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

REPLY SUBMISSIONS OF RIOCAN AND KINGSETT

(Motion for Approval of Monitor's Reports and Activities)

Introduction

1. These reply submissions are filed by RioCan and KingSett in response to the written submissions of the Monitor, dated September 1, 2015 (the "**Monitor's Submissions**"), in respect of the Monitor's motion seeking approval of various Monitor's Reports and activities referred to in such Reports. These reply submissions are further to the submissions of these Responding Parties dated July 29, 2015 (the "**Submissions**"), and their supplemental submissions dated August 18, 2015 (the "**Supplemental Submissions**").

2. Terms defined in the original Submissions and Supplemental Submissions are employed in these reply submissions.

3. The specific arguments raised in the Monitor's Submissions are addressed below.

A. The Monitor's Position on Issue Estoppel is Now Very Clear

4. While there was some doubt regarding the Monitor's position on issue estoppel when this matter was argued, the Monitor has now made its position very clear: the Monitor asserts that any activities which this Court approves on this motion will give rise to an issue estoppel preventing creditors or other stakeholders from reviewing such activities in the future or inquiring into or requesting further information in regard to such approved activities.

5. While these Responding Parties disagree with the Monitor's characterization of the legal impact of such approvals, there can now be no doubt that this is the position all creditors and other stakeholders will face in the future should this Court grant the relief sought by the Monitor. This should be of great concern to this Court given that in a CCAA proceeding such as this, unlike the leading issue estoppel cases which involved full-blown litigation and trials, there has been no documentary or oral discovery process, no trial evidence, no cross-examination of witnesses, and indeed no opportunity for creditors to meaningfully test in any way the information put before the Court by the Monitor in its Reports (for which the Monitor now seeks approval in an effort to create an issue estoppel).

6. Disclosure and the ability for parties to meaningfully test the evidence before the Court are hallmark checks and balances that fairly ground the principle of issue estoppel. Those checks and balances are entirely missing on the present facts.

7. The Monitor's Submissions highlight the critical problem with the Monitor's position on this motion: while the leading cases stand for the proposition that issue estoppel arises **out of**

the reasons and findings of *the Judge* based on a discovered upon and meaningfully tested evidentiary record, the Monitor is in effect trying to ground issue estoppel in **the *Monitor's own* untested statements in its Reports**. Neither this Court nor the creditors have any way of meaningfully testing those statements. The principled basis for issue estoppel is fundamentally absent. This Court simply does not have the necessary information to grant the relief the Monitor seeks, particularly given the far-reaching consequences the Monitor now submits such an Order should have.

B. These Responding Parties' Objection has Nothing to do with Suing the Monitor or Enhancing Rights under Indemnities

8. Contrary to the assertions in the Monitor's Submissions, these Responding Parties have made it patently clear through their written and oral submissions (and their proposed additional wording for any Order that may be granted) that:

(a) their objection has nothing to do with the potential personal liability of the Monitor; they have no intention of pursuing the Monitor personally and they are not trying to preserve any ability to pursue the Monitor with respect to its conduct in this matter - indeed, their proposed additional wording (Schedule B to the Supplemental Submissions) make clear precisely the opposite, by proposing that the following language be included in any report and activity approval Order:

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

(b) they make these objections as creditors in the CCAA process and (while certain of their concerns raised herein relate to issues involving Target U.S.), none of this has anything to do with the indemnities provided by Target U.S. to these Responding Parties with respect to certain of their properties; and

(c) their concerns relate to the way in which this type of approval of the Monitor's Reports and activities might be used against them and other creditors in a way other than to protect the Monitor personally, and they have given many examples and reasons from this particular case for their concern. In other words, contrary to the Monitor's arguments, these objections are not designed to seek leverage against the Monitor or any other party (how that could even be the case is not explained by the Monitor), but rather to ensure that the position of the Applicants or Monitor is not inadvertently increased or the position of creditors is not made more difficult or expensive as a result of the approval of the Monitor's Reports and the Monitor's activities.

9. The vast majority of the Monitor's Submissions is devoted to attempting to persuade the Court that the Monitor needs these unrestricted and unlimited forms of approval out of fairness to *the Monitor*, when both the submissions of these Responding Parties and in particular their suggested Schedule B additional wording for an Order completely remove any risk to the Monitor. If the Monitor's concern here is its own personal liability and not its ability or that of the Applicants or their affiliates to later decline to give information or to attempt to block any creditor steps, then one must ask why the Monitor is not prepared to simply include the Schedule B wording that would limit the use of any such approvals to the Monitor's stated purpose, which is to protect the Monitor from personal liability. **Indeed, it speaks volumes that the Monitor's lengthy Submissions do not respond to or even refer to the Schedule B additional wording proposed by these Responding Parties.** The Monitor has not attempted to explain to this Court why such limiting wording is not sufficient and appropriate.

C. The Monitor's Objective in Advancing This Motion

10. In paragraph 7 of the Monitor's Submissions, the Monitor delineates its view as to the "important purposes" served by the approval of a monitor's activities (although it does not mention the monitor's reports). This list, far from allaying the concerns raised and referred to in the previous Submissions of these Responding Parties, actually suggests that one of the purposes for the Monitor in seeking these approvals, and perhaps a reason the Monitor is apparently not prepared to accept the Schedule B language proposed, is to limit information requests and possible future rights and assertions of creditors. It is notable that this position is taken in a proceeding that is supposed to be geared towards a plan of compromise and arrangement, even where the path to getting to a plan has involved repeated admonitions from the Monitor and the Applicants to the creditors to refrain from unnecessary litigation while the important business of realizing upon the assets proceeded.

11. The Monitor's asserted "important purposes" for report and activity approvals, now said to bear the embedded property of issue estoppel, merit careful examination:

(a) **"allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building block nature of CCAA proceedings".** In referring to "stakeholders", the Monitor cannot be suggesting that it is speaking on behalf of creditors in this regard. After all, this Court has heard from a number of major creditors (beyond these Responding Parties) that they have potential concerns with respect to proceeding further without complete information and without the ability to review certain of the steps that took place during a process into which they had very little visibility. Indeed, these reply submissions are being made within days of the Monitor releasing a long-awaited Report with respect to the inter-company claims and before the relevant "stakeholders" have had an opportunity to consider all of the implications

thereof and the extent to which they require further information, including with respect to activities detailed in certain Monitor's Reports for which approval is being sought in this motion. In fact, the only "stakeholder" that would want to "move forward confidently" by limiting the discovery/information rights of creditors, and by limiting the ability to use the new information they are just now getting, would be the debtors and their parent. The creditors also want to move forward, but with the confidence that they have had the opportunity to understand what has happened.

(b) **"brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way"**. The Monitor appears to be suggesting that the content it chooses to put in a report is necessarily reflective of the concerns of the Court and the creditors. However, the content in a Monitor's report is dictated by what it and its counsel choose to put in that report. The record in these proceedings is quite clear that there is no process whereby the approval of the Monitor's Reports is in essence a short-form hearing as to the substance of the issues referred to in that report. Creditors have had no meaningful ability to inquire into or challenge what is chosen by the Monitor to be referenced in its Reports, nor is it suggested by the Monitor that these activities should be further inquired into, cross-examined upon or challenged.

Moreover, if it were the intention of Parliament that all Monitor activities be fully examined and approved at each step (giving rise to an asserted estoppel), surely somewhere in the CCAA there would be provisions that so provide. There are none.

(c) **"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".** While court approval of a specific asset sale may create finality, a sweeping estoppel-creating approval of all Monitor activities is exactly what these Responding Parties are concerned

will be the use of this otherwise perfunctory approval process -- namely, to provide "finality" and to raise a chosen narrative by the Monitor to the level of judicial finding. Monitors are already given significant deference by courts in terms of their input into CCAA proceedings. Fairness demands that their reports do not become estoppel-creating findings of fact simply because they were prepared by the Monitor (after review by the Applicant and its advisors, and possibly its non-applicant parent company and its advisors), and approved in perfunctory fashion. The Court has already been given numerous examples as to how and why that would be unfair and inappropriate.

It is certainly not the case that all stakeholders have been given a meaningful opportunity to raise specific concerns and objections. Indeed, one of the biggest elephants in the room in these proceedings has been the role played by, and rights and benefits of, Target U.S. One of the key components of that is the inter-company claims, including a $1.9 billion claim and the way in which it ties back to many issues, including the initial disclosures made in the *ex parte* application. However, August 31 (months after *the Applicants* originally proposed this motion be heard) was the first time any of the creditors had an opportunity to learn about inter-company claims to any real extent, and then only in as much detail as was made available in the Monitor's latest Report. Furthermore, the first opportunity any creditors had to cross-examine the sole affiant on all of the Applicants' affidavits thus far was mid-August and these Responding Parties understand that even many of those questions went unanswered. To the extent that anything in previous Reports for which approval is sought might have an impact upon the rights of creditors once they learn (or attempt to learn) the inter-creditor information, it is crucial that such approvals be limited to the personal protection of the Monitor (as proposed in the Schedule B language).

Furthermore, the way in which this motion was brought on in the first place *by the Applicants*, and then brought back on by the Monitor, did not suggest – as the Monitor now clearly appears to be suggesting – that it would create estoppels and

be finally determinative of the rights of creditors with respect to the issues covered by the Reports. That position only clearly emerged as a result of the objections raised by these Responding Parties. It is one thing for the Monitor to be concerned with its own personal liability; it is quite another for the Monitor and Applicants to try to assert that these approvals serve as definitive findings that permanently affect creditors' rights.

It is well-understood that the debtor side (and in this case possibly including Target U.S. -- it is not known) is given an opportunity to review and have input into Monitor's Reports before they are released, meaning that the only opposition that can be expected to such Reports must come from the creditors. It is an important question to ask: how can this system (wherein a Monitor is chosen by and retained initially by the debtor and then becomes a neutral party for the benefit of all) function fairly and realistically if the creditors are constantly required to challenge the Monitor's Reports in order to prevent them from, in effect, becoming judicial findings that may prejudice creditors?

(d) **"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"**. There is no need to address (b) because that is not possibly the effect of the objections being made in this case, for all the reasons stated previously. With respect to (a), that is simply a red herring. These proceedings are literally many months away from a distribution, particularly because of the volume of claims, including inter-company claims, but also because no plan discussions are yet underway. No one is suggesting that there would not be a date by which all requests for information and objections to actions or activities will have to be aired, as is the case with a claims bar date. However, the very design and implementation of these proceedings thus far has made it virtually impossible for fact discovery to have taken place, and the creditors have only just now been presented with at least some information with regard to the all-important inter-company claims issues.

These Responding Parties are trying to avoid having their rights to information and to pursue steps (but not against the Monitor personally) made more difficult and expensive by the approval sought by the Monitor and the Applicants. There is no credible suggestion that any of this will hold up any distributions. The key information has not yet been made completely available. Even the latest Monitor's Report refers to its own limitations in that regard. It is not uncommon in CCAA proceedings for creditors to be told to take a seat and not to pursue their individual concerns until a certain point has been reached. In these proceedings, this point is just now being reached. It would be entirely unfair to suggest that the creditors not be given recourse to those rights at this point, even though many and varied claims have just recently been filed and will take months to sort through and adjudicate, and no plan of arrangement has been proposed.

D. Sweeping Report and Activity Approvals Will Prejudice Creditors

12. In paragraph 14 of the Monitor's Submissions, the Monitor effectively states that the approval it is seeking "does not approve any other person's activities" and does not affect the right to object to the fees of the Monitor. However, and very significantly, the Monitor is specifically omitting from that list of what the approval does *not* do the fact that such approval might be asserted by the Monitor or the Applicants (or Target U.S.) to preclude additional fact-finding on the part of a creditor or the pursuit of any such creditor's rights other than against the Monitor personally. That is the essence of these Responding Parties' objection -- that such efforts by creditors could be resisted and made much more difficult and expensive simply because of the approval sought, unless wording of the type suggested by these Responding Parties in Schedule B to the Supplemental Submissions is adopted.

13. Further, in paragraph 15 of the Monitor's Submissions, the Monitor makes it clear that, in order to deal with the aforementioned concern, a creditor would have to resort to "the overriding

discretion of the court to prevent any unfairness arising from" this approval. Therefore, the Monitor is telling the Court and the creditors that these approvals can be set up as defences and roadblocks by the Applicants, Target U.S., the Monitor and others, such that individual creditors would have to fund a motion to attempt to overcome such hurdles, would bear a high onus, and may not be successful. In a setting in which the fees of the Applicants and the Monitor are paid from the creditors' funds, but the creditors themselves have to fund their own fees individually, approvals of the nature sought by the Monitor, without appropriate limitations in the Order granting them, would only serve to make it even more difficult and expensive for creditors to assert their rights and to seek information.

14. The Monitor's response to this is to suggest that these Responding Parties are raising these issues in order somehow to improve their claims against third parties, such as Target U.S. (see paragraph 12 of the Monitor's Submissions, for example). That is not the case, and the approach of suggesting ulterior purposes, when the clear purpose is to protect their rights as creditors, should not be given credence by the Court. These Responding Parties have been forthright and consistent with respect to their intentions throughout their objection to this motion and it is therefore of concern to see the Monitor suggesting any other intentions. These Responding Parties are entitled to pursue their claims to the fullest extent in order to work to recover the losses they (and all other creditors of the Applicants) have incurred as a result of the failure of the Applicants. Not all of the claims of these Responding Parties are subject to Target U.S. indemnities and, even in respect of those that are, Target U.S. has not yet effected payment thereof, such that it should certainly be expected that these Responding Parties and all other creditors would pursue and protect their rights and claims in this CCAA proceeding to the fullest extent. It is inappropriate to suggest that creditors are not entitled to fully pursue their rights

simply because they may have certain alternative claims, especially when those alternative claims are against the parent of the Applicants. It is also inappropriate to suggest that creditors holding very significant claims are acting improperly when their objections are related to their CCAA claims.

E. The Fact That the Monitor is a Court Officer is No Answer

15. The Monitor goes to great lengths in paragraphs 6, and 23 through 25, of its submissions to suggest that, because court officers are held to a high professional standard, there is "an inherent trustworthiness" to their "activities and reporting thereon." The suggestion appears to be that this ought to provide the Court with comfort in approving Monitor's Reports and all activities described therein, even if untested, in order to give statements in those Reports special status in terms of issue estoppel, for example.

16. There are two major problems with that logic. The first is that these Responding Parties' concern is not that the Monitor is being dishonest or untrustworthy; the concern is that simply because something is referenced in a Monitor's Report does not make it a definitive finding on the subject, no matter how trustworthy and honest the Monitor is. In this particular case, as with many others, the Monitor was not running all aspects of this matter. Its role was one of oversight and supervision, and on some of the most important issues it simply was not present (or not continuously present).

17. Second, Monitor's reports are necessarily selective when it comes to their content. The Monitor, in paragraph 6 of the Monitor's Submissions, refers to the requirement to make full disclosure, whether favourable or not. One need only read the various Monitor's Reports with respect to which approval is sought to determine that there is very little content that would

constitute disclosure unfavourable to the Applicants or Target U.S. That does not mean that the Monitor is hiding anything; it is simply a reminder that monitor's reports are not transcripts of the unfolding of a CCAA proceeding. They are often merely high-level descriptions of certain chosen aspects of the proceedings and their content is usually reviewed in advance by the debtors.

F. The Statutorily Required Components of Monitor's Reports Are Not What is in Dispute

18. In paragraph 20 of the Monitor's Submissions, the Monitor delineates four things that are specifically required of a monitor pursuant to the CCAA as follows:

- 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.

19. It is notable that, in fact, none of these responsibilities is relevant to the approval of the Monitor's Reports or to the concerns expressed by these Responding Parties in this objection. The only statutorily mandated roles the Monitor could find to justify its position in its submissions are four items that have nothing to do with either (a) the objections raised by these Responding Parties or (b) the effect of approval of the Reports that the Monitor is urging upon this Court.

G. Monitor versus Receiver – An Important Distinction for this Motion

20. In paragraphs 26 through 29 of the Monitor's Submissions, the Monitor deals with its reporting function. To be clear, no one is taking issue with the question of whether or not monitors should report to the court. However, the Monitor then attempts to analogize between the role of the monitor and the role of a receiver, as well as the role of reporting versus the concept of having those reports assume the level of estoppel-creating findings of fact that can permanently affect creditors' rights.

21. The Monitor has referenced several cases involving receiverships in order to suggest parallels when it comes to reporting. Those cases must be read with great caution because of the very clear differences between the role of a receiver and the role of a monitor. Indeed, that distinction highlights the fallacy underlying the Monitor's contention that ongoing approvals of its activities are necessary and that such approvals should form the basis of what are essentially findings of fact that can be relied upon for issue estoppel purposes.

22. A receiver is appointed (usually on the application of a creditor) to run a business, to manage assets or to liquidate assets. Upon that appointment, the board of directors of the debtor ceases to have any ability to deal with those assets. The receiver typically has no prior relationship with the debtor and takes no instruction from the debtor, as opposed to a monitor which routinely is hired months before by the debtor, is paid by the debtor prior to filing, and may have helped design the strategy for the way in which the CCAA proceedings are to unfold.

23. A receiver actually controls either a business or the liquidation of assets, albeit subject to the supervision of the court. It is on the front lines and makes decisions that affect substantive rights and values. Without a doubt, a receiver therefore requires the comfort and assurance of

ongoing approvals of its activities because of those responsibilities and because of the fact that its decisions are business decisions in the true sense.

24. A monitor, on the other hand, including this Monitor in particular, has no specific operational responsibility (other than supervisory and reporting) and it is specifically understood and set out that the debtor and its board continue to have those responsibilities, albeit subject to ongoing supervision by the monitor and the court.

25. When a receiver comes to court for approval of its activities, it must file a report containing the relevant information and details of activities it wishes to have approved. Importantly, all of that information refers to situations/activities in which the receiver was an active and present participant, because it is running the operation, not just monitoring. In the case of CCAA proceedings, the direct parallel would be for the debtor to report regularly on all of the activities (by way of affidavit) and to seek ongoing approval of its various activities. However, there is no contemplation of that in the CCAA because the purpose of the CCAA is not to provide debtors (or their monitors) with such ability or to regulate their operations and activities to that extent. The Monitor is there as a monitor and ongoing approval of each step is not specifically contemplated. In any event, even if they were appropriate, for any application in that regard to be meaningful and fair it would necessarily have to involve the filing of affidavits and cross-examination thereon.

26. What is contemplated under the CCAA are ongoing summary reports by monitors (for which statutorily they have virtually no personal responsibility) as to certain aspects of what has happened and the monitor's views in that regard. But they are to be just that -- reports. In some cases, attempts have been made to provide shelter and protection to debtors through the use of

monitor's reports since the monitor is a court officer. There is no realistic prospect of cross-examination on monitor's reports and there is, as the Monitor has pointed out in its submissions, a level of credence attached to a report by a court officer. It is one thing for a monitor to be able to set out certain facts and activities in a Report in order to fulfill its reporting function, but it is a distinctly different thing for that Report to be utilized, after approval thereof, as a substitute for the type of disclosure and exposure to cross-examination that is held to be necessary in all other aspects of litigation in order for activities to receive the level of court approval necessary to give rise to an issue estoppel, or as a reason to resist further disclosure or to defend against the exercise of certain rights.

27. In this case, these Responding Parties in prior submissions have set out clear examples of how unrestricted approval of the Monitor's Reports and the Monitor's activities could, and likely would, give extra benefit to the Applicants and potentially their ultimate parent. The Monitor has now made it clear in its submissions that it believes that the content of its reports should be given effect as estoppel-creating findings and should substantively affect the rights of creditors. These Responding Parties have claims in the hundreds of millions of dollars in these proceedings, and yet the Court is asked to view these creditors as leverage-seeking militants, as opposed to that which they are, significant creditors with much at stake in the proceeding.

28. In any event, an order approving the reports and activities and *subject to* the proposed additional Schedule B language "provided however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval" provides the Monitor with complete protection, without sacrificing or impeding the rights of creditors.

H. These Responding Parties Are Not Making "Onerous and Intrusive Information Requests"

29. In paragraph 28 of its submissions, the Monitor attempts to distinguish its role from that of party litigant, based again on a receivership case. While the objection of these Responding Parties has nothing to do with the Monitor's personal liability, it is simply incorrect to suggest that the Monitor has not been an active participant in these proceedings, in fact perhaps the most active litigant. The Monitor has, from the perspective of these Responding Parties, taken the most active role in opposing the various relief sought by these Responding Parties throughout these proceedings, including in the February hearings.

30. Furthermore, there is simply no basis for the Monitor to suggest that it, as a court officer, is entitled to be "protected from onerous and overly intrusive disclosure requests" or to be further "protected" from having to account to stakeholders for the steps it takes. First and foremost, there have been no such onerous or overly intrusive requests, at least none that the Monitor has disclosed to the Court in its many Reports, and the Court can always control such matters.

31. It is very important to note that the role of a monitor evolved from that of Information Officer, such that to suggest that the Monitor should be "protected" from having to provide information is problematic at best. Moreover, paragraph 27 of the Commercial List standard form Initial Order (and paragraph 50 of the Amended and Restated Initial Order in this case) expressly requires the Monitor to provide information to creditors (subject to the usual protections involving confidentiality).

32. The fact is that details of billions of dollars of inter-company claims on behalf of related parties have just been disclosed to the creditors in the past two weeks that, if allowed, will make

an enormous difference with respect to the amount of the distribution. These Responding Parties are very large creditors in these proceedings and stand to lose a great deal to the extent that the claims of the debtor-related parties are allowed. It is still unclear, as the creditors sift through the information provided in the latest Monitor's Report, whether or not motions will be required to obtain any information that the creditors deem necessary in light of all these revelations. However, it is perfectly clear that the creditors are entitled to face these claims and to obtain such information as is necessary in order to fully understand the entire context in the process of resisting such claims. They cannot and should not be limited to the narrative that has been provided thus far by the Monitor and they should not be put to extra expense having to fight procedural motions as to whether or not they are entitled to ask questions, or whether requests for information (or the assertion of substantive rights) are now subject to issue estoppel.

33. In this regard, it is important to recognize the significant practical inequality that exists in a situation such as this from the perspective of the creditors. First, there is a dramatic information inequality. Second, there is a cost inequality. Everything that the Applicants and/or the Monitor do, whether necessary or not, and whether or not for the benefit of the creditors (or some other party in the case of the Applicants), gets paid for out of the funds otherwise payable to the creditors. The creditors, on the other hand, must not only bear their own costs of any steps they take or opposition they may raise, but they also see their distributions being reduced by the fact that the costs of the Applicants and the Monitor are coming out of their distribution.

I. The Practical Effect of What the Monitor Proposes

34. By accepting the theory urged upon this Court by the Monitor to the effect that issue estoppel will attach to all statements and activities described in approved Monitor's Reports, the

Court will in effect be telling creditors that, unless they spend the time and money to object at each and every stage (to the extent they could even do so effectively), their rights will have been circumscribed even when there is no urgency or necessity to having done so.

35. By way of example, the Court is aware that these Responding Parties raised certain concerns with the Monitor and the Applicants with regard to the way in which certain aspects of the RPPSP were pursued. As has been noted, neither (i) the fact of these concerns having been raised nor (ii) the specifics of those concerns, have found their way into the Monitor's Reports, nor has any explanation of the process the Monitor went through in order to arrive at the answers been given. Without the full context in terms of understanding very important details such as the inter-company claims, the nature of inter-company transactions and the role played by various parties, it was not clear to these Responding Parties (or to any creditors for that matter) whether it would be necessary to seek further information in order to protect or assert their rights.

36. For all these reasons, it would have made no sense whatsoever for these Responding Parties to have brought a motion at that time. If it turns out that no motion in that regard will ever be required, then it certainly would have been a waste of time and money to bring it then. The theory urged upon the Court by the Monitor is premised upon the incorrect conclusion that these Responding Parties ought to have brought a motion months ago when they first had any questions (even though it was not clear that such a motion would ever be necessary) and having failed to do so, the issue ought now be rendered moot by way of an estoppel-creating approval of the Monitor's Reports and activities. Such a result would not only be most unfair to creditors in this case, but it *would also have the undesirable effect of compelling creditors in future cases to spend time and money objecting at each and every stage of the process even before they have the information to determine if such objections will ultimately be necessary.* Such a result would be

the antithesis of the inter-stakeholder cooperation and judicial economy which ought to be the goal of CCAA proceedings.

Conclusion

37. If the Monitor's concern is about protecting the Monitor (and not advancing the interests of the applicants and related parties), the additional language of Schedule B to the Supplemental Submissions provides complete protection to the Monitor, without prejudicing any creditors. The alternative is for the Court at this stage to simply "take note" of the Monitor's reports and activities, as was done by the Quebec Superior Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 17TH DAY OF SEPTEMBER, 2015

BENNETT JONES LLP

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Proceeding commenced at Toronto

REPLY SUBMISSIONS OF RIOCAN AND KINGSETT

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