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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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 (the "Applicants")

SUBMISSIONS OF THE MONITOR

(Re Motion Returnable July 30, 2015)

September 1, 2015

GOODMANS LLP
Barristers and Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Jay Carfagnini LSUC#: 22293T
jcarfagnini@goodmans.ca

Alan Mark LSUC#: 21772U
amark@goodmans.ca

Graham Smith LSUC#: 26377D
gsmith@goodmans.ca

Tel: 416-979-2211
Fax: 416-979-1234

Lawyers for the Monitor

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(Re Motion Returnable July 30, 2015)

I. INTRODUCTION

1. These submissions are respectfully filed by Alvarez & Marsal Canada Inc. in its capacity as Court-appointed monitor (the "**Monitor**") in these proceedings. At the July 30, 2015 hearing in respect of the Monitor's motion (originally returnable May 11, 2015) seeking approval of its activities as described in certain of its Reports, the Court directed the parties to file additional submissions as to the *res judicata* (i.e., issue *estoppel*) effect of Court approval of a monitor's activities. These are the Monitor's submissions in response to that direction.[1]

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[1] The Monitor understands the Court's request for submissions to not be a request for further submissions elaborating upon, or repeating, the parties' positions at the motion, or going to the sufficiency of responses to various information requests made of the Monitor. Rather, the Monitor understands the Court to have requested submissions on the *res judicata* aspect described above. The Objecting Creditors have filed supplemental

2. Counsel for Riocan Management Inc., KingSett Capital Inc. and related interests (collectively, the "**Objecting Creditors**") have objected to the Monitor's application seeking approval of its activities. They have taken the position that the Monitor's application should not be granted at this time or, if approval is granted, it should articulate or delineate the scope and intended legal consequences of that approval. Notably, no one, including the Objecting Creditors, has taken issue with the Monitor's activities.

3. The Objecting Creditors' objection centres on two themes; that approval of the Monitor's activities would: (a) impede their ability "to inquire further and demand information relative to their concerns and claims,"[2] and (b) result in an undefined speculative "risk" to them in respect of future litigation. The Objecting Creditors also call into question the practice of approving a monitor's activities, suggesting that Courts have done so in a meaningless, thoughtless fashion and that its only purpose is to shield monitors from liability.

4. The Objecting Creditors' objection is, with respect, unfounded.

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written submissions (the "**Objecting Creditors' Supplemental Submissions**") that are aimed largely at revisiting and elaborating upon their initial written submissions (the "**Objecting Creditors' Initial Submissions**") in opposing the approval relief, and which make several unsupported assertions that information requests have not be adequately responded to, rather than addressing the specific point on which submissions were requested. Accordingly the Monitor, although it categorically denies these assertions, does not propose to respond to them in detail here or to re-argue the approval motions *per se* in these submissions.

[2] Objecting Creditors' Supplemental Submissions, para. 20.

II. SUMMARY OF MONITOR'S SUBMISSIONS AND CONCLUSIONS

Role and Nature of Monitor

5. A monitor plays an integral part in balancing and protecting the various interests in the CCAA environment. Among reporting obligations and general oversight in respect of the CCAA proceedings, monitors are required to execute any other functions in relation to the debtor that the Court may direct. Indeed, in this case, the Court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtor's assets.

6. At law, Court-appointed officers are held to a high professional standard. Among other things, monitors are required to: (a) make full and fair disclosure to the Court in all of their applications, whether favourable or not, (b) act lawfully, fairly and honourably, and (c) be neutral and objective. The Monitor submits that the exacting standards and duties governing a Court-appointed monitor ensure an inherent trustworthiness to its activities and reporting thereon.

Court Officer Reporting and the Practice of Approving Activities is Meaningful

7. Contrary to the Objecting Creditors' assertions, approval of a monitor's activities serves several important purposes in a CCAA. Court approval:

- 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;
- 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;

- provides certainty and finality to processes in the CCAA proceedings and activities undertaken (e.g., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

- 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;

- provides protection for the monitor not otherwise provided by the CCAA; and

- 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.

8. The very cases cited by the Objecting Creditors illustrate that there are good policy and practical reasons for Court approval of a monitor's activities. Clarity as to the appropriateness of specified activities having been carried out, and as to the results thereof, is foundational to enabling the realization, collection, arrangement and distribution process to progress, building on the steps to date. It is the reporting and approval process that provide this clarity.

Res Judicata (and Related Doctrines) Apply to Approval of a Monitor's Activities

9. The doctrine of issue *estoppel* applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of a monitor's activities as described in its reports.[3] It is appropriate that this be the case. Given the meaningful functions that

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[3] *Res judicata*, as explained below, encompasses two notions: cause of action *estoppel* and issue *estoppel*. These submissions will hereinafter refer to issue *estoppel* since it is the germane aspect of *res judicata* in the present context.

Court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. The actions mandated and authorized by the Court, and the activities taken by the Monitor to carry them out, are not interim measures that ought to remain open for second-guessing or re-litigating down the road. There is a need for finality in a CCAA process for the benefit of all stakeholders.

There is no Prejudice Regarding Access to Information

10. The Objecting Creditors' assertion that an approval potentially prejudices them in obtaining information for speculative, unspecified future purposes cannot be supported in the context of a CCAA process designed to balance stakeholder interests and enable an orderly and timely distribution to creditors, a context that entails "real time litigation" requiring parties to raise objections and seek remedies in a timely manner. Further, the Court controls the CCAA process and can direct the Monitor (if the Monitor does not provide information on its own accord) to provide information in response to reasonable requests.

11. The CCAA process does not exist to create new causes of action against the Monitor, or anyone else, nor to provide parties with information gathering or discovery tools. If the Objecting Creditors have a claim in these proceedings, the onus is on the Objecting Creditors to assert and prove their claims pursuant to the Court-approved claims process in these proceedings.

12. To suggest that approval of activities which would otherwise be appropriate should be withheld, because that approval might somehow hinder information gathering for a

collateral purpose or impede the ability to establish new claims, is to impart an unintended function and purpose to a CCAA process.

There is no Prejudice Regarding Future Litigation

13. The Objecting Creditors' assertion that approval is premature or unfair at this stage because issue *estoppel* may apply at a later date is unsound; it is completely contradictory to the very nature and purpose of the doctrine. By its very nature, the issue *estoppel* inquiry is about comparing the situation at point "B" (the later litigation) to point "A" (the earlier litigation – in this context, the approval). But it is absurd to suggest, as the Objecting Creditors' position appears to, that Courts should therefore make *no* determination at point "A" that it would otherwise be appropriate to make.

14. Further, the Objecting Creditors' objection ignores the safeguards against unfairness built into the Court-supervised CCAA process. It also ignores the fact that the approval sought by the Monitor is by its terms limited to the *Monitor's* activities. It does not approve any other person's activities and it does not affect any party's right to otherwise contest or object to any fee approval application of the Monitor in the future.

15. As is the case with these doctrines in other contexts, their application is always subject to the overriding discretion of the Court to prevent any unfairness arising from their application.

III. DISCUSSION

A. The Relevant Context

16. An understanding of the issue *estoppel* effect and scope of a Court's approval of a monitor's activities is framed and informed by the context: namely, (a) a CCAA proceeding, (b) the nature of the role of a monitor in such a proceeding, and (c) the established practice of approval of a monitor's activities.

B. CCAA Proceedings

17. The purpose of CCAA proceedings is to (a) facilitate ongoing operations of the debtor through reorganization where feasible, partially liquidate the debtor's assets as part of a process of returning to viability, and/or liquidate the company, and (b) balance the interests of stakeholders and enable an orderly distribution to creditors.[4]

18. A CCAA proceeding is not a leisurely process. It entails "real time litigation" and can require "Herculean tasks" to be completed in "head spinning short times."[5]

C. The Role and Nature of a Monitor

Functions

19. A monitor plays an integral part in balancing and protecting the various interests in the CCAA environment. Although the role of a Court-appointed monitor may be an evolving

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4 *Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 at para. 7 (Gen. Div. (Commercial List)), Book of Authorities, Tab 1.

5 *Royal Oak Mines Inc., Re*, 1999 CarswellOnt 792 at para. 7 (Gen. Div. (Commercial List)), Book of Authorities, Tab 2.

one, it is clear that a monitor plays a crucial role.[6] Indeed, it is "the court's eyes and ears with a mandate to assist the Court in its supervisory role."[7]

20. The CCAA specifically requires a monitor to (among other things):

- review and report to the Court in respect of the debtor's cash-flow statement;
- determine with reasonable accuracy the state of the debtor's business and financial affairs and the cause of its financial difficulties or insolvency and report to the Court on its findings;
- report to the Court on the state of the debtor's business and financial affairs, as the Court orders (and, in any event, on a quarterly basis and without delay after ascertaining a material adverse change in the debtor's projected cash-flow or financial circumstances); and
- advise the Court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors.[8]

21. The CCAA also requires the monitor to execute any other functions in relation to the debtor that the Court may direct.[9] The practice is for the Court to exercise its flexible power under the CCAA to particularize aspects of a monitor's mandate both in the initial order and from time to time throughout the proceeding.

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6 *Re Crystallex International Corp.* 2012 ONSC 2125 at para. 125, Book of Authorities, Tab 3.

7 *Re Can-Pacific Farms Inc.*, 2012 BCSC 760 at para. 19, Book of Authorities, Tab 4, citing Kevin P. McElcheran, *Commercial Insolvency in Canada* (Markham, Ont: LexisNexis Canada, 2005) at 236, Book of Authorities, Tab 5.

8 CCAA, s. 23(1)(i).

9 CCAA, s. 23(1) (k).

22. For example, in this CCAA proceeding, the Court has specifically directed and empowered the Monitor to report to the Court as the Monitor deems appropriate regarding matters relevant to the proceedings[10] and to:

- assist with and provide oversight in respect of the wind-down of the business and operations of Target Canada Entities;[11]
- provide an update report to the Court as to the Monitor's progress in responding to certain creditor inquiries regarding the debtor's inventory;[12]
- oversee and consult with Lazard Freres & Co. LLC, as financial advisor to Target Canada Co., and Northwest Atlantic (Canada) Inc. in connection with the sales process for the real property assets held by the Target Canada Entities (the "**Real Property Portfolio Sales Proces**s");[13]
- take any and all actions as may be necessary or desirable to implement and carry out the Real Property Portfolio Sales Process;[14]
- report periodically on the progress of the Real Property Portfolio Sales Process (resulting in four reports from the Monitor on this process and three further reports on the transactions successfully completed further to that process);[15]
- implement a Court-approved claims process and adjudicate claims filed pursuant thereto;[16] and

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[10] Initial Order dated January 15, 2015 at para. 47(e).

[11] Initial Order dated January 15, 2015 at paras. 47(b), (k).

[12] Endorsement of RSJ Morawetz dated February 19, 2015.

[13] Initial Order dated January 15, 2015 at para. 47(d).

[14] Order dated February 11, 2015 (Approving Real Property Portfolio Sales Process and Extending the Stay Period) at para. 2.

[15] Paragraph 42 of the Real Property Portfolio Sale Process attached as Schedule "B" to the Order dated February 11, 2015 (Approving Real Property Portfolio Sales Process and Extending the Stay Period).

[16] Claims Procedure Order dated June 11, 2015 at para. 10.

- prepare and file a report providing the Monitor's assessment as to the validity and quantum of certain intercompany claims.[17]

Duties and Standards

23. At law, Court-appointed officers are required to:

- make full and fair disclosure to the Court of all material facts in all of their applications, whether favourable or unfavourable;[18]
- act lawfully, fairly and honourably;[19] and
- be neutral and objective.[20]

24. These duties and standards are codified in and expanded by the CCAA. The CCAA expressly provides that a monitor (a) must act honestly and in good faith,[21] and (b) comply with the Code of Ethics referred to in the *Bankruptcy and Insolvency Act*[22] (the "**BIA**"). That Code of Ethics[23] requires, among other things:

- honesty and impartiality;

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17 Claims Procedure Order dated June 11, 2015 at para. 35.

18 *Regal Constellation Hotel Ltd., Re*, 2004 CarswellOnt 2653 at para 26 (C.A.), Book of Authorities, Tab 6, cited in *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340 at para. 43, Book of Authorities, Tab 7.

19 *Bell Canada International Inc., Re*, 2003 CarswellOnt 4537 at para. 7 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 8, citing Sir Gavin Lightman & Gabriel Moss, *The Law of Receivers and Administrators of Companies*, 3rd ed. (London, U.K.: Sweet & Maxwell 2000) at 115; *Pine Valley Mining Corp., Re*, 2008 BCSC 356 at para. 10, Book of Authorities, Tab 9.

20 *Bell Canada International Inc., Re*, 2003 CarswellOnt 4537 at para. 9 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 8.

21 CCAA, s. 25.

22 R.S.C. 1985, c. B-3, as amended, s.13.5.

23 *Bankruptcy and Insolvency General Rules*, C.R.C., c 368.

- the high standard of ethics that are central to the maintenance of public trust and confidence in the administration of the insolvency;
- the performance of duties in a timely manner and the carrying out of functions with competence, honesty, integrity and due care;
- the avoidance of any influence, interest or relationship that impairs or appears to impair their professional judgment; and
- not signing any report that the monitor knows or reasonably ought to know is false or misleading.

25. The Monitor submits that the exacting standards and duties governing a Court-appointed monitor ensure an inherent trustworthiness to its activities and its reporting thereon. The Ontario Court of Appeal has specifically stated, with good reason, that a Court is entitled to assume that its appointed officer is acting properly unless the contrary is clearly shown.[24]

IV. COURT OFFICER REPORTS AND THE PRACTICE OF APPROVING ACTIVITIES

Nature and Purpose of Reporting

26. Where the Court appoints a monitor as its officer to be the Court's eyes and ears, carry out specific functions necessary to the insolvency process (often requiring specific expertise) and keep the Court abreast of the activities of the insolvency process, the axiomatic way in which the monitor does so is to report on its activities.

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[24] *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340 at para. 43, Book of Authorities, Tab 7, also cited in the Objecting Creditors' Supplemental Submissions.

27. In the context of a receivership, the Ontario Court of Appeal in *Re Confectionately Yours* articulated the purpose of reporting as follows:

> A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements.[25]

28. Unlike a passing of accounts, where the monitor is essentially the party litigant, the monitor's role in the administration of an estate is not as a party litigant.[26] As the Court's officer, a monitor is entitled to be protected from onerous and overly intrusive disclosure requests and is entitled to carry out its functions without having to account to stakeholders, such as the Objecting Creditors, for every single step it takes in carrying out its Court-ordered mandate.[27] While the Monitor is accountable as the Court's officer, that status also gives the Monitor a large degree of discretion in carrying out its duties and the presumption that it is carrying out its duties properly.[28]

Practice of Court Approval

29. It is the practice that where a monitor seeks approval of its activities as described in its reports, the Court will entertain that relief and, if satisfied that the monitor has heeded the

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[25] *Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 at para. 34 (C.A.), Book of Authorities, Tab 10.

[26] *Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 at paras. 30-31 (C.A.), Book of Authorities, Tab 10.

[27] *Wyszatko v. Wyszatko Estate*, 2013 ONSC 5667 at para. 9, Book of Authorities, Tab 11.

[28] *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340 at para. 43, Book of Authorities, Tab 7.

Court's direction and "discharge[d] its duties properly,"[29] grant an order approving the monitor's activities. In recognizing the crucial role a monitor plays in a CCAA proceeding, the Court in *Re Crystallex International Corp.* recognized the concomitant appropriateness of approving the monitor's activities that it reports to the Court:

> Approval is sought of the actions of the Monitor as disclosed in its second and third report. I have no hesitation in approving these actions. A Monitor plays a crucial role in any CCAA restructuring, and this is particularly so in this case. The Monitor is to be commended for the way in which it has participated and in its efforts to bring a consensual resolution of matters as they have arisen. This assistance is invaluable. I approve the actions of the Monitor as set out in its second and third report. [30]

30. Although the Court's request on July 30 for submissions did not include a request for submissions as to whether the practice is appropriate *per se*, the Objecting Creditors' Supplemental Submissions are premised on the practice being in effect carried out mindlessly and being dependant on the absence of objections. The Monitor submits that that is an inaccurate characterization of the approval practice, as discussed below.

31. The practice of approving a Court-appointed officer's activities from time-to-time is certainly not unique to CCAA proceedings. The authority of the Court to approve its officer's activities during an insolvency, notwithstanding that the relevant insolvency statute is silent as to such a power, has been recognized in Canada for at least 90 years.[31]

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[29] *Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 at para. 34 (C.A.), Book of Authorities, Tab 10.

[30] *Crystallex International Corp., Re*, 2012 ONSC 2125 at para. 125, Book of Authorities, Tab 3.

[31] *Tlustie, Re*, 1923 CarswellOnt 12 at para. 5 (S.C. (In Bank.)), Book of Authorities, Tab 12. See also the authorities that recognize the legitimacy of "mid-stream" approvals to use the Objecting Creditors' phraseology: e.g., *Wiggins, Re*, 2003 CarswellOnt 3514 at para. 7 (Sup. Ct. J.), Book of Authorities, Tab 13, citing *Tlustie*. Also see, e.g., in the receivership context, *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006

> I am of the opinion that for the purpose of carrying out the Act, there must be deemed to be vested in the Court the necessary power and jurisdiction to authorize and sanction acts necessary to be done by the trustee for the due administration and protection of the estate even though there be no specific provisions in the Act expressly conferring such power and jurisdiction.[32]

Purpose and Effect of Court Approval

32. Contrary to the Objecting Creditors' insinuation in their submissions,[33] the established practice of approving the monitor's activities from time-to-time during an insolvency (what the Objecting Creditors pejoratively term "mid-stream"), is not something done thoughtlessly simply because someone once 'tried it on' and there was no objection.[34] (Indeed, two cases on which the Objecting Creditors rely in opposition to the motion are cases where approval of a receiver's activities was given in the face of an *opposed* motion for approval.)

33. Court approval of a monitor's activities serves several important purposes in a CCAA. Court approval:

- ensures the integrity of processes (e.g., sale processes) undertaken in the CCAA proceeding and adds a level of "judicial protection" in respect of those processes;

CarswellOnt 2835 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14, upheld on appeal *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145, Book of Authorities, Tab 14; *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 (Gen. Div.), Book of Authorities, Tab 15; *80 Aberdeen Street Ltd. v. Surgeson Carson Associates Inc.*, 2008 CarswellOnt 330 (Sup. Ct. J.)., Book of Authorities, Tab 16.

[32] *Tlustie, Re*, 1923 CarswellOnt 12 at para. 5 (S.C. (In Bank.)), Book of Authorities, Tab 12.

[33] Objecting Creditors' Initial Submissions at paras. 8-9.

[34] The Objecting Creditors' further suggestion that the CCAA contemplates review of accounts and that the activities will be "impliedly reviewed at that time" (implying not at the present time) is surprising: the CCAA does not address review of accounts, nor is there any suggestion of any authority (or practice) that activities are only to be reviewed at the time of reviewing accounts.

- 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;

- 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;

- provides certainty and finality to processes in the CCAA proceedings and activities undertaken (e.g., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

- 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;

- provides protection for the monitor not otherwise provided by the CCAA; and

- 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.

34. The cases cited by the Objecting Creditors themselves illustrate that there are good policy and practical reasons for Court approval of a monitor's activities from time-to-time throughout an insolvency proceeding.[35] Approval of a Court-appointed officer's activities provides a level of "judicial protection",[36] in respect of the CCAA proceeding as a whole; it confirms the integrity of the processes (e.g., sale processes) undertaken in that proceeding. A CCAA proceeding (whether a restructuring or a 'liquidating'

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[35] See generally the factual circumstances in *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 (Gen. Div.), Book of Authorities, Tab 15; *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006 CarswellOnt 2835 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14; *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, Book of Authorities, Tab 7.

[36] *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 at para. 10 (Gen. Div.), Book of Authorities, Tab 15.

proceeding) inevitably consists of the orderly building of block upon blocks. All stakeholders in a CCAA process benefit from the confidence that a Court, having mandated its independent court officer to undertake certain activities for the benefit of all stakeholders, and having heard from its officer regarding those activities, is satisfied that the monitor has heeded the Court's direction and completed a step in the CCAA process; a building block that allows the monitor and the stakeholders to move forward confidently with the next step.

35. Clarity as to the appropriateness of specified activities having been carried out, and as to the results thereof, is foundational to enabling the realization, collection, arrangement and distribution process to progress, building on the steps to date. It is the reporting and approval process that provide this clarity.

36. For example, as is often the case in Court-supervised insolvency processes (and as was the case in *Toronto Dominion Bank v. Preston Springs Gardens Inc.*[37]), the Court may direct that assets owned by the debtor be sold pursuant to a process and in a particular manner. If the Court officer carries out its Court-ordered mandate and reports to the Court in respect of its activities, the Court has the discretion to approve the monitor's activities. The monitor and all constituents, including the purchaser, can move forward with confidence that the approval affords some level of judicial protection. If that were not the result, distributions of dividends to creditors would be held up and confidence in the conclusion of the underlying transaction lost. At all times, the Court manages its own process and has the discretion to apply the doctrines of *estoppel* (and related doctrines

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[37] 2006 CarswellOnt 2835 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14.

discussed below) to prevent such an undesirable result (as it did, for example, in *Toronto Dominion Bank v. Preston Springs Gardens Inc.*).

37. In seeking Court approval of its activities, a monitor brings its 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. Court approval, therefore, provides certainty and finality to processes in the CCAA proceedings and activities undertaken (e.g., asset sales), all parties having been given an opportunity to raise specific objections and concerns. It also gives the Court, tasked with supervising the CCAA process, the opportunity to satisfy itself that the monitor's Court-mandated activities have been conducted in a prudent and diligent manner.

38. The Monitor concedes that approval of a monitor's activities affords the monitor a level of protection. However, that fact does not make it inappropriate for a monitor to seek approval. The CCAA protection and Court-ordered releases otherwise provided to a monitor do not give it the real-time "judicial protection" in respect of the tasks it has completed and the concomitant confidence that it can move forward with the next step in the proceeding without being distracted in doing so by actions against it alleging liability in respect of its proper activities. Given that one of the primary roles of a monitor is to balance the often competing interests of stakeholders, it is important that parties not be able to brandish the spectre of future litigation against the monitor and that steps authorized by the Court be understood to be final and binding. As noted by Blair J. (as he

then was) in *Bank of America Canada v. Willann Investments Ltd.*,[38] the approval of the Court-officer's conduct serves an important function in this regard. And while the CCAA provides certain immunities, it does not afford a monitor protection from the bringing of frivolous litigation or the cost and distraction associated with the threat of re-litigation of steps taken.

39. Finally, Court approval of a monitor's activities 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.

40. The Objecting Creditors' characterization of the practice of approval of a monitor's activities fundamentally fails to recognize the purposive nature of the approval relief, discussed above. (It also implies that the Courts have repeatedly mindlessly granted "mid-stream" approvals, without basis or purpose. This by its nature is a startling proposition: where Courts repeatedly grant relief of a certain nature, surely the presumption must be that, whether or not expressly discussed in the Court's disposition, the relief is considered, purposeful and meaningful. Courts do not mindlessly grant relief simply because there is no opposition to it.)

Québec Court did not Reject the Practice of Mid-proceeding Approvals

41. The Objecting Creditors cite a 2010 Québec case – *Chantiers Davie inc., Re*[39] under the headline "**Quebec Superior Court rejects mid-proceeding Monitor Activity**

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[38] 1993 CarswellOnt 249 at para. 10 (Gen. Div.), Book of Authorities, Tab 15.

[39] 2010 QCCS 2643, Book of Authorities, Tab 17.

Approvals."[40] This, with respect, is quite misleading. The Court in *Chantiers* made no reference *at all* to rejecting a request for approval of activities because it was sought "mid-proceeding." Rather, the Court (without citing any authority) stated that approval of activities "could" create "a source of confusion" concerning its scope, stating that Parliament prescribed conditions for non-liability of a monitor in two sections in the CCAA.[41] The Court opted to simply "take note" of the Monitor's report – something the Objecting Creditors posit should be the extent of the relief on the Monitor's motion, if any relief is to be granted.

42. To the extent that *Chantiers* is advanced to stand for the proposition that a Court should not approve a monitor's activities – whether "mid-stream" or otherwise – it is not persuasive authority.

43. First, *Chantiers* is clearly an outlier case, inconsistent with the CCAA practice not only in this Court and others[42] but even in Québec.[43]

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[40] Objecting Creditors' Supplemental Submissions at para. 6.

[41] *Chantiers Davie inc., Re*, 2010 QCCS 2643 at para. 47, Book of Authorities, Tab 17, referring to CCAA, sections 23(2) and 25.

[42] See e.g., *Landdrill International Inc., Re*, 2012 NBQB 355 at para. 15, Book of Authorities, Tab 18; *Arctic Glacier Income Fund, Re*, 2015 CarswellMan 274 at para. 2 (Q.B.), Book of Authorities, Tab 19; *Arctic Glacier Income Fund, Re*, 2012 CarswellMan 833 at para. 2 (Q.B.), Book of Authorities, Tab 20.

[43] See e.g., *White Birch Paper Holding Co., Re*, 2011 QCCS 5223 at para. 38, Book of Authorities, Tab 21, a case post-*Chantiers* that granted approval of the Monitor's activities "mid-stream" (to use the Objecting Creditors' phraseology). See also *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 at para. 3, Book of Authorities, Tab 22; *Maax Corp., Re*, 2008 CarswellQue 15021 at para. 3 (Sup. Ct.), Book of Authorities, Tab 23; *Cavalier Specialty Yarn Inc., Re*, 2004 CarswellQue 4816 at para. 36 (C.S.), Book of Authorities, Tab 24; *Cavalier Specialty Yarn inc., Re*, 2004 CarswellQue 4817 at para. 39 (C.S.), Book of Authorities, Tab 25; *Boutique Jacob inc., Re*, 2011 QCCS 6030, Appendix at para. 29, Book of Authorities, Tab 26; *Montreal, Maine & Atlantic Co.*, 2015 CarswellQue 5917 at para. 113 (Sup. Ct.), Book of Authorities, Tab 27.

44. Second, the decision fails to reflect the actual provisions in sections 23(2) and 25 of the CCAA. Section 23(2) refers to non-liability in respect only of specific reports required by the section, and section 25 does not refer to non-liability *at all*. (Even if the sections *had* provided for 'non-liability' more generally, there would be nothing inconsistent between (i) the CCAA expressly providing the monitor protection from liability upon the monitor's meeting certain requirements, on the one hand, and (ii) Court approval of the monitor's activities, on the other.) Court approval may or may not have an effect on monitor liability in a particular case, but nothing in the CCAA purports to "cover the field" in that respect.

45. Finally, contrary to the Québec Court's view in *Chantiers*,[44] the mere "taking note" ("prendre acte") of a monitor's report is what would create ambiguity, in contrast to approval of activities. "Taking note" is by its nature an ambiguous act. (Indeed, even the *Chantiers* decision *itself* recognizes the debatable utility of "taking note" of a report.)[45]

V. ISSUE *ESTOPPEL* IN RESPECT OF APPROVAL OF ACTIVITIES

46. It is in the context of all the foregoing (i.e., the nature of a CCAA process, the nature of a monitor's role and the purposive nature of the established practice of approving a monitor's activities) that (a) the Court's specific inquiry about the effect of issue *estoppel* in respect of approval of a monitor's activities is properly addressed, and (b) the Objecting Creditors' *in terrorem* arguments - based on issue *estoppe*l - about the appropriateness of an approval at this time should be considered.

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[44] 2010 QCCS 2643, Book of Authorities, Tab 17.

[45] *Chantiers Davie inc., Re*, 2010 QCCS 2643 at para. 48, Book of Authorities, Tab 17.

47. The Monitor's submissions therefore now turn to the applicability of issue *estoppel* (and related doctrines) to Court approval of monitor activities.

48. Although the discussion in Court at the July 30 hearing centered around the notion of issue *estoppel*, it should be recognized that there are related doctrines of abuse of process and 'collateral attack' on a Court's order, and any of these notions could have similar application to an approval determination made by the Court in respect of a monitor's activities.

A. Policy Underlying the Issue *Estoppel* (and Related) Doctrines

49. It is well-established that the Courts seek finality to litigation. Matters brought before the Court should only be adjudicated once and duplicative proceedings are to be avoided. As Binnie J. noted in *Danyluk v. Ainsworth Technologies Inc.*:

> The law rightly seeks finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry.[46]

50. The doctrine of issue *estoppel*, and the related rules against abuse of process and collateral attack, promote finality by acting as a bar to re-litigation of issues already decided by the Court, furthering important public policy objectives:

> The public policy or rationale for the doctrine of res judicata is that the preclusive effect of the rule advances consistency, judicial economy, conclusiveness, finality, and the avoidance of repeat or duplicative litigation in the administration of civil justice, most

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[46] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 18, Book of Authorities, Tab 28.

> especially in situations where a party or privy to a party has had his or her day in court.[47]

B. Issue *Estoppel*

51. The doctrine of *res judicata* has two branches: cause of action *estoppel* and issue *estoppel*. Cause of action *estoppel* bars subsequent proceedings that allege the same cause of action between the same parties if that cause of action has already been determined by the Courts. Since a cause of action is not being asserted in an approval motion, cause of action *estoppel* is not germane to this discussion. Issue *estoppel*, however, applies. Issue *estoppel* precludes re-litigation of the same point or issues against the same party. The Court in *Royal Bank* summarized the effect of issue *estoppel* as follows:

> Where a material fact or issue in a proceeding has already been determined by a court of competent jurisdiction, that fact or issue may not be attacked or thrown into dispute in a subsequent proceeding among the same parties.[48]

52. More precisely, issue *estoppel* arises to bar a re-litigation of an issue, where:

(a) the same question has been decided;

(b) the judicial decision which is said to create the *estoppel* was final; and

(c) the parties to the judicial decision, or their privies, were the same persons or their privies as in the proceedings in which the *estoppel* is raised.

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[47] *Martin v. Goldfarb*, 2006 CarswellOnt 4355 at para. 60 (Sup. Ct. J.), Book of Authorities, Tab 29; See also *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at para. 36, Book of Authorities, Tab 30.

[48] *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at para. 47, Book of Authorities, Tab 30; See also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 23, Book of Authorities, Tab 31.

53. Issue *estoppel* applies not only to matters that were actually determined by the Court, but also to matters that could have been raised by the parties in the previous proceeding by exercising reasonable diligence. That is, issue *estoppel* applies to "any issue of fact, law and mixed fact and law that is necessarily bound up with the determination of that issue in a prior proceeding."[49]

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.[50]

C. Abuse of Process

54. The doctrine of abuse of process is derived from the Court's inherent discretion to prevent an abuse of its own procedures. It is a flexible doctrine that is unencumbered by the specific requirements of cause of action and issue *estoppel*.

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel…are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.[51]

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[49] *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at para. 47, Book of Authorities, Tab 30.

[50] *McQuillan v. Native Inter-Tribal Housing Co-operative Inc.*, 1998 CarswellOnt 4172 at para. 8 (C.A.), Book of Authorities, Tab 32, citing *Henderson v. Henderson*, [1843-60] All ER Rep 378 at 381-82 (Eng. V.C.), Book of Authorities, Tab 33. See also *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at paras. 39, 47, Book of Authorities, Tab 30.

[51] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37, Book of Authorities, Tab 31.

55. The Supreme Court has held that Courts have inherent and residual discretion to prevent an abuse of the Court's process, described as proceedings "unfair to the point they are contrary to the interest of justice" and as "oppressive treatment".[52]

D. Collateral Attack

56. A proceeding is a collateral attack when it asserts facts inconsistent with a previous factual determination by a Court that had jurisdiction to make it, or when the proceeding seeks relief that is inconsistent with a previous disposition by a similarly competent Court. It is not necessary that the proceeding bluntly assert that the previous order should be set aside.[53]

57. The rule against collateral attacks on final Court orders or judgments prevents a party from challenging a final order in a subsequent proceeding:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.[54]

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[52] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, Book of Authorities, Tab 31, cited in *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at para. 48, Book of Authorities, Tab 30.

[53] *Roeder v. Lang Michener Lawrence & Shaw*, 2005 BCSC 1784, Book of Authorities, Tab 34, cited in *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at para. 51, Book of Authorities, Tab 30.

[54] *R. v. Wilson*, 1983 CarswellMan 189 at para. 8 (S.C.C.), Book of Authorities, Tab 35.

E. The Overriding Discretion of Court

58. Importantly, issue *estoppel* and the related doctrines do not automatically bar future litigation. These are equitable doctrines, and a Court retains a residual discretion to refuse to apply any form of *estoppel* or bar to litigation when to do so would be contrary to the requirements of justice.[55]

F. Application of the Doctrines to Court Approval of Activities

The Doctrines Apply to Court Approval of Activities

59. Principles of *res judicata* (and related doctrines) apply in the CCAA context in a routine way.[56] Therefore, Court approval of a Court-appointed officer's activities may lead to the application of issue *estoppel* (and related doctrines).

60. It is appropriate that this be the case in a CCAA. Given the meaningful functions (discussed above) that approvals serve, the availability of the doctrine of *res judicata* (and related doctrines) is important to the CCAA process. The actions mandated and authorized by the Court and the activities taken by the Monitor to carry them out, are not interim measures that ought to remain open for second-guessing or re-litigating down the road. There is a need for finality in a CCAA process for the benefit of all stakeholders.

61. The application of *res judicata* (and related doctrines) has squarely arisen in the context of parties seeking leave to sue a Court-appointed receiver. The Courts, for example, have

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[55] *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at para. 54, Book of Authorities, Tab 30; See also *Marsh Engineering Ltd. v. Deloitte & Touche Inc.*, 2008 CarswellOnt 7933 at para. 39 (Sup. Ct. J.), Book of Authorities, Tab 36.

[56] See *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192, Book of Authorities, Tab 30.

denied leave to sue a receiver where relevant activities of the receiver were previously approved.[57] In these cases, the issues raised in respect of the activities had either been previously litigated in the approval motion by virtue of an objection or complaint,[58] or there were no objections.[59]

62. *Toronto Dominion Bank v. Preston Springs Gardens Inc.*,[60] also cited by the Objecting Creditors, is informative on several levels. It illustrates that a Court's "mid-stream" approval of activities is a judicial disposition. It illustrates the Court can and will, at the time of the subsequent litigation or proposed litigation, engage in the exercise of determining what was approved at an earlier point. It also demonstrates that the doctrines protecting against re-litigation of issues apply to approval orders, in the appropriate case. (Notably, the Objecting Creditors are incorrect in asserting that *Preston Springs* is a case limited to applying issue *estoppel* to a "specific transaction approval" in contrast to

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[57] See *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006 CarswellOnt 2835 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14; *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 (Gen. Div.), Book of Authorities, Tab 15; and *Marsh Engineering Ltd. v. Deloitte & Touche Inc.*, 2008 CarswellOnt 7933 (Sup. Ct. J.), Book of Authorities, Tab 36.

[58] See *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006 CarswellOnt 2835 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14; *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 (Gen. Div.), Book of Authorities, Tab 15; and *Marsh Engineering Ltd. v. Deloitte & Touche Inc.*, 2008 CarswellOnt 7933 (Sup. Ct. J.), Book of Authorities, Tab 36.

[59] See *Marsh Engineering Ltd. v. Deloitte & Touche Inc.*, 2008 CarswellOnt 7933 (Sup. Ct. J.), Book of Authorities, Tab 36. In *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 at para. 18 (Gen. Div.), Book of Authorities, Tab 15, the Court also held that the litigant could not seek to re-litigate issues on a leave motion that it could have raised through reasonable diligence, and that *res judicata*/issue *estoppel* applied in respect of those issues.

[60] 2006 CarswellOnt 2835 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14.

approval of activities described in the reports. The prior approval there clearly included approval of the receiver's *activities*.)[61]

63. There are also sound policy reasons particular to the CCAA context why it is appropriate that issue *estoppel* (and related doctrines) might apply in future proceedings to bar attempts to re-litigate matters already decided by the Court. The crucial effect that approvals have in fostering the building block nature of an insolvency would be completely undermined if the doctrines did not apply to Court approval of activities. Further, monitors would be wary of taking or recommending significant steps (including distribution) that are consequent to prior activities, absent some assurance that certain stakeholders are not laying in the weeds only to attack past activities at a later point when they cannot be undone and when the insolvency has progressed on the assumption that those activities were appropriate.

Scope of Approval

64. A Court-appointed officer's report provides a narrative of the officer's activities. Monitors are not expected to report activities in unreasonable and extraordinary detail (indeed, taken to its logical conclusion, on a minute-by-minute basis).[62] This would be

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[61] *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006 CarswellOnt 2835 at paras. 9, 32 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14.

[62] The Court appeared to accept the appropriateness of a "narrative" level of reporting in *Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 at para. 34 (C.A.), Book of Authorities, Tab 10. See also *Wyszatko v. Wyszatko Estate*, 2013 ONSC 5667 at para. 9, Book of Authorities, Tab 11, where the Court approved interim reports of the receiver, notwithstanding an objection that the receiver did not disclose or document every discussion it had with particular parties. The Court held that the interim report "[made] clear to [the] court the various responsibilities that [had] been assumed by the receiver" and the Court was "not prepared to infer from [its] review of the evidence that the receiver [had] not gone about its duties in a manner consistent with the responsibilities of a receiver appointed by [the] court."

enormously unproductive, costly and inconsistent with the objectives of the CCAA. It would seem clear to the extent that a monitor has clearly described an activity in its report, future litigation in respect of that activity as described is subject to the doctrine of issue *estoppel* and related doctrines (themselves subject to the overriding discretion of the Court, inherent in those doctrines, not to apply them in an unfair manner).

65. In less clear cases, the fact that there may have to be a determination in later litigation (point "B") about what could reasonably have been raised in the approval motion (point "A") (the very exercise in which the Courts in the cases cited by the Objecting Creditors engaged),[63] does not prejudice the Objecting Creditors. The doctrine of issue *estoppel* itself safeguards against any potential prejudice.

66. Where it is not clear at point "B" that the Court decided an issue at point "A", the claimant seeking to litigate the issue will only be barred from doing so if the claimant could have brought the issue forward at point "A" with "reasonable diligence." This "reasonable diligence" concept protects claimants to the extent there is information they could not reasonably have been expected to know about at point "A". It also protects monitors, stakeholders and the CCAA process as a whole from parties 'lying in weeds' and reserving rights indefinitely.

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[63] See, e.g., *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006 CarswellOnt 2835 at paras. 31-35 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14; *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 at para. 8 (Gen. Div.), Book of Authorities, Tab 15; *Bayhold Financial Corp. v. Clarkson Co.*, 1985 CarswellNS 200 (S.C. (A.D.)), Book of Authorities, Tab 37.

67. It is absurd to suggest, as the Objecting Creditors' position appears to, that Courts should make *no* determination at point "A" that would otherwise be appropriate to make.[64]

VI. OBJECTING CREDITORS WOULD NOT BE UNFAIRLY PREJUDICED BY APPROVAL

68. The Objecting Creditors' overriding theme is centred on: (a) an impeded ability "to inquire further and demand information relative to their concerns and claims,"[65] and (b) an undefined, speculative "risk" in respect of future litigation. This, with respect, is unfounded.

69. The Court has control of the CCAA process, and the Court can direct the Monitor (if the Monitor does not provide information on its own accord) to provide information if that is appropriate. That is, if there is a *legitimate* need for further information, for a *legitimate* purpose, the Court can direct that to be provided, whether or not approval of specific activities has been granted. Further, and importantly, if the Objecting Creditors' intention (whether formed now or later), is to commence actions against parties other than the Applicants, those actions will have their own complete and robust discovery processes in the normal course.

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64 The Objecting Creditors' reliance on *Bayhold Financial Corp. v. Clarkson Co.*, 1985 CarswellNS 200 (S.C. (A.D.)), Book of Authorities, Tab 37, in this regard is ill-founded. *Bayhold* is a point "B" case: it simply makes clear that to conduct the comparison for a *res judicata* analysis, it is necessary to know what is being alleged at point "B." It does not support a position that a Court should not grant any relief at point "A" because that later inquiry may have to be made.

65 Objecting Creditors' Supplemental Submissions at para. 20.

70. The Court should be very wary of a stakeholder using the CCAA process for collateral purposes.[66] The CCAA process does not exist to create new causes of action against a monitor or anyone else. It does not exist to provide parties with forensic tools (such as information gathering or discovery) for potential causes of action against other parties. Indeed, allowing a stakeholder to use the CCAA process for such a purpose is contrary to the interests of the stakeholders as a whole, given the resultant cost, effort and diminishment of the estate engendered by such activities:

> Officers of the court should be left to perform their functions and duties without the distraction, added costs and potential chilling effect on their investigation that could result from permitting open-ended access to the fruits of their investigation. [67]

71. If the Objecting Creditors have a claim, the onus is on them to assert and prove their claim pursuant to the Court-approved claims process in these proceedings. If they have specific objections to the Monitor's activities as reported, the Objecting Creditors should raise and particularize them at the time approval is sought.[68] The Court and the Monitor ought to be given an opportunity to rectify issues, if any, in a timely manner. Indeed, *Toronto Dominion Bank v. Preston Springs Gardens Inc.*[69] and *Bank of America Canada v. Willann Investments Ltd.*,[70] cited by the Objecting Creditors, illustrate the Court's

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66 *SA Capital Growth Corp. v. Mander Estate*, 2012 ONCA 681 at para. 10, Book of Authorities, Tab 38.

67 *SA Capital Growth Corp. v. Mander Estate*, 2012 ONCA 681 at para. 10, Book of Authorities, Tab 38.

68 As the parties did in *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006 CarswellOnt 2835 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14, and *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 (Gen. Div.), Book of Authorities, Tab 15.

69 *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006 CarswellOnt 2835 at paras. 31-35 (Sup. Ct. J. (Commercial List)), Book of Authorities, Tab 14.

70 *Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 at para. 8 (Gen. Div.), Book of Authorities, Tab 15.

willingness to hear specific objections to a Court-appointed officer's activities before approving those activities. The approval stage is the appropriate time for stakeholders to specify and raise issues. The Objecting Creditors cannot be allowed to withhold objections and reserve rights indefinitely to the detriment of moving the proceedings along to a timely distribution.

72. Further, the approval sought here is by its own terms limited to the *Monitor's* activities, as described in the Monitor's reports. It expressly does not operate to affect (a) any person's rights relating to claims advanced against any Target Canada Entity by a related or affiliated entity under or with respect to the Mutual Termination Agreement, (b) any person's right to otherwise contest or object to any fee approval application of the Monitor in the future. It also does not approve activities of anyone other than the Monitor.

73. Finally, as noted, the very issue *estoppel* and related doctrines *themselves* contain a protective element so as to protect against any undue unfairness arising to a party later seeking to litigate. This, combined with the CCAA Courts' well-established, broad discretionary authority under the CCAA, protect against any *real* prejudice that may *actually* result to future litigants from Court approval of activities.

VII. CONCLUSIONS

74. There are good policy and practical reasons for Court approval of a monitor's activities in affording a level of judicial protection not only for monitors but also in respect of the CCAA proceedings as a whole. Court approval upholds the integrity of the processes (e.g., sale processes) undertaken in the CCAA proceedings and the clarity it provides is

foundational to enabling the realization, collection, arrangement and distribution process to progress, building on the steps to date.

75. The authorities establish that issue *estoppel*, and related doctrines, can and should apply to Court approval of a Court-appointed officer's activities when the requirements of these doctrines are fulfilled. The Court retains an ultimate discretion whether to apply the doctrines in a particular case, in addition to its particular broad discretion in CCAA matters.

76. The issue *estoppel* and related doctrines apply to activities described and approved. The interests of stakeholders are more than adequately protected by: (a) the ability of parties to seek specific disclosure, (b) their ability to participate in any approval proceeding, (c) the Court's discretion whether to apply the doctrines in any case, and (d) the Court's power to control the CCAA process from beginning to end.

77. With respect to the motion outstanding before the Court, the applicability of issue *estoppel* and related doctrines to Court approval of activities is no basis to not approve the activities as reported here. The Courts do not in practice, and for the reasons discussed above should not, shy away from granting otherwise appropriate relief because of these doctrines, just as it does not shy away from granting otherwise appropriate relief in any other case simply because the relief may have an effect on potential future attempts to re-litigate an issue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Goodmans LLP

GOODMANS LLP
Lawyers for the Monitor

SCHEDULE "A"

SCHEDULE OF AUTHORITIES

TAB	
1.	*Lehndorff General Partner Ltd., Re*, 1993 CarswellOnt 183 (Gen. Div. (Commercial List)).
2.	*Royal Oak Mines Inc., Re*, 1999 CarswellOnt 792 (Gen. Div. (Commercial List)).
3.	*Crystallex International Corp., Re*, 2012 ONSC 2125.
4.	*Can-Pacific Farms Inc., Re*, 2012 BCSC 760.
5.	Kevin P. McElcheran, *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Canada, 2005).
6.	*Regal Constellation Hotel Ltd., Re*, 2004 CarswellOnt 2653 (C.A.).
7.	*National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340.
8.	*Bell Canada International Inc., Re*, 2003 CarswellOnt 4537 (Sup. Ct. J. (Commercial List)).
9.	*Pine Valley Mining Corp., Re*, 2008 BCSC 356.
10.	*Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 (C.A.).
11.	*Wyszatko v. Wyszatko Estate*, 2013 ONSC 5667.
12.	*Tlustie, Re*, 1923 CarswellOnt 12 (S.C. (In Bank.)).
13.	*Wiggins, Re*, 2003 CarswellOnt 3514 (Sup. Ct. J.).
14.	*Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2006 CarswellOnt 2835 (Sup. Ct. J. (Commercial List)); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145.
15.	*Bank of America Canada v. Willann Investments Ltd.*, 1993 CarswellOnt 249 (Gen. Div.).
16.	*80 Aberdeen Street Ltd. v. Surgeson Carson Associates Inc.*, 2008 CarswellOnt 330 (Sup. Ct. J.).

TAB	
17.	*Chantiers Davie inc., Re*, 2010 QCCS 2643.
18.	*Landdrill International Inc., Re*, 2012 NBQB 355.
19.	*Arctic Glacier Income Fund, Re*, 2015 CarswellMan 274 (Q.B.).
20.	*Arctic Glacier Income Fund, Re*, 2012 CarswellMan 833 (Q.B.).
21.	*White Birch Paper Holding Co., Re*, 2011 QCCS 5223.
22.	*White Birch Paper Holding Co., Re*, 2010 QCCS 4382.
23.	*Maax Corp., Re*, 2008 CarswellQue 15021 (Sup. Ct.).
24.	*Cavalier Specialty Yarn Inc., Re*, 2004 CarswellQue 4816 (C.S.).
25.	*Cavalier Specialty Yarn inc., Re*, 2004 CarswellQue 4817 (C.S.).
26.	*Boutique Jacob inc., Re*, 2011 QCCS 6030.
27.	*Montreal, Maine & Atlantic Canada Co.*, 2015 CarswellQue 5917 (Sup. Ct.).
28.	*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.
29.	*Martin v. Goldfarb*, 2006 CarswellOnt 4355 (Sup. Ct. J.).
30.	*Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192.
31.	*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.
32.	*McQuillan v. Native Inter-Tribal Housing Co-operative Inc.*, 1998 CarswellOnt 4172 (C.A.).
33.	*Henderson v. Henderson* [1843-60] All ER Rep 378.
34.	*Roeder v. Lang Michener Lawrence & Shaw*, 2005 BCSC 1784.
35.	*R. v. Wilson*, 1983 CarswellMan 189 (S.C.C.).
36.	*Marsh Engineering Ltd. v. Deloitte & Touche Inc.*, 2008 CarswellOnt 7933 (Sup. Ct. J.).
37.	*Bayhold Financial Corp. v. Clarkson Co.*, 1985 CarswellNS 200 (S.C. (A.D.)).
38.	*SA Capital Growth Corp. v. Mander Estate*, 2012 ONCA 681.

SCHEDULE "B"

COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, C. C-36, AS AMENDED

s. 23(1)

Duties and functions – The monitor shall

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

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

s. 23(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.

s. 25

Obligation to act honestly and in good faith – 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*.

SCHEDULE "C"

BANKRUPTCY AND INSOLVENCY ACT
R.S.C. 1985, C. B-3, AS AMENDED

s. 13.5

Code of Ethics – A trustee shall comply with the prescribed Code of Ethics.

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

SUBMISSIONS OF THE MONITOR

(RE MOTION RETURNABLE JULY 30, 2015)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Jay Carfagnini LSUC#: 22293T
jcarfagnini@goodmans.ca

Alan Mark LSUC#: 21772U
amark@goodmans.ca

Graham Smith LSUC#: 26377D
gsmith@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Monitor