

YOU COURT FILE NO.: 2401-15969

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

Clerk's Stamp



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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LLC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

APPLICANT **ALVAREZ & MARSAL CANADA INC.**, in its capacity as Court-appointed Monitor of ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LLC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

DOCUMENT **BENCH BRIEF OF THE MONITOR**

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I. INTRODUCTION

1. This bench brief is submitted on behalf of the Monitor in support of its application (the "**Application**") for an order (the "**Order**") pursuant to the CCAA, among other things, approving the Pre-Filing Report of the Proposed Monitor dated November 13, 2024 (the "**Pre-Filing Report**"), the Monitor's First Report dated November 20, 2024 (the "**First Report**"), the First Supplement to the Monitor's First Report dated November 21, 2024 (the "**First Supplement to the First Report**"), the Second Supplement to the Monitor's First Report dated November 25, 2024 (the "**Second Supplement to the First Report**"), the Monitor's Second Report dated November 28, 2024 (the "**Second Report**"), the Monitor's Third Report dated December 13, 2024 (the "**Third Report**"), the First Supplement to the Monitor's Third Report dated December 17, 2024 (the "**First Supplement to the Third Report**"), the Monitor's Fourth Report dated February 19, 2025 (the "**Fourth Report**"), the First Supplement to the Monitor's Fourth Report dated February 24, 2025 (the "**First Supplement to the Fourth Report**"), and the Fifth Report, and the conduct and activities of the Monitor set out therein.

II. OVERVIEW

2. On November 14, 2024, on application by an ad hoc group of Canadian investors in various real estate and land investment projects (the "**Applicant Investors**"), this Honourable Court granted an initial order (the "**Initial Order**") providing protection to the Debtor Companies (as defined below) under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") and granting the following relief, among other things:
 - (a) appointing Alvarez & Marsal Canada Inc. ("**A&M**") as monitor of Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc., Windridge A2A Developments, LLC, Fossil Creek A2A GP Inc., Fossil Creek A2A Developments, LLC, A2A Developments Inc., Serene Country Homes (Canada) Inc. and A2A Capital Services Canada Inc. (the "**Debtor Companies**") with certain enhanced powers (in such capacity, the "**Monitor**") ;
 - (b) authorizing the Debtor Companies, with the enhanced oversight and control of the Monitor, to remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof and to continue to carry on business in a manner consistent with the preservation of their businesses;
 - (c) granting a stay of proceedings (the "**Stay of Proceedings**"), for an initial period up to and including November 24, 2024 (the "**Stay Period**") for the Debtor Companies, the Property, the Business, and the Affiliate Entities (as defined below);

- (d) declaring that the Angus A2A Limited Partnership, Angus Manor Park A2A Limited Partnership, Fossil Creek A2A Trust, Hills of Windridge A2A Trust, Fossil Creek A2A Limited Partnership and Hills of Windridge A2A LP (collectively, the "**Affiliate Entities**") shall have the same benefit and the same protections and authorizations provided to the Debtor Companies in the Initial Order and all the property and business of the Affiliate Entities shall be deemed to be the Property and Business (each as defined in the Initial Order of the Debtor Companies);
 - (e) authorizing the Monitor to take whatever steps necessary with the Alberta, Federal and Ontario corporate registries to reinstate certain struck Debtor Companies and Affiliate Entities;
 - (f) authorizing the Debtor Companies to enter into an interim financing agreement with Pillar Capital Corp. ("**Pillar**" or the "**Interim Lender**") and to borrow from Pillar the initial principal amount of \$500,000 with the ability in the future to borrow up to \$2,000,000 (the "**Interim Financing**");
 - (g) granting the following charges over the Property in the following relative priorities:
 - (i) First – a charge in favour of the Monitor, its Assistants, Monitors Counsel and Representative Counsel (the "**Administration Charge**") to a maximum amount of \$250,000; and
 - (ii) Second – a charge in favour of Pillar in respect of the Interim Financing to a maximum amount of \$500,000 (the "**Interim Lender's Charge**");(collectively, the "**Charges**"); and
 - (h) authorizing the Monitor to act as "Foreign Representative", in order to apply for a Temporary Restraining Order in the United States and subsequently apply to commence ancillary insolvency proceedings under Chapter 15 of Title 11 of the US Bankruptcy Code in the US Bankruptcy Court for the Northern District of Texas.
3. On November 18, 2024, the Monitor filed an application returnable on November 21, 2024 (the "**Comeback Application**") seeking an amended and restated initial order.
4. On November 21, 2024, counsel to the Debtor Companies served an application returnable November 21, 2024, seeking, among other things, an order setting aside the Initial Order, or in the alternative, staying the Initial Order and adjourning the Comeback Application (the "**Debtor Companies' Application**").
5. On November 21, 2024, this Honourable Court:

- (a) granted an order extending the Stay Period to November 26, 2024; and
 - (b) reserved its decision on both the relief sought by the Monitor at the Comeback Application and the relief sought by the Respondent Application until November 25, 2024.
6. On November 25, 2024, by the oral reasons of Justice Simard (the "**Oral Reasons**"), the Court granted an amended and restated initial order (the "**ARIO**") which provided for, among other things:
- (a) an extension of the Stay Period up to and including December 18, 2024, for a limited scope;
 - (b) a direction to the Monitor to provide a limited purpose report by 4:00 p.m. on November 28, 2024, to the Court to address the expenditures and accruals to date, and a revised cashflow statement listing all proposed expenditures until December 18, 2024, broken down as between service providers (the "**Second Report**");
 - (c) a direction to the Debtor Companies to provide to the Monitor by 4:00 p.m. December 6, 2024, the Requested Information (as defined in the ARIO);
 - (d) a direction to the Monitor to provide a comprehensive report by 4:00 p.m. on December 13, 2024 to the Court to address, among other things (*i.e.* the Third Report):
 - (i) the respective rights and entitlements of each class of investors, including the investors' rights to approve property sales;
 - (ii) the ownership of the properties;
 - (iii) the value of the properties;
 - (iv) the marketing process that was conducted or is being conducted for the properties; and
 - (v) the investor approval process conducted for any sales, including how investors were notified of sales, what they were told, what opportunities they were given to approve sales, and how sales were approved, including by whom and under what authority.(the "**Comprehensive Overview**")
7. Since the ARIO was granted on November 25, 2024, The Monitor has filed three additional Reports with this Court, with various supplements, including the Third Report, there have been five additional hearings in these CCAA Proceeding, this Honourable Court has granted seven additional Orders for various relief, including an Order Dismissing the Debtor Companies' Application, and the Debtor Companies made six applications for leave to appeal an Order granted pursuant to the CCAA.

8. Capitalized terms not otherwise defined herein shall have the meaning given to such terms in the ARIO or the Fifth Report of the Monitor dated April 7, 2025 (the "**Fifth Report**").

III. **FACTS**

A. **Background**

9. The Monitor adopts and relies on the facts set out in detail in the Pre-filing Report, the First Report, the First Supplement to the First Report, the Second Supplement to the First Report, the Second Report, the Third Report, the First Supplement to the Third Report, the Fourth Report, the First Supplement to the Fourth Report and the Fifth Report (collectively, the "**Monitor's Reports**").

B. **Procedural History Regarding the Conduct of the Monitor**

10. The Monitor previously sought approval of the Monitor's activities and conduct on December 20, 2024 and January 17, 2025, however at each hearing the application was adjourned due to opposition from , counsel to Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc., Fossil Creek A2A GP Inc., A2A Developments Inc., Serene Country Homes (Canada) Inc. and A2A Capital Services Canada Inc. (collectively, the "**Canadian Respondents**") and time constraints.
11. In a letter to this Court dated December 19, 2024, counsel to the Canadian Respondents raised concerns that the Monitor, by investigating certain entities and projects outside the scope of the current CCAA Proceedings, extended its investigation beyond the scope of the Comprehensive Overview ordered by Justice Simard in the ARIO.
12. Paragraphs 181 to 187 of the Third Report include the Monitor's investigations and findings related to certain vendor take back mortgages (the "**Stayner VTBs**") that were entered into by entities that the Monitor understood may be related to the Debtor Companies (the "**Related Entities**"). The Monitor understands that its investigations and reporting on the Stayner VTBs is the only conduct of the Monitor which the Canadian Respondents oppose.
13. Justice Simard requested that the Monitor provide the Comprehensive Overview, for the purpose of providing the Court and other stakeholder with a proper record to decide whether the continuation of these CCAA Proceedings was appropriate.¹ While Justice Simard stated in his Oral Reasons that the Monitor and its Counsel's primary task from November 25, 2024 to December 16, 2024 was preparing the Comprehensive Overview and that "[o]ther than that, the [M]onitor should only

¹ Transcript of the Proceedings taken in the Court of King's Bench of Alberta, Courthouse, Calgary, Alberta, November 25, 2024, before the Honourable Justice C Simard at 12-29-36 ["**November 25 Transcript**"].

be carrying out the tasks that is empowered to carry out under the Initial Order that are necessary".² Notwithstanding the foregoing, Justice Simard was explicitly not overly prescriptive of the contents of the Comprehensive Overview.³

14. Justice Simard did not, in his oral reasons or in the ARIO, forbid the Monitor from undertaking those investigations which the Monitor deemed necessary and relevant for the purposes of producing the Comprehensive Overview.
15. The Stayner VTBs were brought to the Monitor's attention by transfers made from the Related Entities to A2A Developments Inc. and by concerned investors who reached out to the Monitor requesting assistance with investigations into their various investments in, among others, those properties subject to the Stayner VTBs.
16. Furthermore, the Monitor was concerned that the vendor take back structure employed in the Stayner VTBs was mirrored by the proposed transaction for the sale of Angus Manor.
17. In accordance with the express direction of Justice Simard, and in light of those concerns presented to the Monitor by investors, the Monitor used its judgement and provided the Court with the Comprehensive Overview, which included the Monitor's investigations into the Stayner VTBs, for the purpose of determining whether these CCAA Proceedings should survive.

IV. ISSUES

18. The Monitor submits that the principal issue to be determined by this Honourable Court is whether the Monitor's Reports and the Monitor's conduct and activities should be approved.

V. LAW & ANALYSIS

A. The Monitor's Conduct and Activities Should be Approved

19. The Monitor submits that the Monitor's conduct and activities as described in the Monitor's Reports should be approved.
20. As noted in *Target Canada Co. (Re)*,⁴ "there are good policy and practical reasons for the court to approve of monitor's reports and activities [...] during the CCAA process."⁵ The policy and practical reasons for approving the activities of the Monitor include that it:

- (a) brings the court-officer's activities before the Court;

² November 25 Transcript at 17-6-10.

³ November 25 Transcript at 13-1-2.

⁴ [*Target Canada Co \(Re\)*, 2015 ONSC 7574](#) ["*Target*"].

⁵ [*Target*](#) at para 22.

- (b) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;
 - (c) enables the Court to satisfy itself that the court-officer's activities have been conducted in prudent and diligent manners;
 - (d) provides protection for the court-officer; and
 - (e) protects the creditors from the delay in distribution that would be caused by re-litigation of steps taken to date, and potential indemnity claims by the court-officer.⁶
21. Notwithstanding that this Court has determined that the CCAA Proceedings are appropriate, has approved the Monitor and its Counsel's fees and disbursements to January 31, 2025 and has approved the Texas Plan, approval of the Monitor's conduct and activities has been adjourned twice now, leaving the Monitor potentially vulnerable to public scrutiny of all of its past, current and future conduct.
22. The Debtor Companies have requested a carve-out from the approval of the Monitor's conduct and activities as it relates to investigations the Monitor has undertaken with respect to the Stayner VTBs.⁷
23. The Monitor has acted fairly and reasonably in the circumstances of the CCAA Proceedings, and in accordance with its powers granted pursuant to the ARIO.
24. The Monitor submits that the Monitor's investigations with respect to the Stayner VTBs, and the balance of the Monitor's conduct and activities should be approved for the following reasons, among other things:
- (a) pursuant to paragraph 39(e) of the ARIO, the Monitor is empowered and authorized to conduct investigations from time to time;
 - (b) pursuant to paragraph 76 of the ARIO, the Monitor was expressly directed to prepare the Comprehensive Overview for the purpose of providing the Court with a proper record to determine whether a continuation of these CCAA Proceedings are appropriate and the Monitor's investigations with respect to the Stayner VTBs were relevant to that purpose;
 - (c) the Monitor received hundreds of inbound communications from investors, some of whom were not only in Angus Manor, Fossil Creek and Windridge (the projects in the scope of the current CCAA Proceedings), but were also invested in other projects ostensibly related to, and controlled by the same controlling minds as, the Debtor Companies;

⁶ [Target](#) at para 23.

⁷ Letter of Position from Miles Davison LLP to Honourable Justice Feasby dated December 19, 2024 at page 2.

- (d) as part of the financial investigation into the books and records of the Debtor Companies, the Monitor examined various intercompany transfers to, not only the legal entities related to the projects within the current scope of the CCAA Proceedings, but many other projects (as further described in the Third Report) and it is a routine exercise in a financial investigation to examine intercompany transfers;
 - (e) the Angus Manor lands were proposed to be sold by way of a vendor take back mortgage which mirrored in certain respects the Stayner VTBs and the Monitor's investigations into the failed Stayner VTBs are relevant to, among other things, the marketing processes that were conducted or are being conducted for the Property and the risks faced by investors in the Angus Manor project.
25. The Monitor has continued to act reasonably, in the interest of the estates' stakeholders, and in good faith in these CCAA Proceedings. All activities described in the Monitor's Reports were necessary and undertaken pursuant to the Monitor's duties and powers set out in the ARIO.
26. Accordingly, the Monitor respectfully submits that the Canadian Respondents' objection to the approval of the conduct and activities described in the Monitor's Reports is without merit. The Monitor's conduct and activities should be approved.

VI. CONCLUSION

27. Based on the foregoing, the Monitor requests that this Honourable Court grant the Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of April, 2025.

Cassels Brock & Blackwell LLP

Per: _____

Jeffrey Oliver
Counsel for the Monitor

VII. LIST OF AUTHORITIES

JURISPRUDENCE

Tab	Authority
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- | | |
|----|--|
| 1. | <u>Target Canada Co (Re), 2015 ONSC 7574</u> |
|----|--|

TAB 1

Target Canada Co. (Re)

Ontario Judgments

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

December 11, 2015.

Court File No.: CV-15-10832-00CL

[2015] O.J. No. 6837 | 2015 ONSC 7574 | 2015 CarswellOnt 19174 | 31 C.B.R. (6th) 311

RE: 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.

(26 paras.)

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — Monitors — Reports — Application by Monitor of Target Canada companies for approval of Monitor's reports in liquidation proceedings allowed — Landlords of Target estates opposed approval on basis it was premature, unnecessary and unfair — Approval served to protect Monitor during creditor protection process and allow stakeholder concerns to be addressed — Caution was required where, as here, Monitor sought general approval, due to broad application of res judicata and potential impact on stakeholders — Wording of approval accordingly limited to protecting Monitor in personal capacity.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, s. 11.7, s. 23(1), s. 23(2)

Counsel

J. Swartz and Dina Milivojevic, for the Target Corporation.

Jeremy Dacks, for the Target Canada Entities.

Susan Philpott, for the Employees.

Richard Swan and S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and Alan Mark, for Alvarez & Marsal, Monitor.

Jeff Carhart, for Ginsey Industries.

Lauren Epstein, for the Trustee of the Employee Trust.

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals.

Linda Galessiere, for Various Landlords.

ENDORSEMENT

G.B. MORAWETZ R.S.J.

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities -- particularly in these liquidation proceedings -- is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

"provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

- (2) Monitor not liable -- 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.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

- (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
- (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
- (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
- (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
- (e) provides protection for the monitor, not otherwise provided by the CCAA; and
- (f) protects creditors from the delay in distribution that would be caused by:
 - a. re-litigation of steps taken to date; and
 - b. potential indemnity claims by the monitor.

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest v. Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related

components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

...

30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.

...

30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.

...

37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a

number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that *res judicata* and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of *res judicata* and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval is limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

G.B. MORAWETZ R.S.J.