CITATION: McEwan Enterprises Inc., 2021 ONSC 6878
COURT FILE NO.: CV-21-00669445-00CL
DATE: 2021-11-01

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 MCEWAN ENTERPRISES INC.

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick, Caroline Descours, Trish Barrett and Peter Ruby,* for the Applicant

Sean Zweig and Joshua Foster, for the Monitor

Virginie Gauthier, for The Cadillac Fairview Corporation Limited

Catherine Francis and Kenneth L. Kallish, Counsel for Royal Bank of Canada

Steven L. Graff and Jeremy Nemers, for First Capital Holdings (Ontario) Corporation

David Ward, for Sayan Navaratnam

HEARD: October 15, 2021

RELEASED: November 1, 2021

ENDORSEMENT

INTRODUCTION

[1] McEwan Enterprises Inc. ("MEI") brings this motion for an order (the "Approval and Vesting Order"), pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA"), among other things:

(a) approving the purchase agreement dated September 27, 2021 (the "Purchase Agreement") between MEI and 2864785 Ontario Corp. (the "Purchaser"), a newly formed company owned by Mark McEwan and Fairfax Financial Holdings Limited ("Fairfax"), and the sale and transfer of substantially all of the assets and liabilities of the McEwan Group, with the Exception of the excluded locations (as defined below), to the Purchaser (the "Transaction");

(b) approving the transaction deposit under the Purchase Agreement (the "Transaction Deposit") up to the maximum amount of $2.25 million, and authorizing MEI to obtain the Transaction Deposit from the Purchaser in order to finance MEI's working capital requirements, other general corporate purposes and capital expenditures, and the costs of these CCAA proceedings, in accordance with the terms of the Purchase Agreement;

(c) ancillary relief required to complete the Purchase Agreement; and

(d) extending the stay proceedings granted pursuant to the Initial Order (the "Stay of Proceedings") to December 17, 2021.

[2] MEI commenced these proceedings on September 28, 2021.

[3] From the standpoint of MEI, the principal objectives of these CCAA proceedings are to ensure the ongoing operations of MEI for the benefit of its stakeholders and to effectuate a restructuring of MEI and its full-service restaurant, catering, gourmet grocery and events company (the "Business") in order to provide for a right-sized, sustainable business going forward. As part of its restructuring efforts, MEI indicated at the outset of the proceedings that it intends to seek to complete the sale and transfer of the business pursuant to the proposed Transaction.

[4] Section 36 of the CCAA imposes certain restrictions on disposition of business assets. It provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by court order.

ISSUES

[5] The issues for consideration on this motion are whether the court should:

(a) approve the Transaction;

(b) grant certain related relief pursuant to the proposed Approval and Vesting Order; and

(c) approve the Transaction Deposit and grant the Transaction Deposit Charge.

[6] Sections 36(3) and (4) read as follows:

s. 36 (3)

Factors to be considered. – In deciding whether to grant the authorization, the court is to consider, among other things,

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

(b) whether the 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.

s. 36 (4)

Additional Factors – Related Persons - If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

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

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

FACTS

[7] In determining whether to approve the Transaction, it is necessary to review the facts in detail.

[8] MEI is a private company incorporated under the laws of Ontario and is headquartered in Toronto. MEI is owned by Fairfax, through one of its subsidiaries, which holds a 55% equity interest in MEI, and by Mr. McEwan, through McEwan Holdings Co. Inc., which owns a 45% equity interest in MEI.

[9] Commencing in the summer of 2021, MEI engaged legal counsel to assist it in reviewing and assessing its various potential options and alternatives, in light of financial difficulties facing MEI.

[10] MEI contends that it made extensive efforts to seek consensual arrangements with its landlords in respect of its leases, to improve lease terms and reduce those lease obligations that are unsustainable and/or to exit certain locations, but is been unable to achieve a comprehensive out-of-court resolution that would result in the long-term viability of MEI in its Business.

[11] MEI then determined that the best available alternative that could be implemented that would preserve the value of the Business for the benefit of MEI's many stakeholders, would be a sale of substantially all the assets of the Business to MEI's current shareholders pursuant to the proposed Transaction, and the continuation of the Business with a reduced number of MEI locations to result in a rightsizing of the Business on a sustainable basis going forward.

[12] On September 27, 2021, the applicant entered into the Purchase Agreement, pursuant to which, subject to court approval, the parties would complete the Transaction.

[13] The proposed Transaction contemplates the transfer of substantially all of the assets and the assumption of substantially all of the liabilities of MEI, with the exception of locations not being assumed by the purchaser as part of the Transaction (the "Excluded Locations"), and an offer of employment to all of MEI's current employees (including those employees at the Excluded Locations).

[14] MEI believes that there would be a significant benefit to its stakeholders from the completion of the proposed Transaction as, without the support of Mr. McEwan, there is a significant risk that many parties could be negatively impacted both on a financial and overall business basis.

[15] MEI points out that the implementation of the Transaction will result in a sustainable business going forward for the benefit of MEI's many stakeholders, including its 268 employees whose jobs will be preserved, its secured creditors whose obligations will be unaffected and assumed by the Purchaser, and its many suppliers and service providers whose contracts and obligations will also all be assumed.

[16] As part of MEI's process to address its financial challenges, MEI stated that it reviewed in detail potential options and alternatives, duly considered a potential third-party sales process and determined that the Transaction is the best result for all parties. MEI believes that a third-party sales process poses potential risks to the business, and what ultimately not provide a better result that would benefit MEI's stakeholders. At the same time, the proposed Transaction leaves unaffected all claims against MEI and otherwise provides for the highest potential recovery in respect of the landlord preferred claim (as defined below).

[17] The relief requested by MEI is opposed by First Capital Holdings (Ontario) Corporation (the "Y & B Landlord"). The Y & B Landlord objects to the proposed Transaction on the basis that it does not comply with the provisions of s. 36(4) of the CCAA.

[18] MEI takes the position that it has been unable to achieve a consensual arrangement with the Y & B Landlord. With no consensual arrangement, and no possibility of the CCAA plan of arrangement (as the sole opposing creditor would have a veto), MEI contends there are only three ways to complete a going concern value maximizing transaction in the circumstances.

[19] The three alternatives are set out at paragraph 9 of the MEI Factum.

	Options	Implications
1.	Completion of the proposed Transaction in a CCAA proceeding.	• All creditor claims (except the Landlord Preferred Claim) are assumed in full at 100% of the amounts owed to such creditors. • Landlord Preferred Claims receive a cash payment in the maximum amount of such claim as calculated under the *Bankruptcy and Insolvency Act* (the "BIA") and is paid in full at 100% of such claim. • The proposed Transaction is superior in all respects including certainty and cost to compete, timing, continued operation of most locations, continued employment for all employees, continuation of experienced management and leadership with the Business, stability and continuation of long-standing stakeholder relationships, and strong shareholder support with financial ability to fund the Business going forward through the continued COVID-19 related challenges.
2.	A receivership and a current or subsequent no asset or bankruptcy process to complete the proposed Transaction.	• Same treatment as above for all creditors. • Bankruptcy proceeding statutorily limits an affected Landlord's claim to a preferred landlord claim pursuant to the BIA. Such landlord can recover no further amounts beyond its BIA preferred landlord claim. • Potential increased risk to the Business given additional time to complete, more costs for additional process, and potential impact on the stability of the Business and stakeholders support in the interim. • Same treatment for all parties and same result achievable as pursuant to #1 above, with no additional benefit to any stakeholders.
3.	A sale to a third party (by the Company or by a Receiver).	• Higher costs to complete and may result in discounted proceeds. • Risk that creditors do not receive payment in full, and creates a pool of unsecured claims (in respect of any excluded/non-assumed employee claims, trade obligations, additional lease claims, and outstanding debt obligations) to share in any

		remaining proceeds following payment of secured claims in priority. • All secured claims, interim financing to fund the Business until closing and professional fees incurred as part of the proceedings and transaction would be satisfied in priority to any unsecured pool. • Once assets are sold (or before), there would be a bankruptcy proceeding as unsecured creditors or the Company would not allow landlord claims to dilute the recovery to unsecured creditors where in a bankruptcy proceeding claims are limited to a preferred landlord claim. • Best possible result for an affected landlord is receiving the maximum amount of its BIA preferred landlord claim. • Many additional risks and uncertainty, including additional time and cost to complete, additional priority funding of operations, potential job losses, closure of additional stores, loss of founder as part of the go-forward business, and potentially less support of management, employees, landlords and trade creditors. • No third party can successfully acquire the Business without the termination of certain leases and amendments to other leases.

[20] MEI contends that under all circumstances, the maximum recovery in respect of an affected Landlord's claim is the maximum amount of a preferred landlord claim calculated under *Bankruptcy and Insolvency Act* ("BIA"), and the proposed Transaction guarantees the payment of such maximum claim amount to the Y & B Landlord.

[21] MEI also points out that the existing ownership group is willing to support the future funding requirements of the restructured company. Further, the Transaction is not subject to any financing due diligence conditions, has the support of the Cadillac Fairview Entities and Royal Bank of Canada, and can be completed efficiently to protect the Business for the benefit of MEI's stakeholders.

[22] Mr. McEwan swore affidavits in these proceedings on September 27, 2001 (the "First McEwan Affidavit") and October 1, 2021 (the "Second McEwan Affidavit").

[23] Of note in the First McEwan Affidavit are the following paragraphs:

> [5] The continuation of the McEwan Group under the ownership of its current shareholders is a critical aspect of any proposed restructuring. My continued involvement as chef and operator of the McEwan Locations (as defined below), which I believe to be fundamental to the value and success of the Busines going forward, is premised on a continuation of my partnership with Fairfax as co-owners of the McEwan Group.
>
> …
>
> [107] The aggregate consideration for the Purchased Assets to the Transaction is: (a) the assumption of the Assumed Obligations (as defined in the Purchase Agreement) by the Purchaser and/or, as applicable, one or more designees of the Purchaser, which as at the date hereof are estimated to be approximately $11 million (calculated based on amounts outstanding as at August 31, 2021, and taking into account additional amounts expected to be incurred and additional funding requirements anticipated until the closing of the Transaction, based on a closing date of October 3, 2021), and (b) a cash payment in an amount equal to the sum of (i) $520,000 (the "Base Purchase Price"), and (ii) an amount equal to the Cure Costs (as defined in the Purchase Agreement).
>
> [108] I am advised by counsel to the Company that the Base Purchase Price was calculated based on an amount equal to the damages in respect of the lease resulting to the McEwan Yonge & Bloor Location as determined pursuant to the formula set forth in section 136(1)(f) of the *Bankruptcy and Insolvency Act* (the "BIA"). As discussed above, the Company and the Cadillac Fairview Entities are continuing their ongoing discussions to reach mutually satisfactory arrangements in respect of the Cadillac Fairview Leases, and thus there is no claim amount included in respect of Fabbrica Don Mills Excluded Location as part of the purchase price under the proposed Transaction.
>
> …
>
> [111] The Company did not complete a third-party sale process to canvass potential interest from third parties in respect of acquiring the Company or the Business, and believes there is no prejudice to stakeholders from not having completed a third-party sale process based on all of the current circumstances. As discussed above, the Purchaser is acquiring and assuming substantially all of the assets and liabilities of the Company, with the exception of the Excluded Locations, and the Base Purchase Price provides for a cash amount in respect of the non-terminated Excluded Location based on the formula provided under the BIA.
>
> [113] As noted above, my continued involvement as chef and operator of the Business, which I believe to be fundamental to the success of the Business going forward, is premised on a continuation of my partnership with Fairfax as co-owners

> of the McEwan Group. I do not anticipate that I would remain with the Business if it were to be sold to a third party purchaser. The Company and its shareholders do not believe that a third party purchaser would be in a position to acquire the assets of the Business, without my continued involvement in the Business, for a similar or higher price.

[24] Of note in the Second McEwan Affidavit are the following paragraphs:

> [26] The Company did not complete a third-party sale process to canvass potential interest from third parties in respect of acquiring the Company or the Business, and believes there is no prejudice to stakeholders from not having completed a third-party sale process based on all of the current circumstances, including the following factors discussed below.
>
> [27] I believe that my continued involvement in the Business is fundamental to the value and success of the Business going forward. I founded the McEwan Group many years ago, and my name, my personal involvement in the Business and my creations as part of the McEwan Restaurants and catering busines are key aspects of the Business. In addition, my personal brand and television projects have become inextricably linked with the brand of the Business.
>
> [28] Accordingly, the Company and its shareholders do not believe that a third-party purchaser would be in a position to acquire the assets of the Business, without my continued involvement in the Business, for a similar or higher price.
>
> …
>
> [36] As a result, the Company determined, in consultation with its counsel, that a third-party sales process was not necessary in the circumstances and could have a negative effect on the ongoing Business of the Company.
>
> [Emphasis Added]

[25] The Monitor has filed a Prefiling Report, a First and a Second Report.

[26] The First Report references the proposed Transaction but does not articulate the Monitor's views on the merits of the proposed Transaction.

[27] The Second Report of the Monitor, filed the day before this hearing, comments on the proposed Transaction.

[28] The Monitor notes that in June 2021, MEI engaged legal counsel to assist it in reviewing and assessing its various strategic alternatives including exploring whether consensual arrangements with its landlords could be reached to improve lease terms, reduce lease obligations and/or exit certain unprofitable locations. The Monitor states that with respect to discussions and negotiations with landlords, that its comments are based on its understanding of the situation.

[29] The Monitor further comments, that after extensive review and consideration of its circumstances and available alternative, MEI ultimately determined to pursue the proposed Transaction. MEI and the Purchaser entered into the Purchase Agreement on September 27, 2021 and MEI commenced the CCAA proceedings on September 28, 2021.

[30] Although the Monitor is now familiar with the terms of the proposed Transaction, there is no indication that the Monitor was involved in any type of analysis at the time that the proposed Transaction was entered into.

[31] At paragraph 3.8 of the Second Report, the Monitor notes that subsequent to the comeback hearing held on October 7, 2021, the Monitor had separate discussions with counsel to MEI, and with the financial advisor and counsel to the Y & B Landlord. The Monitor relates that these conversations did not result in a resolution of the issues between the parties.

[32] At paragraph 3.9 of the Second Report, the Monitor references that the Y & B Landlord through its counsel, provided the Monitor with an email on the evening of October 11, 2021 which gave details as to a Purchase Agreement executed by the Yonge & Bloor Landlord (the "Y & B Landlord's Purchase Agreement") in substantially the same form as the proposed Purchase Agreement, subject to certain revisions.

[33] In paragraph 3.11, the Monitor outlines key differences between the Purchase Agreement and the Y & B Landlord's Purchase Agreement. These key differences are as follows:

(i) the addition of the Yonge and Bloor lease as a go forward operating location would appear to make the Yonge and Bloor Landlord's Purchase Agreement, on its face, financially superior;

(ii) the potential for employee severance and termination claims to arise as a result of Mr. McEwan's potentially other employees not accepting new employment offers from the Yonge and Bloor Landlord, which may be material; and

(iii) the inclusion of a due diligence period.

[34] At paragraph 3.12, the Monitor provides its views that the due diligence requirement introduces a higher level of execution risk and, given the complexities of MEI's business, could very well require more than 14 days to complete. These uncertainties include the prospect the Y & B Landlord would not be able to reach satisfactory arrangements in respect of the Cadillac Fairview leases, or that such arrangement could require significant time to settle. In addition, the Monitor notes that Mr. McEwan and possibly other key personnel are not prepared to accept new employment offers from the Y & B Landlord, and that the resulting disruption to the Business either prevents the Y & B Landlord from waiving the due diligence condition precedent, or requires extended time to allow the Y & B Landlord to identify and hire replacement personnel. Further, if Mr. McEwan and/or other key personnel choose not to accept new employment offers from the Y & B Landlord, that could create material employment related unsecured claims against MEI. The Monitor also notes that with respect to the Cadillac Fairview Entities, if the proposed Transaction

is not approved, third parties considering this opportunity should not expect to receive the same terms that have been agreed to with MEI.

[35] The Monitor also commented on the affected landlord claim. The Monitor notes that the applicant is close to finalizing its arrangements with the Cadillac Fairview Entities, including a settlement and termination payment in connection with Fabbrica at Don Mills (an Excluded Location). Accordingly, the only outstanding obligations to be excluded from the proposed Transaction are the obligations owing and potential claims in respect of the Yonge and Bloor Location [the "Affected Landlord Claim"].

[36] The Monitor includes an illustrative bankruptcy liquidation analysis and a comparison with the proposed Transaction and concludes that the proposed Transaction would provide a favourable outcome. The Monitor's comments with respect to the analysis are set out at paragraph 3.19 and 3.20 as follows.

> *Illustrative Bankruptcy Liquidation Analysis*
>
> 3.19 Having regard to claims that could arise in a bankruptcy liquidation, such as secured and unsecured creditor claims, employee termination and severance claims, lease termination/disclaimer claims and other damages claims for non-performance, the Monitor's Illustrative Liquidation and Valuation Range Analysis projects that in a bankruptcy liquidation scenario, creditor recoveries are estimated to be (all figures approximate):
>
> (i) full payment (100% recovery) in respect of RBC's secured claim of $2.2 million;
>
> (ii) full payment (100% recovery) in respect of the Cadillac Fairview Entities' secured claim, including: (a) a fixtures loan of $198,000; and (b) amounts totalling $1.1 million in respect of the Cadillac Fairview Leases (calculated pursuant to subsection 136(1)(f) of the BIA);
>
> (iii) <u>full payment (100% recovery) in respect of the remaining two lease claims totalling $540,000 (calculated pursuant to subsection 136(1)(f) of the BIA); and</u>
>
> (iv) <u>a recovery to remaining creditors in the range of approximately 1.8% to 26%</u> in respect of unsecured claims estimated to be $11 million in aggregate.
>
> 3.20 In comparison to the above bankruptcy liquidation analysis, the Monitor is of the view that the Proposed Transaction would provide a favourable outcome, for the following reasons:

(i) it is beneficial to MEI's secured and unsecured creditors as it provides for either a full settlement or the full assumption of the obligations owing, with the exception of the Affected Landlord Claim, and avoids the unfortunate termination and dislocation of MEI's 268 employees, which may result in unpaid wages and vacation pay as well as severance and termination claims estimated to be in excess of $4 million, termination of the Assumed Contracts, and termination of MEI's existing customer and trade relationships;

(ii) it is beneficial to the landlord group as a whole as it: (a) provides for the continued operation of six of MEI's eight locations;[1] and (b) provides for a cash payment of approximately $520,000 to the Yonge & Bloor Landlord in respect of the Affected Landlord Claim, which is estimated to be the maximum amount that it would otherwise receive in a bankruptcy; and

(iii) the Proposed Transaction is consistent with the rehabilitative intent of the CCAA by preserving the majority of the business to avoid liquidation.

[Emphasis Added]

[37] At s. 3.21 of the Report, the Monitor states that neither MEI nor the Monitor has completed any formal or informal third-party sale process. The Monitor references comments of Mr. McEwan in the Second McEwan Affidavit and specifically that MEI and its shareholders do not believe that a third party purchaser would be in a position to acquire MEI's Business absent Mr. McEwan's continued involvement (which is contingent upon the continuation of his partnership with Fairfax as co-owners of the Business) for a purchase price that is equal or superior to that provided under the proposed Transaction.

[38] The Monitor goes on to note that the Y & B Landlord Purchase Agreement, on its face, would appear to be financially superior to the proposed Transaction given that includes the assumption of an additional location resulting in fewer claims and accordingly, higher available recoveries. These potential benefits, according to the Monitor, are tempered by the additional risk factors set out in its Report.

[39] The Landlord also points out the following in s. 3.24(ii) as follows:

(ii) as there is no prescribed formula for determining a landlord claim in the CCAA, the claims that could be submitted by landlords within CCAA proceedings

[1] There is no lease arrangement or rent charged at the Diwan location, which is a restaurant located within the Aga Khan Museum in Toronto.

> in respect of one or more disclaimed lease may also range, but in most circumstances, it is expected that the submitted claim would be significantly larger than those in a bankruptcy. By applying such a higher claim amount (as compared to a bankruptcy claim) to the higher range of potential recoveries, there could be certain illustrative sale transaction scenarios where the recovery on the Affected Landlord Claim is greater than $520,000. Conversely in the lower range of potential recoveries, even with a higher claim amount, the recovery on the Affected Landlord Claim is less than $520,000. However, as described in the Second McEwan Affidavit, the Monitor understands that the Applicant has considered and is prepared to advance the Proposed Transaction through a concurrent receivership and bankruptcy process, which in the Applicant's view, effectively limits the Yonge & Bloor Landlord's recovery in any scenario to $520,000.
>
> [Emphasis Added]

[40] At s. 3.30 of its Report, the Monitor undertakes a review and assessment of the proposed Transaction and makes specific reference to be considered by the Court in s. 36(3) of the CCAA, specifically,

(i) *36(3)(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances*

(ii) *36(3)(b) whether the monitor approved the process leading to the proposed sale or disposition*

(iii) *36(3)(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*

(iv) *36(3)(d) the extent to which the creditors were consulted*

(v) *36(3)(e) the effects of the proposed sale or disposition on the creditors and other interested parties*

(vi) *36(3)(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value*

1.2 As described in subsection 36(4) of the CCAA, if a proposed sale or disposition is to a related party, the court may, after considering the factors referred to in subsection 36(3) of the CCAA grant the authorization only if it is satisfied that subsections 36(4)(a) and 36(4)(b) of the CCAA have been satisfied.

1.3 The Monitor regards the provisions within subsection 36(4) of the CCAA, in light of the dispute before the Court between the parties, as a significant threshold issue to the Proposed Transaction's approval. Further, the Monitor views the determination as to whether the circumstances of this case and the Applicant's efforts to ensure that the proposed related

party transaction is in the best interests of MEI's stakeholders satisfy the requirement of subsection 36(4) of the CCAA as a question to be determined by the Court.

[41] At s. 3.32 of its Report, the Monitor outlined certain relevant considerations in respect of subsections 36(4)(a) and 36(4)(b) of the CCAA:

> *36(4)(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company*

(i) no third-party sales process or other market test was conducted in or before these CCAA Proceedings;

(ii) the Monitor understands the Yonge & Bloor Landlord's position to be that the Proposed Transaction cannot be approved absent a third-party sale process;

(iii) the Monitor is aware that Canadian Courts have previously held that subsection 36(4)(a) of the CCAA may be satisfied, in appropriate circumstances, without a formal sale process having been conducted;

(iv) as described in the Second McEwan Affidavit:

(a) prior to entering into the Purchase Agreement the Applicant, in consultation with its legal advisors, considered, among other things, the alternatives available to MEI, the viability and value of MEI's business absent the involvement of Mr. McEwan, Fairfax and MEI's management and the likelihood that an independent third-party purchaser would propose a superior transaction; and

(b) the Applicant has concluded that the Proposed Transaction is in the best interests of MEI and its stakeholders. More to the point, the Applicant has also concluded that the Purchaser is the only party likely to complete a going-concern transaction that would see substantially all of MEI's assets and liabilities acquired and assumed.

> *36(4)(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.*

(vi) in the absence of a third-party sale process being conducted, potential enterprise values, transaction proceeds and ultimate creditor recoveries are necessarily theoretical, uncertain and difficult to predict.

(vii) in the circumstances and under the process conducted by the Applicant, the Monitor regards the consideration to be received under the Proposed Transaction as fair and reasonable and offers a significant recovery to nearly all creditors. Moreover, it would appear to be the highest consideration that could be obtained without exposing MEI's busines to greater transaction risk, including the potential risks posed by diligence periods to conduct a sales process, and additional costs in the CCAA Proceedings. As discussed

previously, the Proposed Transaction currently results in substantially all of MEI's creditors being unaffected and the Affected Landlord Claim receiving the amount it would be entitled to if the Yonge & Bloor Lease were to be disclaimed in a bankruptcy; and

(viii) on its face (and if executable) the Yonge & Bloor Landlord's Purchase Agreement is financially superior to the Proposed Transaction. However, the Monitor notes that the Applicant's secured creditors view the Proposed Transaction as providing more certainty and less risk for the go forward business.

ANALYSIS

[42] MEI submits that it is well-established that the court has the jurisdiction to approve the sale of the assets of a debtor company in the CCAA proceeding in the absence of a plan of arrangement where such sale is in the best interests of stakeholders generally and that the sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA. (See: *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 40 – 43, 45 ("Callidus").

[43] The foregoing principle was recently confirmed by the British Columbia Court of Appeal in *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 31.

[44] I accept this submission.

[45] However, the facts in this case give rise to a number of questions or concerns:

1. The equity interests of MPI will be the same as those of the proposed new entity.

2. Mr. McEwan has stated that he has no interest in being involved in an entity which is a different structure than MEI.

3. The monitor was not involved in the review process that led to the proposed Transaction.

4. The proposed Transaction results in the assumption of significant liabilities of MEI. MEI has reached an accommodation with Cadillac Fairview with respect to its obligations owing under a number of leases. The Y & B Landlord is the only significant party who has not reached a settlement or accommodation with MEI.

5. The Monitor has filed a report which states that the proposed Transaction would be more beneficial to the creditors than a sale or disposition under a bankruptcy. However, the report also sets out that the treatment being provided to the Y & B Landlord is the same as it would receive in a receivership and bankruptcy scenario. The receivership and bankruptcy scenario is referenced in the

> liquidation analysis and in the McEwan Affidavits and is summarized at paragraph 9 of the Factum submitted by MEI.

[46] MEI submits that the proposed Transaction satisfies the factors under sections 36(3) and (4) and is in the best interests of stakeholders.

[47] It is conceded that Mr. McEwan is a related person within the meaning of s. 36(5). Thus s. 36(4) is engaged.

[48] Having considered the factors set out in s. 36(3), it is arguable that the proposed Transaction could be approved.

[49] The Monitor has issued a report which summarizes the impact on creditors. The creditors have been consulted. The effect of the proposed Transaction on creditors suggests that, in the circumstances, the consideration to be received for the assets could be found to be reasonable and fair.

[50] However, I have not been persuaded that factors set out in s. 36(4) have been satisfied.

[51] It is important to note that authorization for the sale can be given **only** if the court finds that the s. 36(4) factors have been satisfied in that:

> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> (b) the consideration to be received is **superior** to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
>
> [Emphasis Added]

[52] In this case, MEI determined, prior to the commencement of the CCAA proceeding that there was no point in embarking on a sales process. The Monitor was not part of the decision making that lead to this determination. Although MEI may have valid reasons to support its decision, that is not the requirement set out in s. 36(4)(a). The statute references efforts being made to sell or otherwise dispose of the assets to persons who are not related the Company. In this case, no efforts were made.

[53] Turning now to s. 36(4)(b), the consideration to be received in the proposed Transaction is set out at paragraph 9 of MEI's factum, which is set out at paragraph 19 of these reasons.

[54] The question is whether the consideration is superior to the consideration that would be received under any offer made in accordance with the process leading to the proposed sale.

[55] In this case, two alternatives to the proposed Transaction are referenced.

[56] The first is an alternative proposal put forth by MEI of a receivership and a concurrent or subsequent no asset bankruptcy process to complete the proposed Transaction.

[57] This alternative provides for the same treatment for all creditors in the proposed Transaction. The Y & B Landlord would receive the same consideration in the bankruptcy ($520,000) as it would receive in the proposed Transaction where it receives $520,000 (the Base Purchase Price). No creditor receives superior consideration.

[58] Under the Y and B Landlord's Purchase Agreement, the details are set out in the Second Report of the Monitor at section 3.9. The Monitor's views and concerns are set out at s. 3.12. The consideration to be received by creditors may be superior but, in view of the concerns raised by the Monitor, it is too speculative to be considered in the analysis.

[59] Accordingly, the merits of the proposed Transaction have to be considered in comparison to the alternative of the receivership and concurrent bankruptcy referenced by the Monitor at section 3.24 of its Second Report.

[60] The two alternatives provide for the same treatment for creditors. The result of the foregoing analysis is clear. The consideration referenced in the proposed Transaction is not superior to the receivership/bankruptcy alternative. The s. 36(4) have not been satisfied and the proposed Transaction cannot be approved.

[61] MEI had a choice. MEI could have proposed superior consideration to the Y & B Landlord, but they elected not to do so.

[62] The Monitor raised concerns with respect to the fact that no efforts were made to sell or otherwise dispose of the assets to persons who are not related to MEI. The Monitor also made reference in its Second Report to a proposal put forth by the Y & B Landlord which would result in an alternate structure and would possibly provide a greater return to the creditors of MEI.

[63] MEI responds that it is simply not practical to consider any sale or disposition to a third party as Mr. McEwan is not interested in pursuing or continuing in this type of a business operation. This explanation falls short of establishing that good faith efforts were made to sell or otherwise dispose of assets to persons who are not related to MEI.

[64] More importantly, there is no evidence that has been provided by either MEI or the Monitor that would allow me to arrive at a conclusion that the consideration to be received is superior to the consideration to be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[65] The cases referenced by MEI are all fact specific and as such, are of no real assistance.

DISPOSITION

[66] The facts of this case are such that the mandatory requirements of s. 36(4) have not been established and the proposed Transaction cannot be approved.

[67] In the event that the alternative transaction proceeds and does not fulfil the expectations of the Y & B Landlord, that is a risk that the Y & B Landlord must assume. It is the sole party that is objecting to the proposed Transaction and if the return that the Y & B Landlord receives is less than the $520,000 promised under the proposed Transaction, it is only just that they suffer the adverse consequences of their actions. The motives of the Y & B Landlord in refusing to accept the proposed Transaction may be questioned, but that is not a question that issues is not before me today.

[68] The motion to approve the proposed Transaction is accordingly dismissed.

[69] Issues with respect to any extension of the Stay Period will be addressed at a hearing scheduled for 3:00 p.m. today.

Chief Justice G.B. Morawetz

Date: November 1, 2021