emphasis added)

the Monitor was unable to reach an agreement with one of JYIC's insurers, Cathay Century Insurance Co. Ltd. On June 20, 2018, the Superior Court approved these transactions between Aquadis, its insurers and the manufacturer of the products in a judgment executory notwithstanding appeal. The Retailers opposed this because, in their view, the proceedings under the *CCAA* were being used to settle disputes not involving Aquadis' creditors, but rather third parties. On June 28, 2018, Rona sought leave to appeal and a stay of the foregoing judgment which was dismissed by a judge of this Court since the matter had become hypothetical given the completion of the transaction immediately following the issuance of the judgment.[7]

[26] At the beginning of 2019, the Monitor filed the Plan of Arrangement providing for the establishment of a litigation pool made up of all the sums collected by the Monitor in exchange for full releases. The Plan of Arrangement also includes the power of the Monitor to sue the Retailers on behalf of the creditors, which is the subject of these appeals.

[27] The Plan, as amended, was unanimously approved at the meeting of creditors called for such purpose on April 25, 2019. All creditors voting (831 in number representing $20,686,727) were in favour. The total claims in the file (885) are $22,424,476, of which 738 creditors held $18,190,120 (or 81%) of the debt. These 738 creditors, who are represented on the creditors' committee, all voted in favour. They are all insurers of consumers who claimed damages arising from the faucets.

[28] On May 23, 2019, the Monitor instituted actions in damages against the Retailers as contemplated in the Plan. These actions were suspended pending judgment in these appeals. The Monitor seeks condemnations against the Retailers based on the total amount of claims received for damages incurred by consumers divided amongst the Retailers on the basis of the proportion of defective faucets sold. The validity of the approach is not in issue in these appeals. The eventual success or failure of these actions based on the evidence presented will be for another day in another court.

[29] The Plan of Arrangement, as amended at the meeting of creditors, was approved by the Superior Court on July 4, 2019 despite the Retailers' contestation. This is the judgment in appeal.

II. THE JUDGMENT IN APPEAL

[30] The *CCAA* judge emphasized from the outset that the Retailers' opposition was based primarily on the fact that Aquadis had no right of action against them. He undertook an analysis of the Plan of Arrangement in light of the three criteria developed by the case law as relevant to approval: (1) that all statutory provisions are complied

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[7] Arrangement relatif à 9323-7055 Québec inc., 2018 QCCA 1345 (Schrager, J.A.).

with; (2) that nothing was done that was not authorized by the *CCAA*; and (3) that the plan is fair and reasonable.

[31] The first two criteria were not in issue. The judge concluded that the Plan of Arrangement satisfies the third criterion since the Monitor's main objective was to achieve an overall solution to all the actions brought against Aquadis. The Monitor's proceedings against the Retailers were therefore aimed at maximizing Aquadis' assets in liquidation, which is a proper purpose recognized in the case law. Thus, the Plan would, upon resolution of the law suits, allow for distribution of all the sums collected in partial satisfaction of creditors' claims.

[32] The judge rejected the Appellants' argument that the objectives of the *CCAA* are being thwarted by allowing the Monitor to pursue a remedy to which it is not entitled. He characterized this argument as technical and unconvincing because, in the absence of consensual settlements, recourse against the Retailers (and JYIC) is the only possible avenue leading to a global treatment of Aquadis' liabilities. Thus, the powers sought by the Monitor were deemed necessary in order to materially advance the restructuring process. The judge accepted this course of action as the only practical resolution of this case. As such, he indicated that the solution chosen was a sensible use of judicial resources since it avoids the multiplication of individual actions outside the framework of the Plan of Arrangement. He also pointed out that the Appellants cannot complain that they are prejudiced by having to defend themselves against a single action rather than a "cascade of litigation by individual insurers".

[33] Finally, the judge noted that the Retailers were aware, in 2016, of the November 2016 Order granting the Monitor the power to sue them but failed to challenge it. As such, their challenge of such power in the Plan of Arrangement was late.

[34] The judge thus approved the Plan of Arrangement.

III. **ISSUES**

[35] The Appellants submit two questions to the Court:

a) Can a monitor appointed under the provisions of the *CCAA* exercise the rights, not of the insolvent debtor, but of certain creditors of the insolvent debtor to sue third parties for damages?

b) Does the mere fact that the Retailers did not challenge the November 2016 Order mean that they could not challenge the application for approval of the corresponding provision of the Plan of Arrangement?

[36] The Respondent Monitor adds that the appeal should be dismissed as hypothetical, since the November 2016 Order granting it the power to sue is not challenged and as such will remain in effect even if this Court allows the appeals.

IV. **APPELLANTS' POSITION**

[37] The Appellants submit to the Court that the judge of first instance erred in granting the Monitor the right to bring actions on behalf of Aquadis' creditors against the Retailers, because this power is not "in respect of the company" within the meaning of section 23 of the *CCAA* which enumerates the Monitor's duties.

[38] In addition, they argue that since these claims are not assets of the Debtor, the mere fact that the law suits relate to products distributed by the Debtor is insufficient to give the Monitor the right to sue the Retailers on behalf of the creditors. The Appellants contend that the Monitor cannot pursue recourses between the various creditors of an insolvent company given the lack of a sufficient connection with the insolvency of the Debtor. Stays of proceedings granted by a *CCAA* judge should apply only to actions against the debtor and its assets. Lawsuits by the creditors against the Retailers fall outside the *CCAA* estate and should not be stayed or otherwise dealt with in the file.

[39] The Appellants further submit that the Monitor's exercise of remedies on behalf of Aquadis' creditors compromises the Monitor's duty of neutrality. They argue that by exercising the rights of the creditors the Monitor is acting for the benefit of some of the Debtor's creditors. They also point out that the Monitor failed to act transparently in the process leading up to the November 2016 Order and that the contingency fee agreed upon with the creditors' committee places the Monitor in a conflict of interest.

[40] The Appellants contend that the hearings of damage actions based on the *Civil Code of Québec* before the Commercial Division of the Superior Court results in inappropriate preferential treatment of such claims over similar ones filed before the Civil Division, which is contrary to the proper administration of justice. Specifically, the Monitor, by instituting proceedings in the Commercial Division, avoids the filing of a case protocol[8] and may improperly rely on the *Canada Evidence Act*.[9] They add that their rights of appeal under the *CCAA* are subject to leave[10] whereas under the *Code of Civil Procedure* they would have a right of appeal for any condemnation exceeding $60,000.[11]

[41] The Appellants also argue that, according to established and recognized principles of statutory interpretation, a tribunal must favour an interpretation of the law

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8 Under arts. 148 and following *Code of Civil Procedure* [*C.C.P.*].
9 *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*CEA*].
10 See s. 13 *CCAA*.
11 See art. 30 *C.C.P.*

that is respectful of the division of powers under the *Canadian Constitution*.[12] They point out that an interpretation conferring rights on the Monitor to exercise remedies on behalf of solvent creditors against solvent defendants (the Retailers) constitutes an unwarranted intrusion by Parliament into the jurisdiction of the provincial legislatures over property and civil rights, thereby contravening the division of powers. They argue that the interpretation of the scope of *CCAA* jurisdiction should be directed to a result that is constitutionally coherent.

[42] As for the second question in appeal, the Appellants argue that they are entitled to challenge the Plan of Arrangement and are not precluded from doing so despite the absence of any contestation of the November 2016 Order, now or previously.

[43] For the Appellants, the Plan of Arrangement is not merely a confirmation of the powers granted by the November 2016 Order, but rather has the effect of replacing the interlocutory orders. In that sense, the present challenge is not, in their view, a collateral attack on the November 2016 Order. Moreover, since that order is the product of an interlocutory decision, it does not benefit from the presumption of *res judicata*.

[44] The Appellants further indicate that they were not notified of the application to vary the Monitor's powers until two years after the fact and, in that sense, they could not oppose the granting of the November 2016 Order. They further state that the consumers or their insurers (i.e. the creditors) are not prejudiced by the failure to challenge the November 2016 Order as this has had no impact on any party who chose to settle.

[45] In addition, the Appellants contend that even if they are effectively precluded from challenging the November 2016 Order, the question as to whether the judge had jurisdiction to sanction a plan of arrangement granting the Monitor the right to exercise the rights of creditors against the Retailers remains open. In that sense, the November 2016 Order does not, in the Appellants' view, establish the validity of any such power under a plan of arrangement made pursuant to the *CCAA*.

V. **DISCUSSION**

[46] I am of the view that the judge's approval of the Plan of Arrangement and, specifically, the Monitor's power to institute proceedings to recover from the Retailers damages allegedly suffered by consumers is not tainted by a reviewable error. Though I think that reasoning in addition to that found in the judgment is required to justify such a position, the result is not an erroneous or unreasonable exercise of the judge's discretion. As such, I propose to dismiss the appeals.

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[12] *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 [*Constitution Act*].

[47] Given such results, it is not strictly necessary to dispose of the Appellants' second ground regarding the right to challenge the Plan given the November 2016 Order, but I think a few words are appropriate to set the record straight from the point of view of both Appellants and Respondent Monitor, because of the emphasis put on such matter by the parties.

[48] The judge said this:

> [27] It bears mention that the Opposing Retailers were aware in November 2016 of the Court's Order authorizing the Monitor to institute legal action against Canadian distributors. They did not oppose the Order at that time, or thereafter attempt to have it set aside or varied. The Opposing Retailers claim they are not challenging the Order now, but they are clearly doing so, and their complaint is late. The Plan merely continues the power granted to the Monitor over two and a half years ago.

[49] This, essentially, is in answer to the Monitor's argument, reiterated in appeal, that the contestation of the Plan of Arrangement by the Appellants constitutes a collateral attack against the November 2016 Order long after the expiry of the time limit to appeal and after the expiry of any time limit which could be reasonable to either revoke it (under the *Code of Civil Procedure*)[13] or vary it (under the comeback clause in the initial order issued under the *CCAA*), the whole given the Appellants' lack of diligence in the matter.

[50] The time limit to seek leave to appeal under the *CCAA* is 21 days.[14] The "comeback clause" in the initial order[15] permits parties such as the Appellants, who may be affected by an order of the *CCAA* court, to seek to vary such provision even after the expiry of the time limit to appeal. Even in the absence of such a clause, a party that was not served with the proceedings could seek its revision.[16] However, a party seeking "comeback relief" must act diligently.[17]

[51] The Appellants underline that with the exception of Rona, they were not served with the proceedings giving rise to the November 2016 Order as they were not on the service list. They contend that they were only informed two years after the fact as

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13 Arts. 347 and 348 *C.C.P*.

14 S. 14 (2) *CCAA*.

15 Paragraph 44 of the Order of December 9, 2016.

16 Janis P. Sarra, ***Rescue! The Companies' Creditors Arrangement Act***, 2nd ed., Toronto, Carswell, 2013, pp. 58-60. *Indalex Limited (Re)*, 2011 ONCA 265, para. 55 [*Indalex*]; *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, para. 48 [*Canada North Group*].

17 See *Indalex*, *supra*, note 16, paras. 157, 161 and 166, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Parc Industriel Laprade Inc. v. Conporec Inc*., 2008 QCCA 2222, paras. 7 and 17; *Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2015 QCCS 3236, para. 33; *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, para. 238; *Muscletech Research and Development Inc., Re*, 2006 CanLII 1020 (Ont. Sup. Ct.), para. 5; *Canada North Group Inc*, *supra*, note 16, para. 48.

disclosed by the correspondence filed as exhibits.[18] However, and though the record does not *per se* disclose it, the fact of not being on the service list is, experience indicates, purely a result of not asking the Monitor or its counsel to be placed on the list.[19]

[52] The Respondents contend that the Appellants have not acted with sufficient diligence in the matter and point to analogous situations arising before the Ontario Court of Appeal in *Indalex* and before the Quebec Superior Court in *Aveos*.[20]

[53] In *Indalex*, the interim lender sought the benefit from the proceeds of asset sales in the repayment of loans in accordance with the priority granted by the *CCAA* court three months earlier. The debtor company's pension fund sought to enforce its alleged priority over the monies, which the monitor contested, pleading that the pension fund was in effect attacking the security previously granted the lenders in priority to the pension fund. The Ontario Court of Appeal held that the pension fund had acted in a timely manner since it was only upon the court application to distribute the funds received from the asset sales that "it became clear" that the debtor company was abandoning the pension plans in their underfunded states.

[54] In *Aveos*, the Superintendent of Financial Institutions claimed that the statutory deemed trust created in its favour afforded a priority for monthly pension plan contributions to defray the pension plan deficit. These payments were stopped with court approval at the inception of the *CCAA* process. The present Respondents quote the undersigned, then the *CCAA* judge treating the argument, as follows:

> [92] The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of "fin de non-recevoir" in civil law.
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> (…)
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> [95] Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.[21]

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18 The record indicates that this is not the case for all of the Appellants (*infra*, para. [55]).

19 Para. 41 of the Initial Order of December 9, 2015 provides for service of proceedings to all who have given notice to the Monitor or its counsel.

20 *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 [*Aveos*] and Indalex, *supra*, note 16, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

21 *Aveos*, *supra*, note 20, paras. 85, 91-95.

Aveos does not support the Respondents' position on the matter of delay since, in effect, the secured creditor in *Aveos* would have retroactively been obliged to cede priority to the $2.8 million of pension deficit. The debtor company and the secured creditor acted throughout on the premise arising from the court's order that the pension payments need not be made in priority to repayments to the secured creditor. In the present matter, the inaction of the Appellants since November 2016 has not caused the Monitor to act to its detriment. The only material prejudice the Monitor points to is the time and energy invested in negotiating with the Retailers, but there is no quantification of a proof of loss and, in any event, the Monitor's fees are calculated on a contingency basis, not on a "time spent on the matter" basis.

[55] In the cases at bar, the Appellants contend that until the Plan was approved (and almost simultaneously the legal proceedings against them filed) it was not clear that their potential liability in the matter would be the object of litigation rather than negotiated settlements. However, they had previously received demand letters from the Monitor[22] and contested the approval of settlements reached by the Monitor with the insurers of the Debtor and the manufacturer. The judgment of Collier, J.S.C., approving the settlements, refers specifically to the November 2016 Order, and counsel for the Appellants Home Depot, Rona and BMR were heard on the application.[23]

[56] The Appellants appear to have had sufficient knowledge of the November 2016 Order prior to the filing of the Plan in 2019. However, even if I were to ignore this, I think that they would still be barred from seeking the revision of the November 2016 Order as part of their contestation of the Plan of Arrangement simply because they have not sought any formal conclusions regarding the November 2016 Order. They target only the powers afforded the Monitor in clause 6.2 of the Plan of Arrangement. The Respondents plead that even if the Plan is set aside, the same powers subsist under the November 2016 Order.[24] As such, the Monitor maintains that the Appellants' contestation is an indefensible collateral attack[25] on the November 2016 Order or, alternatively, that the appeal raises a moot point,[26] because, as stated above, even if

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[22] BMR, Groupe Patrick Morin inc. and Rona appear to have received the letters in 2016 while Home Hardware and Matériaux Laurentiens inc. received one in 2018. No letter addressed to Home Dépôt is filed in the record.

[23] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945.

[24] Moreover, the Monitor amended the Plan at the meeting of creditors to provide that the previous orders survive the Plan sanction: "6.2(d) … the Initial Order remains in effect … until the final distribution date." This is reflected in para. 19 of the sanction order.

[25] See for example: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 par. 61; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279, para. 35; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, paras. 33-34.

[26] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. See also: *R. v. Oland*, 2017 SCC 17; [2017] 1 S.C.R. 250*; R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Forget v. Québec (Attorney General)*, [1988] 2 S.C.R. 90, paras. 67-68. Art. 10, para. 3 *C.C.P*.

section 6.2(c) of the Plan is set aside, the power to sue the Retailers subsists under the November 2016 Order.

[57] I would tend to think that, on the facts, no reviewable error is made out in the judge's conclusion that the attack is late. Moreover, the November 2016 Order would survive the Plan sanction and, in all events, the Appellants do not directly seek conclusions contrary to said order. However, as mentioned earlier, these questions do not require definite resolution given my answer to the primary point of the appeal, which is the validity of the power granted the Monitor in the Plan to sue on behalf of a group of creditors rather than in the exercise of the Debtor's rights. I now address that issue.

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[58] As indicated in the review of the facts above, parties in the distribution chain would in the normal course have recourse against those above them in the flowchart. The recourses (exercised or not) of the ultimate purchasers of the faucets (and their insurers) and the Retailers were stayed upon the initial insolvency filing in 2015. The November 2016 Order led to some negotiated settlements. The consumers (or their insurers) filed proofs of claim; the Retailers did not, nor did they settle any claims asserted by the Monitor. It is against this factual background that the Monitor was granted the power to sue the Retailers under the Plan of Arrangement.

[59] The purpose of the proposed legal proceedings is consonant with a legitimate purpose under the *CCAA,* as the Monitor seeks to establish a "litigation pool" with a view to paying creditors of Aquadis on a *pro rata* basis. In itself, this more than satisfies the spirit of the *CCAA,* but is also supported by examples in the reported cases. Specifically, and of close resemblance is the arrangement in the matter of *Muscletech*,[27] where the debtor was a distributor of dietary supplements in the middle of a multi-tier distribution chain between the manufacturer at one end and ultimate consumers at the other. The plan of arrangement provided for releases from liability to be given to those in the chain who paid into the litigation pool as compensation arising from selling the defective product. The scheme was voluntary – i.e. the monitor was not given power to sue. However, the situation is similar to that in the case at bar. Other examples of voluntary litigation pools where contributors receive releases exist, but the precise factual matrix of the present plan, where the Monitor is empowered to sue, appears to be novel.[28]

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[27] *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 (Ont. Sup. Ct.).

[28] *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403, paras. 6 and 33; *Metcalfe & Mansfield Alternative Investments II Corp (Re)*, 2008 ONCA 587, paras. 69-71 [*Metcalfe*]; *Montreal, Maine & Atlantic City Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235.

[60] The granting of releases for third parties in consideration of their contribution to a litigation pool to satisfy creditors' claims is now well entrenched in *CCAA* jurisprudence.[29]

[61] The *CCAA* expressly provides for certain powers and duties of the monitor.[30] These powers and duties may be extended, because s. 23 *CCAA* provides that a monitor is required to "do anything in respect of the company that the court directs the monitor to do".[31] Thus, while the law does provide the basic framework within which the monitor must act, the courts may use their discretion to grant additional powers considered appropriate.[32]

[62] This discretion cannot be exercised arbitrarily; it must be exercised in a manner consistent with and directed toward the attainment of the objectives of the *CCAA*. In *Century Services Inc.,* Justice Deschamps observed for the Supreme Court that:

> [58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs". (References omitted)

She added that judicial discretion may be exercised in furtherance of the *CCAA*'s purposes,[33] which in the case at bar is the maximization of creditor recovery, since Aquadis has ceased carrying on business.

[63] The courts, however, have expressed reservations regarding the imposition of third-party settlements under the *CCAA,* indicating that the purpose of the *CCAA* is not to settle disputes between parties other than the debtor and its creditors.[34] Nonetheless, the precise point in issue – i.e. whether a judge may allow a monitor to exercise the rights and remedies of certain creditors against other persons or creditors of a debtor appears to be without precedent.

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29 *Metcalfe*, *supra*, note 28.

30 S. 23 *CCAA*.

31 S. 23 (1) (*k*) *CCAA*.

32 *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, paras. 105-106 [*Essar*]; *MEI Computer Technology Group Inc. (Bankruptcy), Re*, 2005 CanLII 15656 (Qc. Sup. Ct.), para. 20.

33 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, para. 59.

34 The courts have also indicated that proceedings under the *CCAA* were not intended to alter priorities amongst creditors: "The *CCAA* is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders (sic) position at the expense of others - there should be no confiscation of legal rights.": *843504 Alberta Ltd., Re*, 2003 ABQB 1015, para. 13. See also: *Royal Oak Mines Inc., Re*, 1999 CanLII 14843 (Ont. Sup. Ct.), para. 1.

[64] In *Urbancorp*,[35] the Ontario Superior Court of Justice refused to recognize the power of a monitor to claw back a payment in kind made by the debtor to a third party who was a creditor of a company related to the debtor. While Justice Myers acknowledged that "… Monitors can certainly be empowered to bring legal proceedings to act on behalf of *CCAA* debtors",[36] he disagreed that the monitor should act as a bankruptcy trustee to bring proceedings in the place of *CCAA* creditors. The latter could initiate their own proceedings outside of the insolvency or provoke a bankruptcy for a trustee to initiate those proceedings for them. It should be emphasized that a single payment was in issue in *Urbancorp*. Justice Myers distinguished *Essar*,[37] which is relied on by Respondents. In that case, the Ontario Court of Appeal confirmed the lower court's authorization of the monitor to institute oppression proceedings for the benefit of various creditors (or stakeholders) in the *CCAA* estate: "(…) the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors (…)".[38] The court noted as well that the debtor would also benefit from such proceedings, particularly in the sense that an impediment to restructuring would potentially be removed by the oppression remedy.

[65] The result in *Urbancorp* was echoed in *Pacific Costal Airlines*,[39] where the British Columbia Supreme Court indicated that "proceedings under the *CCAA* are not intended to resolve disputes between a creditor and third parties":

> [24] It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the *CCAA* proceedings. The purpose of a *CCAA* proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in *CCAA* proceedings, it is not a proper use of a *CCAA* proceeding to determine disputes between parties other than the debtor company.[40]

[66] The *Stelco*[41] case, for its part, raised issues relating to a dispute between certain creditors near the end of the debtor's restructuring process over the distribution of

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35 *Urbancorp Cumberland 2 GP Inc., (Re)*, 2017 ONSC 7649.
36 *Ibid*.
37 *Essar*, *supra*, note 32.
38 *Essar*, *supra*, note 32, para. 124.
39 *Pacific Coastal Airlines Ltd. v. Air Canada*, 2001 BCSC 1721, para. 24; see also *Stelco Inc., Re*, 2005 CanLII 42247 (Ont. C.A.), para. 32 [*Stelco*].
40 *Id*., para. 24.
41 *Stelco*, *supra*, note 39.

certain amounts payable to holders of subordinated notes and the priority entitlement to interest payments. Farley, J. commented as follows:

> [7] The *CCAA* is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company.[42] (References omitted)

[67] The *dicta* in all of these cases reflect the orthodox view of the law put forward by the Appellants. However, none of the fact patterns resemble the chain of distribution in the present case. Nor were these judgments focused on a huge number of claims, which were stayed in this case and are effectively replaced by the Monitor's proceedings authorized under the Plan. This factual distinction makes these judgments of limited instructive or precedential value.

[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA*[43] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor".[44] The Appellants concede, if only indirectly, that the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

[69] In my opinion, the Appellants objections are not well founded.

[70] Firstly, the bankruptcy trustee analogy is only a half truth. Trustees are the assignees of a bankrupt's property, and as such, exercise the patrimonial rights of the debtor but they also wear a second hat.[45] Trustees exercise rights and recourses on behalf of creditors against other creditors and against third parties.[46] Such rights and recourses arise from the *BIA* (for example, under s. 95 for preferences) as well as under the civil law generally (for example, the paulian action under arts. 1631 and following *C.C.Q.*). Most significantly, the *BIA* recourses to attack preferences, transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007.[47] Thus, the mere fact that the

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42 *Stelco Inc., Re*, 2005 CanLII 41379 (Ont. Sup. Ct.).
43 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42 [*Callidus*].
44 Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini and Blair Nixon (eds.), Annual Review of Insolvency Law, Toronto, Thomson Reuters, 2019, p. 650.
45 *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, para. 33.
46 *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, paras. 32-40.
47 S. 36.1 *CCAA*.

judgment in appeal empowers the Monitor to sue to enforce rights of creditors is not conceptually foreign to the general framework of insolvency law.

[71] Moreover, and without making too fine a point, the Appellants' are not creditors of the *CCAA* estate. They might have been, but they chose not to file claims. As such, they are third parties. This eliminates another conceptual, if not legal, difficulty in that, they do not potentially share in the litigation pool after contributing to it.

[72] The Appellants also object, saying that the power given to the Monitor to sue runs contrary to the principle of a monitor's neutrality. However, the case law and literature recognize that this neutrality is far from absolute:

> [110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:
>
> > Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. … [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.
>
> (…)
>
> [119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.
>
> [120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. (…).[48]

[73] As long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated.

[74] It must be repeated that the Retailers are not creditors in the *CCAA* estate as they did not file proofs of claim. As such, their status as "stakeholders" is tenuous, so that any resulting duty to them by the Monitor is questionable.

[75] Neither is the contingency fee arrangement of the Monitor and its counsel a valid ground to attack the Monitor's neutrality. The contingency fee may give the Monitor an interest in the outcome of the litigation, but such arrangements have a long history, particularly with lawyers' mandates, and are recognized as legitimate and, indeed, as

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[48] *Essar*, *supra*, note 32.

enhancing access to justice. The fee arrangement dates back to the initial order. Given that Aquadis had no assets, there would be no other way to pay professionals to act in the matter. In effect, the professionals are financing the recovery efforts.

[76] The Appellants also submitted that the Monitor has lacked transparency. This position has no merit. The Plan sanction was the product of a legal process served on parties that appeared in the record by entry on the service list and followed a creditors' meeting and a court hearing before an impartial judge. The Monitor's agenda was not hidden.

* * *

[77] I agree with the judge that on practical and equitable grounds the power accorded to the Monitor to sue the Retailers in the context of the present matter makes *CCAA* sense. In my mind, however, that is not enough to justify the judge's exercise of discretion to approve the Plan.

[78] The broad judicial discretion propounded in much of the case law and literature is not boundless.[49] It, like all judicial discretion, must be exercised judiciously, meaning that it must be based on legal rules and principles. In my opinion mere commercial expediency or good sense is not enough to qualify the exercise of judicial discretion under the *CCAA* as appropriate[50] nor for a plan to qualify as fair and reasonable. Rulings (even discretionary ones) must have some measure of predictability if confidence in the legal system is to be maintained.[51] That predictability stems from adherence to the application of the law. I am not willing to cross the Rubicon from the realm of the law to the land of the lore.

[79] That being said, there is, in the present case, legal and not merely commercial or practical justification for the judgment. The Appellants attack it based on an analogous reasoning of the powers of a bankruptcy trustee to exercise the debtor's rights against third parties but not the rights of creditors. However, this is not really true as I have indicated above. The trustee in bankruptcy can exercise rights for the benefit of creditors.

[80] Significantly, the creditors voted unanimously that their rights against the Retailers be exercised by the Monitor in their place and stead and for their benefit through the proposed proceedings and the litigation pool within the *CCAA* framework.

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49 *Callidus*, *supra*, note 43, paras. 48-49.

50 *Ibid*.

51 See Sharpe, Robert J., *Good judgment – Making Judicial Decisions*, Toronto, University of Toronto Press, 2018, p. 129; *Nechi Investments Inc. v. Autorité des marchés financiers*, 2011 QCCA 214, paras. 22-23.

[81] Absent a *CCAA* process, the creditors would have been free to consensually assign their rights or subrogate others, including, by way of example, a trustee of a litigation trust. Again, there is precedent in *CCAA* matters for such litigation trusts,[52] which trusts include rights of actions against third parties.[53] With the *CCAA* file, the Monitor, through the Plan, the vote and the sanctioning judgment in appeal, is in such position to exercise those rights against the Retailers. The Monitor is putting into effect the collective will of the creditors expressed through their unanimous vote approving the Plan of Arrangement. Giving effect to creditor democracy reflected in the *CCAA*[54] is a sound basis for a court to approve the Plan.

[82] Accordingly and in conclusion, given that the parties being sued are third parties vis-à-vis the *CCAA* estate and as such, have no claim on the litigation pool, and given that the creditors/beneficiaries of the litigation pool voted unanimously in favour of the Plan of Arrangement, there is sufficient legal rationale to grant the power in question. In addition, as indicated by the trial judge, the mechanism is a direct and practical way to maximize recovery for creditors.

* * *

[83] The Appellants have also argued that granting the Monitor the power to sue is a misuse of the resources of the Commercial Division of the Superior Court, since the proposed proceedings should be taken in the Civil Division. This, however, is purely a matter of case management for the Superior Court. There is but one Superior Court; its administrative divisions, such as the Commercial Division, are not separate and distinct tribunals.[55] Accordingly, there is no valid argument based on the jurisdiction of the Superior Court which can be brought to bear against the judgment of the lower court.

[84] The Appellants submit that they are prejudiced by the judgment in that eventual rights of appeal are restricted because leave is required under the *CCAA* but not under the *C.C.P.* for awards exceeding $60,000. The argument is not persuasive given that the judgment is not erroneous, the Monitor's recourses against the Retailers fall under the *CCAA* and consequently eventual appeals would be governed by s. 14 *CCAA*.

[85] In addition, the Appellants put forward a constitutional argument claiming that since the creditors and Retailers are not insolvent, proceedings of one against the other under the umbrella of the *CCAA* should not apply to them.

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52 Plan of Compromise and re-organization of Sino-Forest Corporation, December 3, 2012, Ont. Sup. Ct. CV-12-9667-00CL.

53 *Lutheran Church Canada (Re)*, 2016 ABQB 419, paras. 125, 134 and 135.

54 S. 6 *CCAA*.

55 *Re Arctic Gardens Inc.*, 1990 R.J.Q. 6 (Qc. C.A.). See also *TVA Publications inc. v. Quebecor World Inc.*, 2009 QCCA 1352, para. 71 (Morissette, J.A.); *Formula E Operations Limited v. Ville de Montréal*, 2019 QCCS 884.

[86] The constitutional validity of the *CCAA* is grounded in Parliament's jurisdiction under s. 91(21) of the *Constitution Act*[56] with respect to bankruptcy and insolvency. The statute should be applied, say the Appellants, in a manner consistent with its constitutional foundation.

[87] The Ontario Court of Appeal made it clear in *Metcalfe & Mansfield* that the granting of releases to solvent third parties in proceedings under the *CCAA* is not contrary to the constitutional division of powers. To the extent that the granting of such powers to the Monitor enables the objectives of the *CCAA* to be achieved, the impact of the exercise of ancillary powers in respect of solvent third parties (such as suing the Retailers) cannot constitute an infringement of the constitutional division of powers. Rather, the powers granted to the Monitor in clause 6.2 of the Plan arise out of, and are necessary for, the valid exercise of federal jurisdiction.[57]

[88] In the case at bar, the Plan provides for releases to be granted to, *inter alia*, Retailers who contribute to the litigation pool destined to satisfy claims of creditors against the Debtor. The Monitor has the additional power to compel such contribution by instituting legal proceedings. Such actions are calculated to maximize creditor recovery, a proper *CCAA* purpose[58] falling within the ambit of s. 91(21) of the *Constitution Act*. Moreover, the parties who might have raised a contestation analogous to that of the objecting parties in *Metcalfe & Mansfield* are the consumers (or their insurers) who can no longer sue the Retailers outside of the Plan of Arrangement. However, they voted unanimously in favour of the arrangement.

[89] As for the other consequence for the Appellants, their direct recourse for any loss would be against Aquadis, but that recourse is stayed and such stay of proceedings is, self-evidently, a valid exercise by way of the *CCAA* of federal jurisdiction in insolvency matters under s. 91(21) of the *Constitution Act*.

[90] The Appellants' submissions based on the division of powers have no merit.

* * *

[91] Plans of arrangement are sanctioned by the courts where considered "fair and reasonable", which raises mixed questions of fact and law. Accordingly, the standard of review is one of deference.[59] Appellate intervention is only warranted where the

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56 *Constitution Act*, *supra*, note 12, s. 91; See *Reference re constitutional validity of the Companies Creditors Arrangement Act (Dom.)*, [1934] S.C.R. 659.

57 *Metcalfe*, *supra*, note 28.

58 *Essar*, *supra*, note 32, para. 103.

59 *Metcalfe*, *supra*, note 28.

judgment is affected by an error of principle or results from an unreasonable exercise of judicial discretion.[60] The Appellants have failed to satisfy this standard.

[92] For all the foregoing reasons, I propose that the appeals be dismissed with legal costs.

MARK SCHRAGER, J.A.

[60] *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, para. 20; *Ivaco Inc., Re*, 2006 CanLII 34551 (Ont. C.A.), para. 71; *Re Air Canada*, 2003 CanLII 36792 (Ont. C.A.), para. 25; *Re Royal Crest Lifecare Group Inc.*, 2004 CanLII 19809 (Ont. C.A.), para. 23; *Algoma Steel Inc. v. Union Gas Ltd.*, 2003 CanLII 30833 (Ont. C.A.), para. 16.

TAB 3

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-048114-157

DATE: July 14, 2021

BY THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
Petitioners

and

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED
Mises-en-cause

And

FTI CONSULTING CANADA INC.
Monitor

And

TWIN FALLS POWER CORPORATION
CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
Twinco Mises-en-cause

JUDGMENT ON MOTION FOR THE EXPANSION OF THE MONITOR'S POWERS
(Sections 11 and 23 of the *Companies' Creditors Arrangement Act*)

OVERVIEW

[1] With their Motion, the Petitioners and the Mises en cause are seeking an order from this Court granting additional powers to the Monitor (the "**Motion**") so that the latter may, directly or through its counsel, do the following:

> a) compel the production, from time to time, from any Person having possession, custody or control of any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the Twinco Interest, CFLCo Indemnity and CFLCo Maintenance Obligations (each as defined hereafter), including the Twinco Requested Information (as defined below) (the "**Requested Information**") in respect of the period from and after January 1, 2010, and such earlier periods as may be approved by further order of the Court (the "**Disclosure Period**");
>
> b) require any Requested Information to be delivered within thirty (30) days of the Monitor's request or such a longer period as the Monitor may agree to in its discretion; and
>
> c) conduct investigations from time to time, including examinations under oath of any Person reasonably thought to have knowledge relating to the Requested Information, in respect of the Disclosure Period.
>
> [the "**Expanded Monitor Powers**"]

[2] Previously, on June 29, 2018, Mr. Justice Stephen W. Hamilton issued an order to sanction the Joint Plan of Compromise and Arrangement dated as of May 16, 2018 (the "**Plan**") submitted jointly by the Petitioners and the Mises en cause (collectively the "**CCAA Parties**" for the purposes hereof).

[3] During the present CCAA proceedings initiated in January 2015 pursuant to the provisions of the *Companies' Creditors Arrangement Act* (the "**CCAA**"), the CCAA Parties have sold all of their assets other than the combined 17.062% equity interest (the "**Twinco Interest**") held in Twin Falls Power Corporation ("**Twinco**") by Wabush Iron Co. Limited and Wabush Resources Inc. (collectively "**Wabush**").

[4] Pursuant to the Plan, the net proceeds of sales and other recoveries are to be distributed to the creditors of the Participating CCAA Parties[1] in accordance with the terms and conditions of the Plan.

[5] Since the implementation of the Plan, the CCAA Parties, with the assistance of the Monitor, have been working to wind down the estates of the CCAA Parties so that the net

[1] As defined in the Plan.

proceeds from such recoveries and realizations can finally be distributed to the creditors of the CCAA Parties as soon as possible.

[6] The initial interim distributions to the creditors with proven claims under the Plan took place in August and September 2018.

[7] A second interim distribution to such creditors with proven claims took place in mid-of May 2021.

[8] A final distribution will not occur until the realization or collection of all material assets of the CCAA Parties including the Twinco Interest.

[9] The CCAA Parties were informed by the Monitor that a significant majority of the creditors of Wabush are former employees of Wabush Mines, many of whom are elderly, and who are reasonably assumed to be anxious to receive their final distributions as soon as possible.

[10] Subject to the resolution and collection of certain outstanding tax refunds, the CCAA Parties have realized on all of their assets other than the Twinco Interest.

[11] On November 16, 2020, in furtherance of the CCAA Parties' efforts to monetize the Twinco Interest, the CCAA Parties filed a *Motion for the Winding up and Dissolution, Distribution of Assets, Reimbursement of Monies and Additional Relief* (the "**CBCA Motion**") on a *pro forma* basis, which was subsequently scheduled by the Court to be heard on January 29, 2021.

[12] On January 29, 2021, the Court adjourned the CBCA Motion, the CFLCo Contestation[2] and the Twinco Dismissal Motion[3] *sine di*e, and on February 22, 2021, the Supreme Court of Newfoundland and Labrador (the "**Newfoundland Court**") adjourned the Twinco Liquidation Motion[4], in order to allow the parties an opportunity to explore the possibility of a consensual resolution of the matters raised in those proceedings which essentially boils down to disposing of the Twinco Interest.

[13] As those negotiations did not proceed in any meaningful way, the CCAA Parties are seeking this *Motion for the Expansion of the Monitor's Powers* to facilitate the recovery of assets for the benefit of the CCAA Parties' creditors and the winding up of the CCAA Parties' estate and the termination of the CCAA Proceedings.

[14] As can be noted above, the Expanded Monitor Powers sought herein all relate to the Twinco Interest which is, to all intents and purposes, the last asset to monetize and realize in the context of the CCAA proceedings.

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[2] As defined below.
[3] As defined below.
[4] As defined below.

[15] Until now, Twinco and its shareholder CFLCo have been steadfastly blocking all attempts of the CCAA Parties and the Monitor to monetize the Twinco Interest in the furtherance of the Plan, which involves obtaining the relevant and necessary documentation required to determine with reasonable certainty the value of the Twinco Interest in the context of the present CCAA Proceedings.

[16] Twinco's and CFLCo's refusal to deal with the Twinco Interest has left little alternative but to seek the wind down and the dissolution of Twinco in the context of the present CCAA Proceedings to finally permit the CCAA Parties, with the assistance of the Monitor, to realize this asset of Wabush, complete the final distribution to the Plan creditors and terminate at last the CCAA Proceedings that have been ongoing since 2015.

1. THE PROCEDURAL CONTEXT INVOLVING TWINCO

1.1 The Twin Falls Power Corporation (Twinco)

[17] Based on the Motion, the Court retains the following relevant facts:

- Twinco is an incorporated joint venture formed under the *Canada Business Corporations Act* (the "**CBCA**") on February 18, 1960, among Churchill Falls (Labrador) Corporation Limited ("**CFLCo**"), Wabush Iron Co. Limited and Wabush Resources Inc. (collectively "**Wabush**") and the Iron Ore Company of Canada ("**IOC**"), among others;

- As at December 31, 2019, Twinco was owned 33.3% by CFLCo, 49.6% by IOC, and 17.062% interest held jointly by Wabush[5];

- Pursuant to Twinco's fiscal year 2019 Audited Financial Statements, Twinco has approximately $6.1M in cash and cash equivalent assets (the "**Twinco Cash**") and approximately $46,000 of liabilities[6];

- The history of the Twinco Plant[7] is long and complicated and is set out in significant detail in the CBCA Motion. However the highlights are set out hereafter;

- In 1961, CFLCo licensed to Twinco the rights to develop a 225-megawatt hydroelectric generating plant on the Unknown River in Labrador (the "**Twinco Plant**");

- In addition to the Twinco Plant, Twinco owned a number of other assets including (i) the physical building which houses the Twinco Plant (the "**Twinco Building**"); (ii) the transmission lines from the Twinco Plant to its consumers (the "**Twinco Transmission Lines**"); and (iii) the equipment which comprises the Twinco Plant

[5] 4.6% held by Wabush Iron Co. Limited and 12.5% by Wabush Resources Inc.
[6] **R-3**.
[7] As defined below.

and which was used in the production of hydroelectric power (the "**Twinco Machinery**") (collectively, with the Twinco Building and Twinco Transmission Lines, and such other assets of Twinco the "**Twinco Assets**");

- In 1974, CFLCo took over the Twinco Plant and undertook comprehensive maintenance obligations in respect of the Twinco Plant (the "**CFLCo Maintenance Obligations**"), and indemnified Twinco in respect of those obligations and environmental liabilities in connection with the Twinco Plant and Twinco Assets (the "**CFLCo Indemnity**")[8];

- The Twinco Plant was placed into an extended shutdown in 1974. Since that time until today, based on various environmental assessments commissioned by Twinco over the years as summarized in various Audited Financial Statements of Twinco, the CCAA Parties understand that potential environmental liabilities may have occurred in respect of the Twinco Plant and Twinco Assets (the "**Potential Environmental Liabilities**");

- The CCAA Parties are of the view that the responsibility for any environmental liability lies squarely with CFLCo and not Twinco, pursuant to CFLCo's Maintenance Obligations and CFLCo Indemnity[9];

- It is not clear to the CCAA Parties and the Monitor whether, and to what extent, Twinco may have funded maintenance or environmental remediation that was CFLCo's responsibility, and for which Twinco may have a claim against CFLCo for reimbursement;

- As stated in the CBCA Motion, for years, both prior to and after the commencement of the present CCAA Proceedings, the CCAA Parties, with the support of IOC, have sought to obtain a distribution of the Twinco Cash to Twinco's shareholders, but such distribution has been continuously resisted by Twinco and CFLCo;

- The CCAA Parties believe that CFLCo did not support further distributions to the shareholders because it wants to ensure a cash pool from Twinco to pay for the Potential Environmental Liabilities notwithstanding the CFLCo Indemnity and CFLCo Maintenance Obligations;

- Pursuant to Twinco's Articles of Continuance dated August 1, 1980[10], the shareholders are entitled to share rateably in the remaining property of Twinco upon dissolution;

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[8] As more particularly detailed in the CBCA Motion.
[9] **R-6** of the CBCA Motion.
[10] **R-4**.

- Wabush's share of the Remaining Twinco Cash[11] is approximately $1,040,000, a material amount, together with their *pro rata* share of what other money may be subject to reimbursement claims against CFLCo;

- As the information to determine the amount of maintenance and other indemnifiable expenses that may be subject to reimbursement by CFLCo is within the knowledge of Twinco, an accounting was requested in the CBCA Motion;

- Without this information, it is impossible for the CCAA Parties or the Monitor to calculate what the approximate true value of the Twinco Interest may be to ensure that the CCAA Parties' creditors receive appropriate recovery from the Twinco Interest.

1.2 **The CBCA Motion and the relief sought**

[18] The history of the CCAA Parties' repeated attempts to engage in a constructive dialogue with Twinco and its majority shareholder CFLCo, is more fully set out in detail in the CBCA Motion, which has been continued *sine die* until now.

[19] While the CCAA Parties had been hopeful that a consensual resolution could be achieved, they concluded that based on the lack of desire of Twinco and CFLCo to engage in a constructive manner, a consensual resolution was not possible.

[20] Accordingly, on November 16, 2020, the CCAA Parties filed the CBCA Motion, seeking the issuance of Orders against Twinco and CFLCo:

> a) confirming CFLCo's liability for Twinco's maintenance obligations and environmental liabilities related to the Twinco Plant from and after July 1, 1974;
>
> b) compelling an accounting from Twinco of all monies expended by Twinco in respect of maintenance and environmental costs that have not been reimbursed by CFLCo pursuant to the CFLCo Indemnity and CFLCo Maintenance Obligations (collectively, the "**Reimbursable Environmental/Maintenance Costs**");
>
> c) directing CFLCo to reimburse all Reimbursable Environmental/Maintenance Costs (such amount to be reimbursed by CFLCo, being the "**CFLCo Reimbursement**") to Twinco for distribution to the shareholders as part of the winding up and dissolution of Twinco pursuant to the relief requested in paragraph (d) below;
>
> d) directing the winding up and dissolution of Twinco pursuant to section 214 and/or section 241 (3)(l) of the CBCA and a distribution of: (i)

[11] As defined below.

the Twinco Cash net of all reasonable fees and expenses incurred by Twinco to implement and complete the wind-up and dissolution being sought in this Motion (the "**Remaining Twinco Cash**"), and (ii) the CFLCo Reimbursement to Twinco's shareholders, including Wabush, on a *pro rata* basis; and

e) in the alternative to (d), directing Twinco and/or CFLCo to purchase the shares of Twinco held by Wabush pursuant to section 214 (2) and/or section 241 (3)(f) of the CBCA for a purchase price equal to the amount of Wabush's *pro rata* share of: (i) the Twinco Cash, and (ii) the CFLCo Reimbursement.

[the "**CBCA Motion Proposed Orders**"]

1.3 **Twinco's and CFLCo's response to the CBCA Motion**

[21] In response to the CBCA Motion, Twinco filed a proceeding entitled "*Motion by Twin Falls Power Corporation to Dismiss the Application for Lack of Jurisdiction and for Forum Non-Conveniens"* dated January 15, 2021[12], seeking to dismiss the CBCA Motion for lack of jurisdiction of this Court to hear the CBCA Motion and alternatively, for *forum non-conveniens* (the "**Twinco Dismissal Motion**"). The latter motion is scheduled to be heard in August 2021.

[22] Concurrently, CFLCo filed a proceeding entitled "*Contestation to the CBCA Motion*" dated January 15, 202113 (the "**CFLCo Contestation**"), substantially to the same effect while announcing that it was also filing an *Originating Application for the Issuance of a Court-Supervised Liquidation and Dissolution Order* before the Newfoundland Court pursuant to sections 214 (1)(b)(ii), 215, and 217 of the CBCA, seeking, *inter alia*, the court-supervised liquidation of Twinco.

[23] Seemingly in reaction to the CBCA Motion, CFLCo advised the CCAA Parties in its CFLCo Contestation that despite years of resisting to do so, CFLCo was going to imminently commence in the Newfoundland Court an originating application for a court-supervised liquidation and dissolution of Twinco (the "**Twinco Liquidation Motion**")[14].

[24] The Twinco Liquidation Motion was formally filed on January 21, 2021, to be heard in Newfoundland on February 23, 2021[15].

[25] At the time, subject to obtaining a court hearing date for the Twinco Dismissal Motion and CFLCo Contestation and the CBCA Motion, the parties agreed to seek an adjournment of the CBCA Motion, the Twinco Dismissal Motion, the CFLCo Contestation

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[12] **R-5**. The Twinco Dismissal Motion was modified on May 17, 2021.
[13] **R-6**. The CFLCo Contestation was amended on May 19, 2021, in response to the present Motion.
[14] **C-1**.
[15] **R-7**.

and the Twinco Liquidation Motion, in each case without prejudice to each party's right to seek a new hearing date for any of such proceedings on 14 days' prior written notice to the other parties.

[26] On January 27, 2021, this Court adjourned *sine die* the CBCA Motion, the Twinco Dismissal Motion, and the CFLCo Contestation and on February 22, 2021, CFLCo confirmed the adjournment *sine die* of the Twinco Liquidation Motion with the Newfoundland Court (all such adjourned proceedings, the **"Adjourned Proceedings**").

[27] By letter dated February 1, 2021 (the "**February 1st Letter**"), counsel for the CCAA Parties sought to confirm its understanding of the terms of the adjournment of the Adjourned Proceedings as among the parties[16].

[28] In the February 1st Letter, CCAA Parties' counsel also set out the documents and information that was to be provided by Twinco and CFLCo in furtherance of the proposed efforts to reach a potential consensual resolution. The requested documents and information were to be provided within 30 days of the letter, or within a reasonably anticipated time that would be required to obtain any requested information that was not readily available for delivery to the CCAA Parties.

[29] The requested documents and information were intended to provide the CCAA Parties and the Monitor with a general understanding of the approximate range of Reimbursable Environmental/Maintenance Costs that could be at issue to better enable the CCAA Parties and Monitor to determine the approximate potential value of the Twinco Interest. Without this information, a potential consensual resolution would be extremely difficult, if not impossible, to reach.

[30] The requested documents and information in the February 1st Letter included, among other things, the following information:

> a) amount of cash and cash equivalents held by Twinco as at January 31, 2021, and a budget of expenses anticipated to be incurred by Twinco to the date of the wind-up and liquidation that are not currently anticipated to be subject to any reimbursement or sharing obligation;
>
> b) copies of audited financial statements for Twinco for the years ended December 31, 1974, to 2019 (excluding audited financial statements for the year-ended December 31, 2004, 2005, 2008, 2013-2019); and
>
> c) a summary of all expenses incurred by Twinco in respect to environmental and maintenance and other costs in respect to the Twinco Plant, Twinco Building and equipment located thereon for which Twinco has not received full reimbursement from CFLCo or any other party, for the

[16] **R-8**.

> period from July 1974 to December 31, 2020, as described in more detail in the February 1st Letter.
>
> [the "**Twinco Requested Information**"]

[31] The CCAA Parties pointed out that as shareholders, Wabush Iron and Wabush Resources were already entitled to copies of all annual financial statements of Twinco pursuant to section 155 of the CBCA. The balance of the information requested was in the nature of information relating to expenses incurred by Twinco in connection with the maintenance and environmental liabilities and Twinco's updated cash position as at January 31, 2021, and Twinco's go forward budget to the anticipated date of its wind-up and dissolution.

[32] However, according to the CCAA Parties' counsel, the respective counsels for Twinco and CFLCo both denied any undertaking to use in good faith efforts to provide any of the Twinco Requested Information to the CCAA Parties and Monitor and both resisted the production of any documentation to the CCAA Parties and Monitor.

[33] By letter dated February 4, 2021, counsel for Twinco stated that Twinco made no such undertakings, any request would be taken under consideration — "nothing more"— that they would not, without specific direction from the Twinco directors, offer to provide any documents, and that it would seek instructions from Twinco's directors in respect to the Twinco Requested Information and whether it was reasonable to "even consider" undertaking to provide the Twinco Requested Information.[17]

[34] Likewise, by letter dated February 5, 2021, CFLCo's counsel denied any good faith undertaking to provide any information requested by the CCAA Parties and stated that the "ultimate decision to provide the requested documentation lies with Twinco".[18]

[35] On February 16, 2021, Twinco's counsel sent a subsequent letter to the CCAA Parties' counsel confirming that Twinco's board of directors, a majority of whom are CFLCo's nominees, decided that Twinco would not provide any of the Twinco Requested Information to the CCAA Parties, as there was no "use" in such undertaking. Instead, Twinco's counsel informed the CCAA Parties that Twinco's directors have decided only to provide the CCAA Parties with Twinco's audited financial statements from 2013–2019, which financial statements, in the February 1st Letter, already expressly noted were excluded from the CCAA Parties' request (as the CCAA Parties already had copies of these financial statements).[19]

[36] While counsels for Twinco and CFLCo expressed concern that the CCAA Parties' requests went back to 1974, neither counsel proposed to narrow the scope of the

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[17] **R-9**.
[18] **R-10**.
[19] **R-11**.

information requested to a shorter time period but instead issued blanket refusals and denied any good faith undertaking to engage in the disclosure of such information.

[37] Based on the Expanded Monitor Powers being sought in this Motion, the CCAA Parties and the Monitor are initially proposing to go back to January 1, 2010, only, with the ability to request the Court to expand the time period to include earlier periods, if needed.

[38] The counsels for the CCAA Parties and the Monitor sought to engage Twinco's and CFLCo's counsels to try to find a resolution to the disclosure impasse and have been informed by Twinco's counsel that Twinco was not prepared to provide any additional documentation beyond the financial statements it provided which the CCAA Parties already had.

[39] By letter dated May 6, 2021, counsel for the CCAA Parties expressed their disappointment and frustration over the lack of good faith demonstrated by Twinco and CFLCo towards pursuing a consensual resolution and the resulting delay that ensued since January 27, 2021, when the Adjourned Proceedings were adjourned. In that letter, Twinco and CFLCo were advised that the CCAA Parties had no alternative but to seek the present Motion and to reactivate the CBCA Motion.[20]

1.4 **The relief sought by the CCAA Parties and the Monitor**

[40] The CCAA Parties are seeking the Expanded Monitor Powers, with the support of the Monitor, pursuant to sections 11 and 23 of the CCAA, specifically sections 23(1)(c) and (k), for the expansion of the powers of the Monitor in these CCAA Proceedings, so that the Monitor may, directly or through its counsel exercise the Expanded Monitor Powers more fully described above.

[41] The Expanded Monitor Powers are necessary to enable the Monitor to: (i) assist the CCAA Parties with the recovery of value for the CCAA Parties' creditors from the last remaining asset of the CCAA Parties' estate outside of tax refunds (ii) fulfill its statutory duties to investigate and properly value, the assets and the liabilities of the CCAA Parties, and (iii) facilitate the winding up and termination of these CCAA Proceedings.

[42] The true value of the Twinco Interest is unknown as both Twinco and CFLCo have continuously refused to provide the CCAA Parties or the Monitor with any information in respect of the nature and quantum of the Reimbursable Environmental/Maintenance Costs that would assist the CCAA Parties and Monitor to properly value the Twinco Interest.

[43] In the opinion of the CCAA Parties, the valuation of the Twinco Interest is of particular importance as, among other things:

[20] **R-12**.

a) the Twinco Interest is the last asset of the CCAA Parties that has not yet been monetized in these CCAA Proceedings, apart the collection of outstanding tax refunds;

b) the Twinco Interest would increase the Plan creditors' recoveries;

c) the monetization of the Twinco Interest is one of the last material steps to be taken in these CCAA Proceedings, apart from the collection of the outstanding tax refunds, before the CCAA Parties can complete their wind-up of these CCAA Proceedings and provide a final distribution to the Plan creditors;

d) expanding the Monitor's powers would permit it to further the valid purpose of the CCAA engaged in the present circumstances of maximizing recovery for the CCAA Parties' creditors; and

e) the monetization of the Twinco Interest would fulfill the purpose of the Plan which is to distribute the net proceeds of the Participating CCAA Parties' assets to the Plan creditors.

[44] The continuous refusal of Twinco and CFLCo to engage with the CCAA Parties and the Monitor has only served to perpetuate the status quo, resulting in further delays to the ability of the CCAA Parties' creditors to obtain a final distribution and complete the winding up and termination of these CCAA Proceedings.

[45] The CCAA Parties contend that:

- the requested relief is necessary and appropriate in the circumstances and is in the best interests of all the CCAA Parties' stakeholders as Twinco and CFLCo have continued to demonstrate that they will not cooperate in connection with the realization of the Twinco Interest and instead, will engage in actions that seek only to preserve the status quo by frustrating and delaying all realization efforts by the CCAA Parties; and

- the valuation of the Twinco Interest is of particular importance to these CCAA Proceedings and should be conducted by the Monitor for the benefit of the creditors irrespective of the proposed liquidation and wind down of Twinco.

[46] Given the inextricable conflict of CFLCo and its new strategic attempt to control the liquidation and wind down process of Twinco in Newfoundland and Labrador, which it had previously steadfastly opposed to frustrate the CCAA Parties, the latter contend that it would be appropriate for this Court to grant their Motion, expand the powers of the Monitor and allow it to proceed with the long-delayed valuation of the Twinco Interest without further obfuscation from CFLCo.

1.5 **The position of Twinco and CFLCo**

[47] The position of Twinco and of CFLCo is essentially the same and can be summarized as follows:

- No interpretation of section 11 of the CCAA, alone or read in conjunction with sections 23(1) c) and (k), permits the granting of the Expanded Monitor Powers in the present circumstances;

- The Expanded Monitor Powers aim at Twinco which is not a debtor company pursuant to the CCAA;

- This Court does not have the power to delegate such broad powers (*i.e.*, the power to examine under oath) to the Monitor, without an explicit statutory authorization;

- This Court does not have the power to compel a person outside of Québec to respond to such orders;

- The statutory discretion under section 11 of the CCAA does not extend to the Expanded Monitor Powers sought by the CCAA Parties in the Motion.

[48] In connection with the last argument put forward by both Twinco and CFLCo that there is a limit to the statutory discretion under section 11 of the CCAA, they added that the present CCAA Proceedings which aim at restructuring corporations as opposed to their liquidation, are not the appropriate vehicle for investigation of third parties to the CCAA Proceedings.

[49] In line with the forgoing, Twinco makes the astonishing if not misleading affirmation that it is a third party (a stranger) herein, with no link to the CCAA Proceedings:

> 17. Further, neither Twinco nor CFLCo is a party to the CCAA Proceedings, nor is either corporation a party governed by the original or any subsequent order issued in the CCAA Proceedings.
>
> 18. Rather, both Twinco and CFLCo are strangers to the CCAA Proceedings in which the Wabush Motion has been brought.
>
> 117. Here, Twinco is a third party, with no link with the CCAA Proceedings. […] Twinco is neither the debtor, nor a creditor, an employee, a director, a shareholder, nor another party doing business with the insolvent company. It has no interest whatsoever in the recovery, and now, in the liquidation of the CCAA Parties.[21]

[21] Paragraphs 17, 18 and 117 of the Twinco's Argument Plan.

[Emphasis added]

[50] Contrary to the foregoing assertions, Twinco is not a "stranger to the CCAA Proceedings".

[51] Pursuant to the Claims Process[22] authorized by the Court, Twinco filed a proof of claim against Wabush for approximately $780,000[23]. Twinco's claim was allowed by the Monitor in 2016[24].

[52] The Court understands that Twinco even received a partial distribution in respect of its claim under the Plan and is likely to participate in the final distribution.

ANALYSIS

[53] With all due respect, the Court finds that it has jurisdiction to rule on the present Motion pursuant to the provisions of the CCAA.

[54] For the following reasons, the Court also finds that given the particular circumstances and the nature of the present issues confronting the CCAA Parties and the Monitor to bring the CCAA process to a conclusion within a reasonable delay, it is appropriate for this Court to exercise its judicial discretion and grant to the Monitor the Expanded Monitor Powers sought herein.

The Court has exclusive jurisdiction to determine the scope of the powers of the Monitor in furtherance of the purposes of the CCAA

[55] At the outset, the Court is of the opinion that given the nature and the somewhat narrow scope of the Expanded Monitor Powers sought, the present Motion can be entertained regardless of the CBCA Motion, the Twinco Dismissal Motion and the CFLCo Contestation and their eventual outcome as the latter rest essentially on the right of the CCAA Parties to seek to wind down and the dissolution of Twinco via the CCAA Proceedings before the Commercial Division of the Superior Court of Québec rather than allow CFLCo to proceed with its Twinco Liquidation Motion before the Court of Newfoundland.

[56] Wabush Iron Co. Limited and Wabush Resources Inc. are undoubtedly shareholders of Twinco and as such, the Twinco Interest is one of their assets to be monetized and realized with the assistance of the Monitor pursuant to the Plan sanctioned by the Court in June 2018.

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[22] On November 5, 2015, the CCAA Court issued an Order, *inter alia*, approving a procedure for the submission, evaluation and adjudication of claims against the CCAA Parties and their current and former directors and officers (the "**Claims Process**").
[23] **R-14**.
[24] *Id*.

[57] Therefore, the valuation of the Twinco Interest is not only of particular importance to the present CCAA Proceedings, but it should be conducted by the Monitor for the benefit of the creditors irrespective of the dispute between the parties relating to the jurisdiction over the proposed liquidation and wind down of Twinco.

[58] In fact, the monetization and the realization of the Twinco Interest do not necessarily require the wind down and the dissolution of Twinco to occur given the apparent extent of the Twinco Interest in Twinco.

[59] The Court understands that the Twinco Requested Information is intended to provide the CCAA Parties and the Monitor with a general understanding of the approximate range of the Reimbursable Environmental/Maintenance Costs that could possibly be the subject of the CFLCo Reimbursement to better enable the CCAA Parties and Monitor to calculate the approximate value of the Twinco Interest.

[60] The Twinco Requested Information is purely factual in nature and excludes documents that the Wabush shareholders already have in their possession such as financial statements for December 31, 2004, 2005, 2008, 2013–2019.

[61] The Court also understands that it is the steadfast and the somewhat inexplicable refusal of Twinco and of its shareholder CFLCo to provide any of the Twinco Requested Information[25] to the CCAA Parties and to the Monitor that prevents the latter from determining with a minimum of accuracy what is the estimated value of the Twinco Interest.

[62] This determination expected to be performed by the Monitor relates directly to an asset of the CCAA Parties that is covered by the Plan sanctioned by this Court, and such a determination falls squarely on the tasks, duties and responsibilities of the Monitor within the present CCAA Proceedings regardless of the eventual dissolution or not of Twinco.

[63] Moreover, of obvious significance in the eyes of the Court, Twinco filed a proof of claim for $780,000 that was accepted by the Monitor pursuant to the Claims Process approved by the Court.

[64] It is somewhat incomprehensible that Twinco would nevertheless affirm that it is a third party, a “stranger” with no link with the CCAA Proceedings and that it is neither the debtor, nor a creditor, an employee, a director, a shareholder, nor another party doing business with the CCAA Parties that include two of its shareholders (Wabush).

[65] How can Twinco seriously pretend that it has no interest whatsoever in the recovery, and presently, in the liquidation of the CCAA Parties when it filed a proof of claim for $780,000?

[25] Purposely limiting the same to documents that the Wabush shareholders already have.

[66] Twinco even stands to retrieve by way of the final distribution, a portion of the Twinco Interest once realized by the Monitor, as the case may be.

[67] Moreover, didn't Twinco attorn to the jurisdiction of the Québec Superior Court (Commercial Division) by deciding to file a proof of claim against the Wabush shareholders in the present CCAA Proceedings?[26]

[68] The evidence satisfies the Court that Twinco and its shareholder CFLCo have demonstrated that they have no intention of providing any information to the CCAA Parties in a timely fashion that would assist the CCAA Parties and Monitor to determine the true value of the Twinco Interest, which would then form the basis for a potential consensual resolution, leading to a final distribution to creditors and a wind-up and termination the CCAA Proceedings.

[69] The Court shares the CCAA Parties' counsel view that it is even possible that with the information on hand, the CCAA Parties and the Monitor may come to a determination that the amount of the CFLCo Reimbursement in dispute may not be sufficiently material on a cost-benefit analysis to continue to pursue recovery of such amount, significantly narrowing the issues in dispute in the CBCA Motion.

[70] Who knows? Should the Twinco Interest be disposed of on a consensual basis, Twinco and CFLCo could very well decide to forgo the wind down and the dissolution proceedings completely, a decision that would rest with them without any further involvement of the CCAA Parties (i.e., the Wabush shareholders).

[71] Be that as it may be, the CCAA Parties are only seeking to expand the Monitor's powers in the CCAA Proceedings to enable the Monitor to obtain the Requested Twinco Information necessary to value the Twinco Interest, which is now the most significant asset of the CCAA Parties remaining to be realized in the CCAA Proceedings apart from tax refunds.

[72] With all due respect, the proposed relief sought with the present Motion does not entail any compromission of the rights and recourses of Twinco and of its shareholder CFLCo vis-à-vis the Twinco Interest other than enabling the CCAA Parties and the Monitor to be aware of its potential estimated value without prejudice to the arguments that Twinco and/or CFLCo may want to put forward in connection therewith.

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[26] *Bouygues Building Canada inc. v. Iannitello et Associés inc*, 2018 QCCA 504 :
[23] By submitting a proof of claim to the Trustee and appealing the disallowance, the Joint Venture attorned to the jurisdiction of the Quebec Superior Court sitting in bankruptcy matters. It could hardly blame the Trustee after the fact as it did for having decided on the validity of the claim as submitted, since the Trustee was obliged to do so. The Joint Venture did not seek permission to continue the Ontario proceedings with a view to qualifying its contingent claim prior to filing a proof of claim with the Trustee. [References omitted]

[73] The Court finds that the Expanded Monitor Powers sought in the present Motion are necessary and appropriate to enable the Monitor to, among other things:

> (i) fulfill its statutory duties to investigate and properly value the assets and the liabilities of the CCAA Parties;
>
> (ii) further the valid purpose of the CCAA to maximize the recovery of Plan creditors, by assisting the CCAA Parties with the recovery of value for the CCAA Parties' creditors from the last significant asset remaining of the CCAA Parties' estate other than tax refunds; and
>
> (iii) facilitate the winding up and termination of these CCAA Proceedings.

[74] The Court bears in mind that the Monitor was appointed by this Court pursuant to the authority granted upon this Court under the CCAA[27].

[75] Therefore, subject to the provisions of the CCAA, this Court has the exclusive jurisdiction to determine, *inter alia*, the scope of the powers of the Monitor in furtherance of the purposes of the CCAA especially if such powers relate directly to an asset or the property of the CCAA Parties that is part of the Plan previously sanctioned.

Section 23(1)(c) of the CCAA

[76] In *Ernst & Young Inc. v. Essar Global Fund Limited*[28], the Court of Appeal for Ontario reminded us that section 23 of the CCAA sets out a basic framework of the minimum mandatory duties and functions of the monitor under the CCAA which may be augmented through the exercise of discretion by the Court, and that, not surprisingly, the monitor's role has evolved since then over time:

> [106] The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the CCAA supervising judge. This framework is reflected in s. 23 of the CCAA, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

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[27] Section 11.7 (1) CCAA.
[28] 2017 ONCA 1014.

> [107] Not surprisingly, as with the CCAA itself, the role of the monitor has evolved over time. […]
>
> [Emphasis added]

[77] Section 23(1)(c) of the CCAA requires the Monitor to "*make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs*".

[78] In the present instance, the true value of the Twinco Interest is unknown as both Twinco and CFLCo have continuously refused to provide the CCAA Parties or the Monitor with any information in respect to the nature and quantum of the Reimbursable Environmental/Maintenance Costs that would assist the CCAA Parties and the Monitor to properly value the Twinco Interest.

[79] The information required to determine the amount of maintenance and other indemnifiable expenses that may be subject to reimbursement by CFLCo is solely within the knowledge of Twinco.

[80] Therefore, the Court is satisfied that without the Expanded Monitor Powers presently sought, it will be impossible for the Monitor to calculate what the true approximate value of the Twinco Interest may be in order for the Monitor to fulfill its statutory duties under the CCAA.

[81] In the present circumstances, it is only appropriate for this Court to grant the Expanded Monitor Powers requested.

[82] Moreover, the present circumstances are not necessarily unique, CCAA monitors have already been granted the type of additional powers sought by the CCAA Parties herein.

[83] Recently, in *Arrangement relatif à 9227-1584 Québec inc.*[29], Justice Peter Kalichman then sitting in the Commercial Division of the Québec Superior Court reminded that under section 23(1)(c) of the CCAA, a monitor was required to make an assessment or proceed to investigate what the monitor considered necessary to determine the state of the debtor's financial affairs.

[84] As the monitor was attempting to recover an asset, which was possibly of significant value to the debtors, Justice Kalichman also declared that being consistent with the purposes of the CCAA:

- The monitor was authorized and empowered to exercise powers of investigation in respect of the debtors to (i) conduct an examination under oath of any person thought to have knowledge relating to the debtors, their

[29] 2021 QCCS 1342, par. 47 and 48.

business or their property; and (ii) to order any such person to be examined to produce any books, documents, correspondence or papers in that person's possession or power relating to the debtors, their business or their property;

- Certain persons could be compelled to provide the monitor with a copy of their complete accounting with respect to the sale of certain property, which according to Justice Kalichman, was linked to the debtors and their assets.

[85] In the aforementioned case, Justice Kalichman relied in part on the extended powers that had already been granted to the Monitor by the Court in the Amended and Restated Initial Order.

[86] The Court was taken aback at the suggestion made by Twinco's counsel that such powers granted to a monitor in an Initial Order or the like should be somewhat discounted as they usually form part of a draft Initial Order prepared and submitted by the debtor's lawyer, alas, implying that the Commercial Division Justices blindly rubber stamp such draft Initial Orders, which could not be further from the reality.

[87] With all due respect, the Court believes that the Monitor's powers to investigate, question and compel the communication of information and documents required *to determine with reasonable accuracy the state of the company's business and financial affairs* which includes the assessment of the value of assets or property of the debtor, should not be limited to the only corporate documents available to a shareholder pursuant to the provisions of the CBCA.

[88] In *Osztrovics Farms Ltd*.[30], the Ontario Court of Appeal dismissed the suggestion that the trustee's power to obtain information "*relating in whole or in part to the bankrupt, his dealings or property*" only extended to corporate documentation that pertained solely to the business and affairs of the corporation, and not another company in which the bankrupt held a significant interest.

[89] The Ontario Court of Appeal also stated that applying a narrow interpretation of the trustee's investigatory powers only to the corporate documentation, that pertain solely to the business and affairs of the bankrupt, and not to information about another company in which the bankrupt has significantly invested, would frustrate the trustee's ability to discharge its duty to the bankrupt's creditors to value and realize upon the most significant asset in bankrupt's estate.

[90] In *Osztrovics*, the bankrupt was a shareholder in a corporation, owning 48% of the company. The trustee requested that the company provides certain information that the trustee required to value the bankrupt's shares in that corporation. The latter refused and the trustee sought and obtained an order pursuant to sections 163 and 164 of the BIA

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[30] *Osztrovics Estate v. Osztrovics Farms Ltd*., 2015 ONCA 463, pars. 7,14 and 15.

requiring: (i) that company to disclose to it certain documents; and (ii) certain parties to submit to oral examinations.

[91] While *Osztrovics* was decided in the context of bankruptcy proceedings under the *Bankruptcy and Insolvency Act*[31], the Court believes that those principles apply equally to the CCAA proceedings[32].

[92] The Court may add that the fact that we find ourselves in the context of CCAA proceedings involving the liquidation of the CCAA Parties as opposed to their restructuring does not matter.

[93] Liquidating CCAA proceedings have been accepted in practice and case law with an expanded view of the role of the monitor under such circumstances[33].

[94] All in all, in liquidating CCAA proceedings, the responsibilities and the powers of the Monitor remain essentially the same subject to any additional powers that may be granted by the Court at its discretion.

Section 23(1)(k) of the CCAA

[95] Section 23(1)(k) of the CCAA expressly allows this Court to expand the list of duties and functions of the Monitor by directing the latter to "*carry out any other functions in relation to the debtor company that the court may direct*."

[96] In previous decisions, Justices sitting in the Commercial Division of the Québec Superior Court expanded the monitor's powers to include the ability to compel any person reasonably thought to have knowledge relating to any of the debtors, their business or property to be examined under oath, and to disclose and produce to the monitor any books, documents, correspondence or papers in that person's possession or power.[34]

[97] The counsel for the CCAA Parties pointed out, rightly so, to the Court that although CCAA courts have authorized relief similar to the Expanded Monitor Powers in respect to "any person" thought to have knowledge of the debtor, its business or property, the Expanded Monitor Powers here are narrower in that they are only directed at those persons reasonably thought to have knowledge relating to the Twinco Interest, the CFLCo

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[31] Sections 163 and 164 BIA.

[32] *Confederation Treasury Services Ltd., Re*, 1995 CarswellOnt 2301, par. 18.

[33] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 at para 68:
[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA* and the expanded view of the role of the monitor, indeed the baptism of the "super monitor". […] [References omitted]

[34] Amended and Restated Initial Order dated August 24, 2018, in the matter of the Arrangement under the *Compagnies' Creditor's Arrangement Act*, of *The S.M. Group Inc.*, 500-11-055122-184 at para 50.1; See also Amended and Restated Initial Order dated December 2, 2019, in the matter of the Arrangement under the *Compagnies' Creditor's Arrangement Act*, of *9227-1584 Québec Inc. & 9336-9262 Québec Inc*., 500-11-057549-194 at para 39 k).

Indemnity and the CFLCo Maintenance Obligations, including the Twinco Requested Information, and, subject to any further order of this Court, they are limited to a disclosure period of only 10 years, going back to 2010.

The broad judicial discretion conferred under Section 11 of the CCAA

[98] Section 11 of the CCAA stipulates:

> 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.
>
> [Emphasis added]

[99] The Court is particularly mindful of the teachings of the Supreme Court of Canada in the recent case of *9354-9186 Québec inc. v. Callidus Capital Corp*.[35], in which the broad discretion under section 11 of the CCAA, being the "engine" of the CCAA, was confirmed:

> [47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18–19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.
>
> [48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "*The Evolution of Canadian Restructuring: Challenges for the Rule of Law*", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).
>
> [49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of

[35] 2020 SCC 10.

> demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
>
> [Emphasis added]

[100] In the present instance, the Court is satisfied that the CCAA Parties have demonstrated that the Expanded Monitor Powers are appropriate in the circumstances and that they have been acting in good faith and with diligence in this matter.

[101] The Court is also satisfied that granting the Expanded Monitor Powers shall further the purposes of the CCAA.

[102] Under the present circumstances, the Court is also guided by the Plan dated May 16, 2018, that was sanctioned by the Court soon after and is satisfied that:

(i) the Expanded Monitor Powers should enable the Monitor to assist the CCAA Parties to recover additional value for the CCAA Parties' creditors;

(ii) the Twinco Interest is the last remaining asset of the CCAA Parties' estate (outside of tax refunds) that has not yet been monetized in these CCAA Proceedings;

(iii) the successful monetization of the Twinco Interest would increase the Plan creditors' recoveries. Wabush Iron and Wabush Resources' share of the Twinco Cash is approximately $1,040,000, together with their *pro rata* shares of any CFLCo Reimbursement;

(iv) a significant majority of the creditors of Wabush are former employees of Wabush Mines, many of whom are elderly, and who are reasonably assumed to be anxious to receive their final distributions as soon as possible; and

(v) the monetization of the Twinco Interest would fulfill the purpose of the Plan which is to distribute the net proceeds of the Participating CCAA Parties' assets and other recoveries for the creditors' benefit.

The "*person*" that may be subjected to the Expanded Monitor Powers does not necessarily need to be a debtor company under the CCAA Proceedings

[103] The Court shares the view of the counsel for the CCAA Parties that it is not a requirement under section 11 or section 23 of the CCAA that those who are subject to any order granted thereunder need to be debtor companies. As previously seen, there are various examples of CCAA courts granting orders under these sections that provide

for relief against third parties, including investigatory powers being granted to monitors to investigate third parties in respect of the debtor's property.

[104] Be that as it may, the Expanded Monitor Powers being sought here are in relation to the CCAA Parties' property, namely the Twinco Interest and therefore, the present Motion is clearly "*in respect of a debtor company*" without forgetting that Twinco having elected to file a proof of claim, has chosen to be a party to the CCAA Proceeding.

The Monitor's neutrality

[105] Counsel for CFLCo questioned the neutrality of the Monitor if it is granted the Expanded Monitor Powers given the ongoing litigation in Québec and in Newfoundland.

[106] The Court has already stated that the present Motion and the Expanded Monitor Powers sought therein do not impact the rights and recourses of the parties in the CBCA Motion and the Twinco Liquidation Motion instituted subsequently by CFLCo in Newfoundland.

[107] It only relates to information to be provided to the Monitor without compromising any of the parties' rights and recourses in connection with the Twinco Interest with the added potential benefit of inducing a consensual settlement and possibly avoid protracted litigation.

[108] In *Aquadis International*[36], the Québec Court of Appeal held that in expanding the monitor's powers under section 23 of the CCAA, the principle of the monitor's neutrality is "*far from absolute*" and there are exceptions. The Court stated that "[a]*s long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate CCAA purposes*, *it now appears inescapable that the neutrality it must maintain is attenuated*."[37]

[109] Moreover, in *Aquadis International*, Justice Schrager made the following comments regarding the involvement of a monitor in liquidating CCAA proceedings which the Court finds quite relevant in the case at hand given the arguments raised by Twinco and CFLCo in that respect:

> [68] **What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA*[38] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor"**.[39] The Appellants concede, if only indirectly, that

[36] See Note 33.
[37] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 at para 73.
[38] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42 [*Callidus*].
[39] Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini and Blair Nixon (eds.), Annual Review of Insolvency Law, Toronto, Thomson Reuters, 2019, p. 650.

the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

[69] In my opinion, the Appellants objections are not well founded.

[70] Firstly, the bankruptcy trustee analogy is only a half truth. Trustees are the assignees of a bankrupt's property, and as such, exercise the patrimonial rights of the debtor but they also wear a second hat.[40] Trustees exercise rights and recourses on behalf of creditors against other creditors and against third parties.[41] Such rights and recourses arise from the *BIA* (for example, under s. 95 for preferences) as well as under the civil law generally (for example, the paulian action under arts. 1631 and following *C.C.Q.*). **Most significantly, the *BIA* recourses to attack preferences, transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007.**[42] **Thus, the mere fact that the judgment in appeal empowers the Monitor to sue to enforce rights of creditors is not conceptually foreign to the general framework of insolvency law**.

[71] **Moreover, and without making too fine a point, the Appellants' are not creditors of the *CCAA* estate. They might have been, but they chose not to file claims**. **As such, they are third parties**. This eliminates another conceptual, if not legal, difficulty in that, they do not potentially share in the litigation pool after contributing to it.

[72] **The Appellants also object, saying that the power given to the Monitor to sue runs contrary to the principle of a monitor's neutrality. However, the case law and literature recognize that this neutrality is far from absolute**:

> [110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:
>
> > Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. … [T] he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness

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40 *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, para. 33.
41 *Lefebvre (Trustee of) ; Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, paras. 32–40.
42 S. 36.1 *CCAA*.

> contemplated by the Court decisions, and more of an active participant or party in the proceedings.
>
> (…)
>
> [119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.), at paras. 49–53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.
>
> [120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. (…).[43]

[73] **As long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated**.

[Emphasis added]

[110] Ultimately, Justice Schrager rejected the Appellants' argument that the objectives of the *CCAA* were being thwarted by allowing the Monitor to pursue a remedy to which it was not entitled. In so deciding, Justice Schrager upheld the position of the CCAA Judge who, in the exercise of his judicial discretion, had favoured a *practical resolution of the case* by expanding the powers of the monitor:

> [32] The judge rejected the Appellants' argument that the objectives of the *CCAA* are being thwarted by allowing the Monitor to pursue a remedy to which it is not entitled. He characterized this argument as technical and unconvincing because, in the absence of consensual settlements, recourse against the Retailers (and JYIC) is the only possible avenue leading to a global treatment of Aquadis' liabilities. Thus, the powers sought by the Monitor were deemed necessary in order to materially advance the restructuring process. **The judge accepted this course of action as the only practical resolution of this case**. As such, **he indicated that the solution chosen was a sensible use of judicial resources** since it avoids the multiplication of individual actions outside the framework of the Plan of Arrangement. […]
>
> [Emphasis added]

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43 *Essar*, *supra*, note.

[111] In the present instance, the circumstances warrant the expansion of the Monitor's powers as it is also the only practical and most reasonable solution to obtain the Requested Information without necessarily compromising the rights and recourses of the parties.

[112] At the very least, the CCAA Parties and the Monitor will, at long last, be in a better position to determine the steps actually needed to realize the Twinco Interest and to terminate the CCAA Proceedings without necessarily proceeding with its CBCA Motion in its present format.

Is the Order granting the Expanded Monitor Powers enforceable throughout Canada?

[113] It was argued that an Order of this Court granting the Expanded Monitor Powers could not be enforceable in Newfoundland and persons in that Province could not be compelled to testify at the behest of the Monitor in the exercise of his expanded powers.

[114] With all due respect, the Court disagrees with such a proposition given the fact that such an Order is made pursuant to the CCAA.

[115] Moreover, it is only appropriate to remind Twinco and CFLCo that the Initial Order as it was subsequently amended modified and restated (collectively the "**Initial Order**") already grants to the Monitor the authorization to apply to any other court in Canada *for orders which aid and complement this Order and any subsequent orders of this Court*:

> 66. **DECLARES** that the Monitor or an authorized representative of the CCAA Parties, and in the case of the Monitor, with the prior consent of the CCAA Parties, shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the *U.S. Bankruptcy Code,* including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which the Monitor, or the authorized representative of the CCAA Parties, shall be the foreign representative of the CCAA Parties. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.
>
> [Emphasis added]

[116] Although the above-mentioned provision already contains a declaration that "*All courts*" are *requested to make such orders and to provide such assistance to the Monitor*

as may be deemed necessary or appropriate for that purpose, the following paragraph expands further on the Court's request for aid and assistance as follows:

> 67. **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the CCAA Parties, the Monitor 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 CCAA Parties and the Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the authorized representative of the CCAA Parties in any foreign proceeding, to assist the CCAA Parties and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.
>
> [Emphasis added]

[117] For greater certainty, the Court shall restate the same requests in the present Order notwithstanding that the same nevertheless already apply without having to restate all the provisions of the Initial Order herein.

The provisional execution of this Order notwithstanding any appeal

[118] It is also appropriate to grant the request of the CCAA Parties to order the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[119] All in all, based on all the circumstances mentioned above, the Court finds that without such an order, the CCAA Parties and the Plan creditors are bound to suffer greater prejudice should Twinco and/or CFLCo appeal the present Order, thus causing further delays in the implementation of the Plan given that the Twinco Interest is essentially the last tangible asset to monetize and to realize in order to permit the final distribution and the termination of the CCAA Proceedings initiated in 2015.

[120] Moreover, providing the Requested Information does not cause any prejudice to Twinco and CFLCo other than allowing the CCAA Parties and the Monitor to have at last a better idea of the value of the Twinco Interest without compromising the rights and recourses of the parties.

FOR THOSE REASONS, THE COURT:

[121] **GRANTS** the present *Motion for the Expansion of the Monitor's Powers* (the "**Motion**");

[122] **DECLARES** that the CCAA Parties have given sufficient prior notice of the presentation of this Motion to interested parties;

DEFINITIONS

[123] **ORDERS** that capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Motion;

EXPANSION OF MONITOR'S POWERS

[124] **ORDERS** that, in addition to any other powers in the Initial Orders or other Orders granted in these CCAA Proceedings, notwithstanding anything to the contrary and without limiting the generality of anything therein, the Monitor is hereby authorized and empowered to, directly or through its counsel:

a) compel any Person (as defined in the Initial Orders) with possession, custody or control to disclose to the Monitor and produce and deliver any books, records, accounting, documents, correspondences or papers, electronically stored or otherwise, relating to the Twinco Interest, the CFLCo Indemnity and the CFLCo Maintenance Obligations, including the Twinco Requested Information (the "**Requested Information**") in respect of the period from and after January 1, 2010, and such earlier periods as may be approved by the Court from time to time (the "**Disclosure Period**"); and

b) conduct investigations, including examinations under oath of any Person reasonably thought to have knowledge relating to the Twinco Interest, the CFLCo Indemnity and the CFLCo Maintenance Obligations, including the Twinco Requested Information, in respect of the Disclosure Period;

DISCLOSURE OF DOCUMENTS AND INFORMATION

[125] **ORDERS** that requests made by the Monitor for the production of Requested Information pursuant to subparagraph 124 (a) of this Order shall be made in writing and delivered by electronic transmission, registered mail or courier, specifying the Requested Information to be delivered to the Monitor by such Person;

[126] **ORDERS** that any Requested Information to be delivered by any Person to the Monitor pursuant to subparagraph 124 (a) of this Order shall be delivered within thirty (30) days of the Monitor's request or such longer periods as the Monitor may agree to in its discretion;

POWERS OF EXAMINATION

[127] **ORDERS** that the examinations held pursuant to subparagraph 124 (b) of this Order shall be conducted virtually due to the ongoing COVID-19 pandemic unless otherwise agreed between the Monitor and the Person being examined;

[128] **ORDERS** that the Monitor shall deliver by electronic transmission on the Person he wishes to examine pursuant to this Order, at least five (5) days prior to the scheduled date of the examination, a summons to appear specifying the time and the Requested Information that the Person must have in his or her possession during the examination;

[129] **ORDERS** that objections raised during examinations held pursuant to this Order shall not prevent the continuation of the examination, the witness being required to respond, unless they relate to the fact that the Person being examined cannot be compelled or to fundamental rights or to a matter of substantial legitimate interest, in which case the Person being examined may refrain from responding;

[130] For greater certainty, **RESTATES** and **DECLARES** that the Monitor or an authorized representative of the CCAA Parties, and in the case of the Monitor, with the prior consent of the CCAA Parties, shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the *U.S. Bankruptcy Code,* including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which the Monitor, or the authorized representative of the CCAA Parties, shall be the foreign representative of the CCAA Parties. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

[131] For greater certainty, **RESTATES** and **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the CCAA Parties, the Monitor 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 CCAA Parties and the Monitor as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the authorized representative of the CCAA Parties in any foreign proceeding, to assist the CCAA Parties and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

[132] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

[133] **THE WHOLE** with judicial costs payable by Twin Falls Power Corporation and Churchill Falls (Labrador) Corporation Limited.

_____
MICHEL A PINSONNAULT, J.S.C.

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Hearing date: June 3, 2021

TAB 4

TAB 4

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

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

Ontario Reports

Court of Appeal for Ontario,

Blair, Pepall and van Rensburg JJ.A.

December 21, 2017

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

Case Summary

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

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

which, among other things, removed Portco's control of the port facilities. The defendants appealed.

Held, the appeal should be dismissed.

The trial judge did not err in finding that the monitor had standing as a complainant under s. 238(*d*) of the *CBCA*. While a monitor generally plays a neutral role in *CCAA* proceedings, in exceptional circumstances it may be appropriate for a monitor to serve as a complainant. This was one such case. There was a *prima facie* case that merited an oppression action. The monitor commenced the action as an adjunct to its role in facilitating a restructuring. The monitor could efficiently advance an oppression claim on behalf of a conglomeration of stakeholders -- Algoma's pensioners, retirees, employees and trade creditors -- who were not organized as a group and who were all similarly affected by the alleged oppressive conduct. The remedy granted by the trial judge removed an insurmountable barrier to a successful restructuring.

The trial judge did not err in finding that the action was properly brought as an oppression action under s. 241 of the *CBCA* rather than as a derivative action under s. 239 of the *CBCA*. The derivative action and the oppression remedy are not mutually exclusive, and there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This case fell into that overlapping category.

The trial judge correctly identified the two prongs of the oppression remedy inquiry: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling with the term "oppression"? On the evidence, he was entitled to find that the port transaction, and in particular the transfer of control and the loss of Algoma's ability to restructure absent Essar's consent, violated the reasonable expectations of Algoma's stakeholders.

In light of the fact that Algoma's board of directors was not independent and did not actually exercise business judgment, the business judgment rule did not provide a defence to Essar.

The remedy granted by the trial judge was appropriate.

BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, 52 B.L.R. (4th) 1, EYB 2008-151755, J.E. 2009-43, 301 D.L.R. (4th) 80, 71 C.P.R. (4th) 303, 383 N.R. 119, 172 A.C.W.S. (3d) 915; *Nortel Networks Corp. (Re)* (October 3, 2012), Toronto, 09-CL-7950 (Ont. S.C.J. (Comm. List)); *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp*. (2003), 68 O.R. (3d) 544, [2003] O.J. No. 5242, 180 O.A.C. 158, 42 B.L.R. (3d) 14, 46 C.B.R. (4th) 313, 127 A.C.W.S. (3d) 830 (C.A.); *Rea v. Wildeboer* (2015), 126 O.R. (3d) 178, 2015 ONCA 373, **consd**

Other cases referred to

Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 80 D.L.R.

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APPEAL from the judgment of Newbould J. (2017), 137 O.R. (3d) 438, [2017] O.J. No. 1377, 2017 ONSC 1366 (S.C.J.) for the plaintiff in an action for an oppression remedy; and from the costs order, [2017] O.J. No. 4248, 2017 ONSC 4017, 50 C.B.R. (6th) 148 (S.C.J.).

Patricia D.S. Jackson, *Andrew D. Gray*, *Jeremy Opolsky*, *Alexandra Shelley* and *Davida Shiff*, for appellants Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding

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

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

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

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

The judgment of the court was delivered by

[1] **PEPALL J.A.**: — This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") restructuring proceedings of the respondent Essar [page5 S]teel Algoma Inc. ("Algoma"),[1] one of Canada's largest integrated steel mills, and the respondent Ernst & Young Inc., the court-appointed monitor.

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

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

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

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

A. *Facts*

(1) *Algoma's operations*

[6] The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake [page6 H]uron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the city since construction of the steel mill in 1901. Not surprisingly, the city's port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the port's primary customer and its employees have traditionally run the port operations. Raw materials used to produce steel are shipped to the port and the steel that is produced is shipped to market from the port. The relationship is one of mutual dependence.

[7] Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) *The Essar Group*

[8] Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc. and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) *Algoma's recapitalization*

[9] In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

[10] At the time of the discussions relating to the recapitalization, Algoma's board of directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the board of directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. [page7 A]lgoma personnel had no day-to-day control over the recapitalization project.

[11] Although the three independent directors had begun expressing concerns about their roles on the board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their

requests for timely, full disclosure of information and full participation in the strategic decisions of the board had not been properly taken into account by the other board members. On January 19, 2014, the three sent a memo to the board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the board.

[12] On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].
>
> . . . . .
>
> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
> We cannot discharge our responsibilities under such an environment. [page8]

[13] The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

[14] The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

[15] The trial judge also found that the recapitalization and the port transaction were run by Joe Seifert, chief investment officer of Essar Capital. The trial judge rejected the contention that

Mr. Seifert was merely an advisor to the board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the port transaction. As the trial judge noted, at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) *Restructuring support agreement*

[16] Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the port transaction.

[17] Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a restructuring support agreement (the "RSA") with Essar Global and an ad hoc committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in [page9 r]eturn for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* plan of arrangement. As a condition of the RSA and pursuant to an equity commitment letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

[18] The equity commitment letter provided a remedy in the event of a breach. The plan of arrangement contained a release of any claim arising out of the equity commitment letter in favour of Essar Global, the noteholders and the other corporations participating in the arrangement.

[19] It was a condition of the proposed plan of arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

[20] Nonetheless, an application for approval of the plan of arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

[21] Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However, the transaction marketed did not accord

with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

[22] The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global. [page10]

[23] And so it was that Algoma was left without the cash to repay or refinance its debt.

[24] Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US$300 million originally contemplated by the equity commitment letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the equity commitment letter. The releases contained in the original filing were repeated in the amended plan of arrangement.

[25] As subsequently discussed, in light of the amended RSA, an amended plan of arrangement was approved on November 10, 2014.

(5) *Port transaction*

[26] The port transaction closed on November 14, 2014. In summary, Algoma sold to Portco the port assets consisting of the port buildings, the plant and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

[27] Turning to the details of the port transaction, Algoma and Portco entered into a master sale and purchase agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

-- a cash payment by Portco of US$151.66 million; and

-- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

[28] To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent. [page11]

[29] Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a shared services agreement, an assignment of material contracts agreement and a cargo handling agreement.

(i) *Promissory note*

[30] The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set off against amounts owing by Algoma to Portco under the cargo handling agreement: *Essar Steel Algoma Inc. (Re)*, [2017] O.J. No. 4258, 2017 ONSC 3930, 53 C.B.R. (6th) 321 (S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) *Lease*

[31] Under the lease, Portco leased from Algoma the port lands, roads and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance and property taxes.

(iii) *Shared services agreement*

[32] Under the shared services agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the cargo handling agreement. These services were to be provided by Algoma employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 per cent per annum beginning in 2016.

(iv) *Assignment of material contracts*

[33] Under the assignment of material contracts agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the port, including the cargo handling agreement except by way of security granted to its other third party lender. [page12]

(v) *Cargo handling agreement*

[34] Under the cargo handling agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 per cent per annum commencing in 2016. Therefore, while Algoma was entitled to US$11 million annually under the shared services agreement, it had to pay Portco at least US$36 million annually under the cargo handling agreement, such that Portco would receive an annual revenue stream from Algoma of US$25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the cargo handling agreement, and potentially for 42 years if the agreement was not terminated.

[35] Section 15.2 of the cargo handling agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco -- and therefore Portco's parent, Essar Global -- a veto over any party acquiring Algoma in the *CCAA* proceedings.

[36] Although inclusion of the change of control provision in the cargo handling agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted, at para. 117, that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

[37] In discussing the financial ramifications of the shared services agreement and the cargo handling agreement, the trial judge observed, at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan. [page13]

[38] Duff & Phelps assessed the fair value of the Portco transaction as ranging between US$150.9 million and US$174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the cargo handling agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable.[2]

(6) *Final recapitalization*

[39] Ultimately, the recapitalization of Algoma consisted of the following transactions:

(a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the port transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

[40] In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees -- one from Essar Global and one from Algoma Port Holding Company Inc. -- guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the port transaction, were approved unanimously by Algoma's board of directors after receiving advice and on the recommendation of Algoma's management. By this time, the board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on [page14]August 24, 2014; the board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the port transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

[41] As mentioned, the approved plan of arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* plan of arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

[42] Based on the materials before this court, it would appear that the port transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the port transaction in the affidavits filed in support of the amendment to the plan of arrangement. The port transaction is not mentioned in that order or in any endorsement.

[43] The outcome of the port transaction was that all port assets were transferred from Algoma to Portco, the port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US$19,840,000 promissory note and was obliged to pay Algoma US$11 million per annum under the shared services agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the cargo handling agreement, subject to renewal, netting Portco US$25 million per annum as against the shared services agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) *Insolvency protection proceedings*

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

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

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

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

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

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

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

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

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

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

[52] The monitor also argued that s. 15.2 of the cargo handling agreement itself constituted oppression, because it was for the [page17]long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

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

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

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

cause of action or wrongful conduct was asserted by the monitor against them. Nonetheless, the monitor was seeking remedies that eviscerated the security held by them. They asserted that the monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the port transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the monitor, it had no jurisdiction to prejudice the interests of GIP. The monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

[56] Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the ad hoc committee of Algoma's noteholders; Algoma retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that [page18]the standing motions be dealt with at the trial scheduled for January 30, 2017. On January 5, 2017, he urged the monitor to give as many particulars as it could regarding the relief it might seek.

[57] On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

[58] The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. *Trial Judgment*

[59] The trial judge organized his reasons for decision under six principal headings: the monitor's standing; who directed the recapitalization and the port transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) *Monitor's standing*

[60] As mentioned, both Essar Global and GIP challenged the monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

[61] He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the port transaction to a group of creditors including trade creditors, pensioners, retirees and the City of St. Sault Marie.

[62] The trial judge acknowledged, at para. 34, that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1) (*k*) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp. (Re)* (October 3, 2012), Toronto, 09-CL-7950 (Ont. S.C.J.

(Commercial List)). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

[63] Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is [page19]a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544, [2003] O.J. No. 5242 (C.A.), this court confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action -- which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually -- should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

[64] To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 39 the trial judge relied on *Rea v. Wildeboer* (2015), 126 O.R. (3d) 178, 2015 ONCA 373, at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) *Essar Global directed the recapitalization and the Portco transaction*

[65] The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the port transaction -- if the conduct was oppressive, relief could be granted. Nonetheless, he found, at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

[66] At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the port transaction. Nor was either involved in the renegotiation of the RSA.

[67] The trial judge relied on other evidence, including Algoma's annual business plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found, at paras. 56-57, that some of the witnesses had been evasive, including Rewant Ruia, the Ruia family's [page20]lead in the Essar Group's North American operations; Mr. Seifert; and Rajiv Saxena, the executive director of Essar Steel India Ltd.

[68] After reviewing the evidence, the trial judge noted, at para. 58, that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the port transaction. He concluded, at para. 60:

> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions.

> Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) *Reasonable expectations and their violation*

[69] The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69: (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial or unfairly disregards a relevant interest?

[70] He described the reasonable expectations asserted by the monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the cargo handling agreement. He stated, at para. 64:

> The monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

[71] At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the monitor. He noted, at para. 73, that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees. [page21]

> [72] He concluded, at para. 75, that
> the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[73] The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners and retirees were violated in two principal ways: first, the port transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the port transaction.

[74] The port transaction was caused by Essar Global's breach of both the RSA and the equity commitment letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the cargo handling agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge

found, at para. 78, that the transfer of the port assets to Portco was driven by GIP's desire for a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the port assets and that was separate from Algoma.

[75] The port transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the equity commitment letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found, at para. 82, that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

[76] The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the equity commitment letter made it necessary to carry out the port transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the port transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's board of directors been [page22]struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the port transaction structure. The board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

[77] Additionally, the long-term value given to Essar Global by the port transaction was itself oppressive (although in stating this, the trial judge noted that the monitor did not pursue its claim that the port assets were transferred to Portco at an undervalue).

[78] As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the equity commitment letter. The trial judge found, at para. 100, that the monitor was not making a claim under that letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the port transaction.

[79] The trial judge also observed that when the court approved the amended plan of arrangement under the amended RSA, it did not have knowledge of the port transaction. There was no reference to the port transaction in the affidavits filed in support of the amendment to the plan of arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

[80] Ultimately, he concluded that the port transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

(4) *Change of control provision*

[81] The trial judge determined, at para. 104, that the change of control provision gave effective control to Portco (*i.e*., Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the cargo handling agreement so that it could operate the steel mill. Therefore, the veto under this clause was effectively a veto over any change of control of the Algoma business.

[82] Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out, at para. 110, the parties [page23]could have included a provision in the assignment of material contracts agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded, at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/ Essar Global a veto.

[83] The trial judge concluded, at para. 113, that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated, at para. 117, that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

[84] The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued to express its own interest as a prospective bidder. The trial judge observed, at para. 115, that "it is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

[85] The trial judge also observed that the evidence established that Portco's right to refuse assignment of the cargo handling agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the port. He concluded that the change of control provision in favour of Portco in the cargo handling agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

(5) *The business judgment rule*

[86] The trial judge also determined that the business judgment rule, which accords deference to a business decision of a board of directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the equity commitment letter. As the trial judge stated, at para. 123, the result of this was the port transaction, which was

an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with [page24]a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

[87] Moreover, there was no evidence that the board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) *Remedy*

[88] The trial judge stated, at para. 136, that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the port transaction. He accordingly deleted s. 15.2 of the cargo handling agreement and inserted a provision in the assignment of material contracts agreement, which provided that, if GIP becomes the equity owner of Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

[89] He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the cargo handling agreement (with automatic renewal for successive three-year periods, barring either party's termination). As the port was critical to Algoma's operation and survival, Algoma's ability under the cargo handling agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

[90] He concluded, at para. 144, that the payments under the cargo handling agreement were an unreasonable benefit in favour of Essar Global. If the agreement lasted only the initial 20-year term, Portco/Essar Global would receive US$300 million after GIP's loan was paid off. If the agreement was not terminated before the end of its 50-year life, Portco/Essar Global would receive an additional US$750 million for the last 30 years.

[91] Accordingly, the trial judge ordered that the lease, the cargo handling agreement and the shared services agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

[92] The trial judge decided, at para. 147, that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result [page25]of set-off and for amounts owing under the cargo handling agreement was in the ongoing *CCAA* proceedings.

(7) *Costs*

[93] Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the monitor or by or to GIP.

C. *Issues*

[94] There are eight issues to be addressed:

(1) Did the monitor lack standing to be a complainant under s. 238 of the *CBCA*?

(2) Could the claim of the monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

(3) Did the trial judge err in his analysis of reasonable expectations?

(4) Did the trial judge err in his analysis of wrongful conduct and harm?

(5) Did the trial judge err in tailoring a remedy?

(6) Was there procedural unfairness?

(7) Should the fresh evidence be admitted?

(8) Should leave to appeal costs be granted to GIP and the costs award varied?

D. *Analysis*

(1) *Standing of the monitor*

[95] Essar Global submits that the monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the monitor could avoid conflicts.

[96] GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all [page26]stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the monitor's oppression claim against it. Also, Algoma can be directed to make the cargo handling agreement payments to GIP directly and therefore the monitor owed a fiduciary duty to GIP.

[97] In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the monitor could have standing to bring an oppression action.

(a) *The purpose of CCAA restructurings*

[98] As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

[99] As outlined by Deschamps J. in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, the *CCAA* fell into disuse after amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015), at pp. 336-37; and *Century Services*, at para. 13.

[100] The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially distressed corporations without forcing them to first declare bankruptcy: [page27]*Reference re: Constitutional Creditor Arrangement Act (Canada)*, [1934] S.C.R. 659, [1934] S.C.J. No. 46, at p. 661 S.C.R.

[101] The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-39. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

[102] The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

[103] To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

[104] It is against this background that the role of a monitor must be considered.

(b) *The role of the monitor*

[105] Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd. (Re)*, [1988] B.C.J. No. 1210, 29 B.C.L.R. (2d) 257 (S.C.). [page28]In that case, an interim receiver was appointed whose role was described, at p. 277 B.C.L.R., as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq https://www.mondaq.com. The monitor was thus a court-appointed officer.

[106] The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(*k*) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct". Its express duties under s. 23(1)(*c*) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

[107] Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008), 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor -- taking on larger mandates, often times involving complex, cross-border restructurings.

[108] Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd. (Re)*, [1992] B.C.J. No. 1163, 67 B.C.L.R. (2d) 385 (C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd. (Re)*, [1993] B.C.J. No. 79, 77 B.C.L.R. (2d) 332 (S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy. [page29]

[109] Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy and, as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties

reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed, it is required by statute to do so. See, for example, s. 23 of the *CCAA* that describes certain duties of a monitor.

[110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) *A monitor as complainant in an oppression action*

[111] Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA.*[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather, they simply argue that the monitor has no standing.

[112] Section 238 of the *CBCA* defines a complainant as

(*a*) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates, [page30]

(*b*) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(*c*) the Director, or

(*d*) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(*d*) is the relevant subsection.

[113] Section 241of the *CBCA* describes the oppression remedy:

> 241(1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> *(a)* any act or omission of the corporation or any of its affiliates effects a result,
>
> *(b)* the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

> *(c)* the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[114] The question here is whether the trial judge erred in concluding that the monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the monitor have been a complainant in this case? I would answer both questions affirmatively.

[115] As is clear from s. 238(*d*) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's-length party. As this court said in that case, at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

[116] Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like [page31]a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

[117] Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(*k*) of the *CCAA* expressly provides that a monitor shall carry out any functions in relation to the company that the court may direct. Moreover, s. 23(1)(*c*) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

[118] Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order that it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc. (Re)*, [2016] O.J. No. 4688, 2016 ONCA 662, 39 C.B.R. (6th) 173, at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

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

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

[121] Here, in para. 37(c) of the amended and restated initial *CCAA* order dated November 20, 2015, the monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the monitor to commence proceedings under s. 241 of the *CBCA*. The monitor proceeded with the oppression action in the interests of the restructuring consistent [page32]with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the port transaction, such as the change of control clause in the cargo handling agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The monitor took the action as an "adjunct to its role in facilitating a restructuring".

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

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

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

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

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

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

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

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

(2) *Derivative or oppression action*

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

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

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

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

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

> circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131, [1992] O.J. No. 2382 (Gen. Div. [Commercial List]); *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589, [2000] O.T.C. 865 (S.C.J.), affd [2001] O.J. No. 3918, 152 O.A.C. 39 (Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201 (C.A.), at para. 526, leave to appeal refused [2004] S.C.C.A. No. 291.

[132] Or, as Armstrong J.A. put it in *Malata (Group (HK) Ltd. v. Jung* (2008), 89 O.R. (3d) 36, [2008] O.J. No. 519 (C.A.)), at para. 26:

> [T]here is not a bright-line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

[133] In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion -- unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation -- this case falls into the overlapping category.

[134] For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted, at para. 31, the monitor initially cast quite widely the net of stakeholders affected by the port transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners and retirees.

[135] In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the Act) *of the interests of the claimant*: see *BCE*. The monitor asserted at the hearing, and the trial judge found, at para. 75: [page35]

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[136] It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the port transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the port transaction.

[137] The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded, at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process *and negatively impact creditors*.

(Emphasis added)

[138] On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the monitor was asserting "that the personal interests of the creditors ha[d] been affected".

[139] The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

[140] For example, the appellants rely on certain aspects of the following comments by this court, at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants[.]
>
> . . . . .
>
> The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea -- the only director plaintiff -- does not plead that the Improper Transactions have impacted his interest *qua* director. [page36]
> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

[141] While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders -- for example, trade creditors, employees, retirees or pensioners -- simply because each of them, separately, may have suffered the same type of individualized harm.

[142] Instead, I read the reference, at para. 29, to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the

individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole".

[143] Were the appellants correct in their submissions, as counsel for the monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412, 214 D.L.R. (4th) 496 (S.C.J.) (Commercial List), at para. 153, affd [2004] O.J. No. 636, 42 B.L.R. (3d) 34 (C.A.). Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (2006), 79 O.R. (3d) 81, [2006] O.J. No. 27 (C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

[144] The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests have been "compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": [page37]*J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd*., [2008] O.J. No. 958, 2008 ONCA 183, 41 B.L.R. (4th) 51, at para. 66. See, also, *Fedel v. Tan* (2010), 101 O.R. (3d) 481, [2010] O.J. No. 2839, 2010 ONCA 473, at para. 56.

[145] The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

[146] Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

[147] I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the port transaction, including the cargo handling agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

[148] In conclusion, at law, the monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) *Reasonable expectations*

[149] Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that

the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

[150] The monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees and trade creditors held expectations that had been violated and that those expectations were objectively reasonable. [page38]

[151] In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court, at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

[152] In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> First, oppression is an equitable remedy. It seeks to ensure fairness -- what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
> Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

(Citations omitted)

> [153] As also stated in *BCE*, at para. 71:
> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all the interests at play.

[Citations omitted]

[154] Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

[155] The monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.,* the port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations [page39]were stated by the monitor to include commercial practice, the nature of Algoma and past practice. These particulars would all feed an expectation of fair treatment.

[156] Based on the reasonable expectations particularized by the monitor, as already noted, the trial judge found, at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[157] There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the port transaction and would not have expected an outcome in which Algoma no longer had full control over the port facility.

[158] The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

[159] Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

[160] The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted, at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global -- particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors [page40]and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

[161] Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the plan of arrangement, where he deposed that he believed that Algoma would be solvent. I would not give

effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

[162] The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated, at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[163] Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include (i) general commercial practice; (ii) the nature of the corporation; (iii) the relationship between the parties; (iv) past practice; (v) steps the claimant could have taken to protect itself; (vi) representations and agreements; and (vii) the fair resolution of conflicting interests between corporate stakeholders.

[164] The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2009), at 17.47.

[165] Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor (iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical [page41]asset, as in the port transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

[166] As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the monitor found at para. 80 of its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

[167] This was essentially a factual exercise. There was conflicting evidence before the trialI judge. However, it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

[168] I therefore reject the appellants' submissions on reasonable expectations.

(4) *Wrongful conduct and harm*

[169] Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

[170] First, Essar Global submits that the trial judge inappropriately relied on the equity commitment letter. It argues that the court approved the amended plan of arrangement that released Essar Global from any claim relating to the equity commitment letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

[171] I disagree. I can state no more clearly than the trial judge did, at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The [page42]Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

[172] An amended plan of arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful and the port transaction was the only available means to generate sufficient cash for Algoma.

[173] I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended plan of arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the port transaction being part of the plan of arrangement, nor was there any mention of it in any endorsement or the order approving the amended plan of arrangement.

[174] In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the equity commitment letter. Rather, he found that the totality of Essar Global's conduct regarding the recapitalization and port transaction satisfied the wrongful conduct requirement.

[175] Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

[176] Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely, US$150 million rather than the US$250 to US$300 million that was originally promised, was generated by the port transaction when it was not. They also complain that he erred in granting an oppression remedy when the equity commitment letter provided for a limited remedy in the event of a breach.

[177] The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million". Reading that paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization. [page43]

[178] The relevant contributions made to Algoma in November 2014 consisted of

- US$150 million in cash from Essar Global under the amended RSA;
-
- US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to
- members of the Essar Group under the amended RSA; and

-- US$150 million in cash generated from the port transaction.

[179] Essar Global only provided Algoma with US$150 million in cash equity, not the US$250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted, at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

[180] Algoma, the monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the port transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert -- which the trial judge considered in great detail -- clearly sets out Essar Global's cash contribution to Algoma and the US$150 million in cash paid by Portco to Algoma under the port transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

[181] The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma -- one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the port transaction. He also

understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

[182] Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the equity commitment letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250 --$300 million required. He obviously understood that there was to be [page44]a cash component to Essar Global's contribution separate and apart from the proceeds of the port transaction.

[183] In addition, at para. 88, the trial judge noted that the port transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the port transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the port transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

[184] Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

[185] No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the port transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

[186] In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

[187] As mentioned, Essar Global also asserts that the remedy for breach contained in the equity commitment letter precluded any oppression remedy. No one was suing for breach of the equity commitment letter. Rather, it formed part of the context that included a failure to explore alternatives, the port transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees and trade creditors.

[188] Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the equity commitment letter did not cause Algoma to enter the port transaction.

[189] Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's [page45]equity commitment and the port transaction. It argues that the port transaction was a key component of the recapitalization before the execution of the equity commitment letter.

[190] At trial, the trial judge rejected Essar Global's argument, finding, at para. 87, that the port transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty. He accurately noted that the first plan of arrangement that was approved by the court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the equity commitment letter and that the port transaction was not a part of that plan. He found that the port transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the equity commitment letter.

[191] The causal connection between Essar Global's equity commitment and the port transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

[192] Furthermore, the port transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US$2 million had to be used to reduce Algoma's debt.

[193] I am not persuaded that the trial judge made any palpable and overriding error in his finding.

[194] Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the board's decisions.

[195] The trial judge correctly described [at para. 119] the business judgment rule, relying on para. 40 of *BCE*:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions. [page46]

[196] Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755, [1998] O.J. No. 1886, 160 D.L.R. (4th) 131 (Gen. Div. (Commercial List)), at pp. 150-51 D.L.R.

[197] Second, the rule's protection is available only to the extent that the board of directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

[198] In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's board formed an independent committee in February 2014, events may have evolved differently, and the board may have accepted the advice to hold Essar Global to its commitment.

[199] Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh -- who cast the deciding vote in that decision -- was not free to vote as he chose.

[200] Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted, at para. 15, that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly when considered alongside his extensive comments, at paras. 43-60, finding that the critical decisions regarding Algoma's recapitalization and the port transaction were made not by Algoma's board, but by Essar Global and Essar Capital as led by Mr. Seifert.

[201] Specifically, the trial judge made findings of fact, at paras. 51-53, regarding the limited role played by Algoma's board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the port transaction. He also accepted the evidence of Mr. Ghosh that the transaction was [page47]approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

[202] Essar Global maintained before the trial judge, as they do before this court, that the Algoma board's decisions were nonetheless shielded from court intervention because the board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the board elected not to follow.

[203] At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the board that unsecured noteholders would not react well to the port transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the equity commitment letter. Mr. Schrock said that the board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

[204] Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving

information and engaged in decision-making in the same manner as those board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

[205] Essar Global also submits that the trial judge should not have gone on to censure the activities of the board in November 2014 (when the board approved the transactions) by relying on the board's February 2014 decision regarding the independent committee.

[206] The trial judge did not censure the decisions of the Algoma board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated [page48]that the board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

[207] Specifically, the trial judge found, at para. 123, that, if the board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

[208] Additionally, the trial judge found that the board had accepted the inclusion of the contentious change of control provision in the cargo handling agreement without considering alternatives. If the provision was truly for the benefit of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

[209] All this evidence speaks to the board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

[210] Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

[211] It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required. Although it is true that an independent committee was not legally or technically required, the board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the board's lack of independence, the board's failure to follow its advisors' advice, the board's failure to consider alternatives, and the board's acquiescence to recapitalization transactions that primarily benefited the interests of

Essar Global over those of Algoma. Again, the [page49]totality of the evidence supports the board's lack of good faith, and renders the business judgment rule inapplicable.

[212] There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

[213] Here, the minutes of the board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

[214] To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

[215] I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

[216] Fifth, Essar Global submits that the involvement of Algoma's management and board in the port transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the monitor failed to attack the board's process in its pleading. I do not accept these arguments.

[217] Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.). [page50]

[218] Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's board and management played a limited role in the port transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual background demonstrates why it was open for the trial judge to conclude that the port transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

[219] On the pleadings issue, I note that the monitor pleaded that the port transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the port transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's board and senior management, who were acting on an informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its

pleadings, it cannot now say that issues related to the board's process were not properly before the trial judge.

[220] Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the port transaction to Algoma and the impairment of Algoma's ongoing restructuring.

[221] In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the port transaction did not provide sufficient value to Algoma.

[222] Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed, his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the port transaction.

[223] Moreover, it was an exercise in self-dealing. As the trial judge stated, at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend [page51]to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

[224] The trial judge also concluded that the mismatched terms of the cargo handling agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the cargo handling agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If

> Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

[225] The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the cargo handling agreement served no practical purpose to GIP and the same rights could have been provided for in the assignment of material contracts.

> [226] As the trial judge concluded, at para. 138:
> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP. [page52]

[227] There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

[228] On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

[229] Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion, the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand

that Essar Global has control rights".

[230] I see no error in the trial judge's conclusion.

(5) *The remedy*

[231] Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the cargo handling agreement and in granting Algoma the option of terminating the port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the provision was an overly broad remedy that was unconnected to the [page53]reasonable expectations of the stakeholders, and instead, he should have considered a nominal damages award.

[232] GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

[233] I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177, [1998] O.J. No. 4142 (C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

[234] Second, the trial judge properly identified the need to avoid an overly broad remedy, stating, at para. 136, that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma (the remedy the monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the port and that Essar Global would not have a veto over its restructuring efforts.

[235] Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the port transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee [page54]provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

[236] Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) *Was there procedural unfairness?*

[237] Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

[238] As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

[239] The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481, [1995] O.J. No. 1377 (C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore, a party against whom a specifically tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by [page55]the trial judge where the relief granted had not been specifically pleaded or sought in argument.

[240] Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

[241] That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully canvassed in the evidence and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the monitor. And although he did not think an amendment was

necessary, he nonetheless ordered that the monitor would be granted leave to amend its claim to support the relief he granted.

[242] I would not give effect to this ground of appeal.

(7) *Fresh evidence*

[243] Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's board of directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the monitor and so Essar Global had no reason to adduce this evidence earlier.

[244] Messrs. Mirchandani and Kothari joined Algoma's board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the board when the port transaction was approved in November 2014.

[245] Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer*, [1980] 1 S.C.R. 759, [1979] S.C.J. No. 126, or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, [1994] O.J. No. 276 (C.A.).

[246] As this court has noted, the two tests are quite similar: see *Chiang (Trustee of) v. Chiang* (2009), 93 O.R. (3d) 483, [2009] O.J. No. 41, 2009 ONCA 3, at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must [page56]demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

[247] Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

[248] Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

[249] In both its original and its amended statement of claim, the monitor alleged that representatives of Essar Global were members of Algoma's board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to have been caught by surprise by the issue of the board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

[250] In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

[251] However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his

reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

[252] Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

[253] I would therefore dismiss the motion for fresh evidence.

(8) *Costs*

[254] GIP claimed costs of CDN$750,156.18 against the monitor payable on a partial indemnity scale. It claimed it was [page57]entirely successful because it successfully resisted relief sought by the monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

[255] GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, at para. 27.

[256] At trial, GIP was unsuccessful in challenging both the monitor's claim of standing and its claim that the port transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the monitor's claims, while it appeals the trial decision.

[257] I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. *Disposition*

[258] For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

[259] As agreed, I would order that the monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000, respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The monitor and Algoma shall have until January 24, 2018 to respond.

Appeal dismissed.

Notes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009), at pp. 430-31 and 436.

6 Janis P. Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010), at p. 99.

TAB 5

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[7] At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

[8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

[9] This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

[10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

[11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

[12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

[13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

[14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

[17] There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "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".

[19] Section 36(1) of the CCAA provides:

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

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> (d) the extent to which the creditors were consulted;
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp,* 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:

see *Target Canada Co. (Re),* 2015 ONSC 1487, at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently
- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re)*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only

by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

[46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

[47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

[48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

[49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

[50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

[51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

[52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

[53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

[54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

[55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

[56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

[57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

[58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

[64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re),* 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

[65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

[71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

TAB 6

SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00696017-00CL **DATE: May 12, 2023**

NO. ON LIST: 3

TITLE OF PROCEEDING: In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co.

BEFORE: JUSTICE CONWAY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

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

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE CONWAY:

[1] All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of the Applicant dated May 10, 2023.

[2] The Applicant seeks three orders today: (i) the Approval and Vesting Order; (ii) the Assignment Order; and (iii) the Ancillary Relief Order. All of those orders will implement the Transaction with BMO (through its subsidiaries) to acquire the assets and assume the liabilities of the AIR MILES® Reward Program business, as set out in the Asset Purchase Agreement.

[3] At the conclusion of the hearing, I said that I was granting the orders (with the minor amendments discussed at the hearing). These are my reasons for doing so.

[4] BMO was the stalking horse bid in connection with the SISP, both of which were approved by this court. The SISP process ran its course. Although 48 parties were contacted, BMO was the only bidder and was confirmed to be the Successful Bid.

[5] The Transaction will see the AIR MILES® Reward Program continue as a going concern, with offers of employment for approximately 700 employees, as well as continuity for the approximately 10 million active Collectors, the Partners, Reward Suppliers and vendors. The Buyers will purchase all or substantially all of the operating assets of the Applicant, including the Travel Services Shares, and assume the Assumed Contracts. The Buyers will pay US$160,259,861.40 in cash, less certain purchase price adjustments, and will assume the Assumed Liabilities and pay certain transfer taxes.

[6] There is widespread support for the Transaction. It is supported by the Monitor. Mr. Staley and Mr. MacFarlane voiced their support for their respective secured creditors. There is no opposition from any stakeholder. Mr. Taylor addressed the court for the Bread parties and confirmed that they are not opposing the relief today. The Monitor, in its Third Report, states that the Transaction "provides for the greatest

recovery available in the circumstances and will be more beneficial to creditors than a sale or disposition in a bankruptcy".

[7] With respect to the **Approval and Vesting Order**, I am satisfied that the Transaction should be approved. I have considered the factors in s. 36 of the CCAA and in *Soundair*. Specifically, the process leading to the Transaction – the SISP – was developed in consultation with the Monitor, the Financial Advisor, BMO and certain Credit Agreement Lenders. It was approved by this court and followed by the Applicant. The market has been canvassed in accordance with that process and the Transaction is the only one that emerged. As noted, it is the only viable option and continues the business as a going concern. The purchase price will be sufficient to satisfy the Charges and the Employee Payables, and provide for a distribution to the Credit Agreement Lenders in partial recovery of their secured claims at a later date.

[8] The repayment of the DIP and the payment of the Transaction Fee are satisfactory and approved.

[9] I reviewed the Releases in detail with counsel at the hearing. I approve them pursuant to s. 11 of the CCAA. I am satisfied, among other things, that the Released Parties were necessary to the Transaction; the released claims are rationally connected to the purchase of the Transaction and are necessary for it; and the Released Parties contributed to the Transaction. The Releases do not extend to the Applicant or Travel Services. They exclude any obligations that may not be released under s. 5.1(2) of the CCAA, any obligations under the Asset Purchase Agreement and related documents, and any obligations of BMO to its own customers (the latter as directed by me at the hearing). There is no release of any Bread-related parties as set out in paragraph 24.

[10] All other provisions of the Approval and Vesting Order are satisfactory and I approve it.

[11] With respect to the **Assignment Order**, Newco (a subsidiary of BMO) will be assuming the Assumed Contracts. These are required for the ongoing business operations of the Applicant. There are approximately 231 contracts. The Applicant has served all counterparties, except for four who were served under the contract provisions but cannot be found. While the Applicant has obtained approvals for the transfer from a large number of counterparties, there are some for whom consent has not been obtained as yet (most of which are non-disclosure agreements (NDAs) and have no cure costs at issue). Ms. Dietrich advised the court that there have been no oppositions to the transfer.

[12] The Assignment Order provide that any assignment is subject to payment of any cure costs, satisfying the requirement under s. 11.3(4) of the CCAA. The assignments are to Newco, which is a subsidiary of BMO, a sophisticated financial entity. Mr. Bish submitted that although the purchase has been structured this way, for all practical purposes BMO will be seeing that the obligations under these contracts are satisfied going forward. With respect to the NDAs, the assignment will enable Newco to protect any confidential data of the business through enforcement of those agreements. Considering all of these factors, I consider it appropriate to grant the Assignment Order.

[13] With respect to the **Ancillary Relief Order**, the stay extension to July 14, 2023 is approved. This will give the parties time to close the Transaction and start the transition of the business. The Applicant is acting in good faith and with due diligence and no creditor will be prejudiced by the extension. I am expanding the powers of the Monitor under s. 11 and 23(1)(k) of the CCAA. This will enable it to seek additional avenues of recovery for the remaining assets of the Applicant, to assist in the transition of the business, and to bring this CCAA proceeding to an efficient conclusion for the benefit of stakeholders.

[14] I have signed the three orders and attached them to this Endorsement. These orders are effective from today's date and are enforceable without the need for entry and filing.

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1376

Date: 20150709
Docket: S154746
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 *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, as amended

And

In the Matter of North American Tungsten Corporation Ltd.

Petitioner

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	John R. Sandrelli Jordan D. Schultz
Counsel for the Monitor, Alvarex & Marsal Canada Inc.:	Kibben M. Jackson
Counsel for Callidus Capital Corporation:	William E.J. Skelly
Counsel for Government of Northwest Territories:	Mary Buttery H. Lance Williams
Counsel for Wolfram Bergbau and Hütten AG:	Jonathan McLean Angela L. Crimeni
Agent for Counsel for Global Tungsten & Powders Corp.:	Jonathan McLean Angela L. Crimeni
Place and Date of Hearing:	Vancouver, B.C. July 8, 2015
Place and Date of Judgment:	Vancouver, B.C. July 9, 2015

[1] **THE COURT:** This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to s. 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[2] I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.

Background

[3] The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

[4] The Company sought protection under the *CCAA* as a result of circumstances mostly beyond its control, including a severely depressed world market for tungsten. At the reduced price the Company has been receiving for its tungsten, the Cantung Mine was generating sufficient cash flow to pay the majority of its operational and administrative costs but was unable to meet its financing costs. At the time of the Initial Order, the Company was experiencing significant cash flow problems.

[5] Alvarez & Marsal Canada Inc. was appointed Monitor under the Initial Order. A summary of the amounts claimed as owing by secured creditors and their respective security interests as at July 7, 2015 is set out in the Monitor's Fourth

report. I will refer to that summary because an understanding of the security interests held by the principal creditors is necessary to consider the issues raised on this application.

[6] Callidus Capital Corporation is owed approximately $13.33 million. This is secured by all present and after-acquired property not related to Mactung. That includes more than 200 pieces of mining equipment used at the Cantung Mine. The Monitor has opined that there is sufficient value in the equipment to satisfy that debt.

[7] The Government of Northwest Territories ("GNWT") is owed $24.67 million. This is secured by all present and after-acquired property related to Mactung. While there is some issue and ongoing negotiation about the actual amount of debt which arises from the Company's reclamation obligations, it is significant.

[8] Global Tungsten & Powders Corp. ("GTP") and Wolfram Bergbau and Hütten AG ("WBH") are the Company's only two customers for all of the tungsten produced from the Cantung Mine. The total indebtedness to the customers is approximately $8.16 million. They also hold security over all present and after-acquired property related to Mactung.

[9] Debenture holders are owed $13.58 million, which is secured by all present and after-acquired property of the Company.

[10] Queenwood Capital Partners II LLC ("Queenwood II") is owed approximately $18.51 million, secured by all present and after-acquired property of the Company. The principals of Queenwood II are related to Company insiders.

[11] The total amount of the secured debt is in the range of $80 million. There is also approximately $14 million in unsecured liabilities. The reported book value of the assets at the time of the Initial Order was approximately $64 million, which included a value of $20 million for the Mactung property. The fair market value or realizable value has not been determined by the Monitor.

[12] The somewhat unique situation here is that Callidus does not have security over the Mactung property and the GNWT and the customers do not have security over the Cantung property.

[13] The stay granted by the Initial Order expired yesterday, but I extended it until July 10, 2015 to allow me to consider the arguments advanced on this application. Since the Initial Order, management of the Company has been working in good faith to develop a plan of arrangement. Management has developed an operating plan to manage cash flow through the next several months. I will not refer to the projected cash flow except to say that it anticipates receipt of the interim financing and continued revenues of more than $22 million from operations.

[14] The Company has been involved in extensive discussions with the Monitor and stakeholders to put in place a potential Sale and Investment Solicitation Process ("SISP"). To date the plan has involved re-focusing on surface mining and milling ore stockpiles rather than underground mining. Employees have been terminated. If the interim financing is obtained, the Company plans to continue operations at the mine until the end of October 2015, including management of environmental care. It plans to conduct an orderly wind down of underground mining activities, including a staged sale of equipment used in the underground work. It plans to reconfigure the mill facilities to facilitate tailings reprocessing so that it can use existing tailings stores as well as the surface extraction as a revenue source. It also plans to undertake limited expenditures on Cantung reclamation and Mactung environmental work with a view to increasing asset values. It hopes to seek court approval of a SISP in the next couple of weeks.

[15] As a result of difficulties arising from timing of receipt of payments from GTP, one of the customers, the cash flow problems for the Company became critical within the last ten days. The Company sought interim financing and received an offer from a third party. Callidus was opposed to that offer of financing and the Company eventually obtained a $500,000 loan from Callidus on June 29, 2015 on a short-term basis (the "Gap Advance"). They continued to negotiate and arrived at an agreement

for interim financing (the "Interim Facility") and a forbearance agreement (the "Forbearance Agreement"). These form the basis for the application before this court. Terms of these agreements which are relevant to the application include:

a) the $500,000 Gap Advance would be deemed to be an advance under the Interim Facility;

b) Callidus will advance an additional $2.5 million, which along with the Gap Advance would be secured over all of the property of the Company and have priority over the secured creditors; and

c) the Company will have to make repayments to Callidus by certain dates and those payments include payments of interest and principal on the existing loan facility (the "Post-Filing Payments").

[16] At the hearing of the application, one of the more contentious issues was the Company's request that the court make the order in relation to the Gap Advance *nunc pro tunc*. This term was sought because s. 11.2(1) of the *CCAA* allows a court to make an order for interim financing but "The security or charge may not secure an obligation that exists before the order is made."

[17] Of course the Gap Advance was an obligation which existed before the making of any order for interim financing. During the course of argument yesterday, the Company withdrew the application for a *nunc pro tunc* order in relation to the Gap Advance. This occurred because Callidus agreed to modify the terms of the Interim Facility such that the Gap Advance will be treated as an advance under its existing facility. In other words, the proposed Interim Facility is now for a $2.5 million loan facility and not $3.0 million, as set out in the application.

Position of the Company

[18] The Company says that in all of the circumstances, proceeding with the Forbearance Agreement and the Interim Facility is better for the petitioner's restructuring efforts and necessary given the urgent need for funding. It stresses that

without access to the interim financing, it will be unable to meet its ongoing payroll obligations or its negotiated payment terms for the post-filing obligations. It will be unable to continue restructuring and will likely face liquidation by its secured creditors. It also says there is greater value for all stakeholders if the Company is permitted to continue operating as a going concern. It says there would likely be no recovery for creditors other than the senior secured creditors without access to the Interim Facility. The local community of Watson Lake and local businesses would suffer significantly, as 100 employees would be out of work. Further, the Company says there is little prejudice to the secured creditors. In addition, it says if the mine site is abandoned, there would be a larger reclamation obligation, which would be to the detriment of the GNWT and other creditors with claims against an interest in the Mactung property.

Position of the Customers

[19] The customers oppose the Interim Facility and the extension of the stay. They argue that the financing of $2.5 million at interest rates of 21% will not help the Company emerge from this process with a workable plan. They argue that putting the Cantung Mine into care and maintenance as of November and hoping that tungsten prices rise in the future is not a workable plan.

[20] The customers say the result of approval of the Interim Facility is that the security interests of WBH and GTP would be prejudiced because those interests would be subordinated to Callidus as well as the GNWT. Finally, they argue that the bankruptcy of the Company and sale of its assets is inevitable no matter what happens.

Position of the GNWT

[21] The GNWT does not oppose the extension of the stay nor the granting of the Interim Facility. However, it opposes the Forbearance Agreement which would grant the Interim Facility priority over the GNWT Mactung security, which it holds to secure the environmental and reclamation obligations of the Company. It says that it would be prejudiced as a result of the granting of that priority and that in the circumstances

here there is no reason to do so. It says that Callidus would effectively receive approximately $1.5 million in Post-Filing Payments in very short order, which essentially allows it an unfair priority.

The Monitor

[22] The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.

- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.

- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.

- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.

- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

[23] The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISP

being undertaken by the Company. Overall… the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application…"

Extension of the Stay

[24] I turn now to the reasons for granting the extension of the stay. Subsection 11.02(2) of the *CCAA* provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. Subsection 11.02(3) provides:

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[25] A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the *CCAA*. Justice Deschamps stated at para. 70:

> … Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

[26] When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corporation (Re)*, 2012 BCSC 781.

[27] It is also appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.).

[28] When *CCAA* proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met. See, for example, *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775.

[29] The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process.

[30] I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

[31] It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

The Interim Facility

[32] I turn to my reasons for approving the interim financing. Subsection 11.2(4) of the *CCAA* sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> …
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report… if any.

[33] While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Limited (Re)*, 2012 ONCA 552 at para. 6, and I am paraphrasing:

> a) without interim financing would the petitioner be forced to stop operating;
>
> b) whether bankruptcy would be in the interests of the stakeholders; and
>
> c) would the interim lender have provided financing without a super priority charge…

[34] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

> a) the applicants needed additional financing to support operations during the period of the going concern restructuring;
>
> b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;

c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

[35] When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

- The cash flow projections show that the $2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.

- I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.

- I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.

- The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.

- Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.

- It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover Post-Filing Payments, those will likely

be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.

- I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.

- Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

[36] Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the Post-Filing Payments to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the Post-Filing Payments may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

[37] In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of $2.5 million, and as previously indicated, the Gap Advance is not included in that.

[38] What about the date for an extension of the stay?

[39] MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISP. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

[40] THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

[41] MR. SCHULTZ: Okay.

[42] THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

[43] MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

[44] THE COURT: All right. The stay is extended to July 17, 2015.

"Butler J."

TAB 8

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

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

Jay Swartz, for the Target Corporation

Alan Mark, *Melaney Wagner*, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

   a) Should the stay be extended to the Partnerships?

   b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

   c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

   d) Should the Court approve protections for employees?

   e) Is it appropriate to allow payment of certain pre-filing amounts?

   f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

   g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

   h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015