

Action No.: 1703-12327
E-File No.: EVQ19667402ALBERTA
Appeal No.: _____



IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

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 ARRANGEMENT OF 667402 ALBERTA
LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA
LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS
LTD.

PROCEEDINGS

Edmonton, Alberta
January 10, 2019

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

2 _____

3
4 January 10, 2019 Morning Session

5
6 The Honourable Mr. Justice Hillier Court of Queen's Bench of Alberta

7
8 D.R. Bieganeck, Q.C. For the Monitor

9 R. Quinlan For the Monitor

10 C.L. Nicholson For 726 Group

11 Z. Han For 726 Group

12 D. McAllister For 726 Group

13 C.P. Russell, Q.C. For Canadian Western Bank

14 B. Smith For Mr. and Ms. Hadfield

15 S. Chimuk For Great White Sand Tiger Lodging

16 S. Delblanc For Mr. McCracken

17 D. Borman Court Clerk

18 _____

19
20 **Discussion**

21
22 THE COURT: Good morning, everyone. Please be seated.

23
24 Just before you get started, Mr. Bieganeck, I want to cover off the -- an aspect of this
25 fundamentally. We have got a lot of work ahead of us, but I, as a preliminary point, want
26 to confirm that all counsel got correspondence from Ms. Hinz that obviously alerted you
27 that I would hearing this matter.

28
29 But equally, if not more importantly, that in review of the materials over the weekend, it
30 came to my attention that my response had not been forwarded. It was prepared that
31 night, but it did not get forwarded. It does not change anything as it relates to the
32 substantive positions, but I do regret that you did not get that response as it was prepared.

33
34 The message, as has been the case, since September at least is that the Court wants these
35 parties to make as effective use as you can of the time that is available. And I felt that
36 was important before I get Mr. Bieganeck on his feet, and I will allow you to focus us as
37 best we can.

38
39 Thank you.

40
41 MR. BIEGANEK: Thank you, My Lord. Perhaps I'll start with

1 introductions just so the Court knows the cast of characters.

2
3 Myself and Mr. Quinlan are here on behalf of the Monitor.

4
5 THE COURT: Thank you.

6
7 MR. BIEGANEK: Mr. McCullough is also here. I anticipate he'll
8 only stay for a portion of the day.

9
10 THE COURT: Thank you.

11
12 MR. BIEGANEK: Ms. Nicholson, Ms. Han, and Mr. McAllister
13 are here on behalf of the 726.

14
15 THE COURT: Thank you.

16
17 MR. BIEGANEK: Mr. Russell is here on behalf of Canadian
18 Western Bank. And Ms. Taha from the bank is here, as well.

19
20 THE COURT: Thank you.

21
22 MR. BIEGANEK: Mr. Smith -- right behind me -- is here for the
23 Hadfields.

24
25 THE COURT: Thank you.

26
27 MR. BIEGANEK: I understand he'll only be here to deal with the
28 vesting order issue.

29
30 Mr. Chimuk is here on behalf of Great White Sand Tiger.

31
32 And Mr. Delblanc is here on behalf of the McCrackens.

33
34 Ms. Hampton is here on behalf of Kingdom Properties, but I don't anticipate she'll be
35 making any submissions today.

36
37 THE COURT: Thank you.

38
39 MR. BIEGANEK: In terms of the batting order, I circulated a
40 note -- I only received a few comments -- but for -- we'll start, of course, with the
41 Monitor's application to deal with the slight modification to powers and the vesting order,

1 in respect of the sale of certain units.

2
3 And then address, at that time, Mr. Smith's filed applications yesterday. And then
4 proceed after that with the -- what I'm going to call the 726 and Great White Sand Tiger
5 matters. Unfortunately, I think the Great White Sand Tiger matter is somewhat tied in
6 with the others in terms of the effect of legal arguments, not necessarily the facts or the
7 specific equipment.

8
9 So what we'll -- subject to the Court's direction, what I propose to do is address -- first of
10 all, have Ms. Nicholson address her adjournment request, which is still extant. And then,
11 depending on the outcome of that application, in the normal course of events throughout,
12 the Monitor's gone first, with CWB to follow, then 726 to make their submissions. 726 or
13 Great White Sand Tiger, we can address that. And then with reply after that. Hopefully,
14 that will get us done before late in the day tomorrow, but there's a lot of material to cover.

15
16 So subject to any comments that Your Lordship has, I'd like to turn over the vesting order
17 application to Mr. Quinlan.

18
19 THE COURT:

Oh, that is consistent with the Court anticipated.

20 Thank you.

21
22 **Submissions by Mr. Quinlan (Amendment)**

23
24 MR. QUINLAN:

Good morning, My Lord.

25
26 THE COURT:

Good morning.

27
28 MR. QUINLAN:

As you would have seen from our materials
29 filed on Friday, the Monitor is seeking a small amendment to your prior order with
30 respect to the vesting order for the HML kitchen units, and that approval of a sale for
31 certain Wandering River camp assets, and then, as Mr. Bieganek indicated, a modification
32 of the Monitor's powers to sell assets for the Court approval.

33
34 I can advise that service is in order. Service was provided to those on our service list by
35 email on January 4th, which was last Friday.

36
37 If I could, Sir, I'd just -- because it's the easiest -- I just want to deal with the amendment
38 of your prior order. As you would have seen from the Twenty-First Report and the form
39 of orders we circulated, we are seeking an amendment to your prior vesting order for the
40 HML Kitchens.

1 The only amendment here, Sir, is seeking to correct a misstated serial number that was on
2 one of the assets. This was just simply a matter of the parties believing that that particular
3 unit had a certain serial number, and then when the purchaser went to demobilize and
4 transport the unit, it was discovered that there was a different serial number on it.

5
6 So we are just seeking an amendment to include the correct serial number, Sir.

7
8 **Ruling (Amendment)**

9
10 THE COURT: I take it there is no objections in relation to that.

11 I will take your order. Thank you.

12
13 MR. QUINLAN: And this is in the form of order I did circulate
14 yesterday, My Lord.

15
16 THE COURT: Yes.

17
18 Signed that order.

19
20 MR. QUINLAN: Thank you, Sir.

21
22 **Submissions by Mr. Quinlan (Sale)**

23
24 MR. QUINLAN: Now, with respect to the new sale approval we
25 are seeking -- as you would have seen, we are seeking approval for a sale of certain assets
26 that are located on the Wandering River campsite. Specifically, Sir, these are six well
27 sites, a six-unit rec, and a three-unit rec dorm, which are listed in the Twenty-First Report.
28 The details of the offer, including its purchase price, are included in the Confidential
29 Supplement to the Twenty-First Report.

30
31 As I previously advised this Court, since obtaining its expanded powers, the Monitor has
32 retained two outside consultants who specialize in the sale of assets, like those of the
33 applicant's, to assist the Monitor in the marketing and sale of these assets. This particular
34 offer, Sir, was received by the Monitor unsolicited.

35
36 The proposed purchaser here is AOS Canada who has been involved in some discussions
37 and negotiations with the Monitor on various items since its expanded powers in May.
38 The Monitor is certainly of the view that it is an active and eligible purchaser of assets in
39 the industry.

40
41 AOS is the only party to make an offer on these assets. Used Modulares, which is one of

1 the Monitor's consultants who had generated the last couple of offers by this Court, has
2 been marketing these assets on its website, Kijiji, and social media platforms.

3
4 After the AOS offer was received, the Monitor enquired with Used Modulares about it,
5 who then canvassed its customers, but advised the Monitor it does not expect any other
6 offer to arrive for these assets in the near future. And as I previously advised, the Monitor
7 is of the view that Used Modulares has a strong knowledge of the camp industry and the
8 potential purchasers involved in it.

9
10 The values of the two rec units, My Lord, are at or slightly above the for-sale value
11 appraised by Nu Terra. The values of the well sites are slightly below the for-sale values
12 appraised by Nu Terra. However, all costs of demobilization and transportation are going
13 to be borne by the purchaser in this sale.

14
15 Sir, while it's not detailed in the report, I've been informed by the Monitor, who sent me
16 some emails yesterday afternoon for my review, that the Monitor did, in fact, negotiate
17 with AOS to achieve a higher offer. There were earlier offers made by AOS at lower
18 amounts, but the Monitor was able to negotiate them up.

19
20 And without giving away confidential information, I can advise the Court and
21 stakeholders here that in respect of the well sites, the original offer price was only about
22 68 percent of its current offer price. In respect of the rec units, it was only about 82
23 percent of the current offer price.

24
25 From our review of the creditors with security agreements and PPR registrations, it
26 appears that CWB is the only secured party with an interest in the well sites. My friend,
27 Mr. Smith, might have something to say about that. And CWB does have a copy of the
28 conduct to supplement and is aware of the purchase price and supports the sale.

29
30 ECN has -- ECN and CWB both have security interest in the rec units. These units are
31 the subject of an ECN financing lease, and ECN has the Confidential Supplement, is
32 aware of the purchase price, and supports the offer.

33
34 As we've previously discussed this on numerous occasions, My Lord, this Honourable
35 Court does have the power to grant a vesting order in respect of these assets, pursuant to
36 Section 36 of the *CCAA*, which sets out certain factors of which you are aware of, and I
37 don't intend to go through again.

38
39 The factors in the well-known *Royal Bank v. Soundair* case were also routinely
40 considered in *CCAA* asset sales, and I'm sure Your Lordship is familiar with those, as
41 well.

1
2 The Monitor submits that it's just as appropriate for the purchaser's offer for these assets
3 to be approved. Our submissions in this respect are, Sir, that these proceedings have
4 become liquidating CCAA proceedings and liquidation must occur for creditors to recover
5 amounts owed to them. The Monitor has led and approved this process, which has been a
6 fair on a transparent level for all potential purchasers.

7
8 The process leading to the offer was reasonable in the circumstances, and I canvassed the
9 applicable market. The Monitor took sufficient steps to attempt to maximize the value for
10 these assets. The Monitor has filed the report with this Court stating it's the opinion that
11 this offer will be beneficial for stakeholders of the estate.

12
13 Sir, this is the highest and best offer put forward to date. The consideration received was
14 reasonable and fair, taken into account their values.

15
16 And, of course, Sir, on the creditor consultation issue which has come up before, we can
17 advise that ECN and CWB were consulted about the offer before they indicated their
18 support. CWB, in particular, pursuant to a confidentiality undertaken given, has been
19 aware of the Monitor's marketing efforts throughout and of any creditors that enquired
20 about the marketing or the status of these assets were informed.

21
22 As such, we submit that it's appropriate to grant the approval of the sale.

23
24 Now, I'm in your hands. I could turn it over to other people who wish to speak on that
25 topic before I move on to the expansion of power subject. Or I can just go through
26 everything, and we can turn it over to my friends after that.

27
28 THE COURT: I think I am going to have you complete your
29 matters.

30
31 MR. QUINLAN: Sure.

32
33 THE COURT: But let me understand. Is there anyone else
34 besides Mr. Smith that is going to speak to that sale? I can hear briefly from Mr. Russell,
35 but I know his approval.

36
37 MR. McCALLISTER: I will be speaking just with respect to the
38 six-unit -- six rec units --

39
40 THE COURT: Okay.

41

1 MR. McCALLISTER: -- only.

2
3 THE COURT: Okay.

4
5 MR. McCALLISTER: Thank you, My Lord.

6
7 **Submissions by Mr. Quinlan (Monitor Expansion of Power)**

8
9 MR. QUINLAN: So as you would have seen from our materials,
10 My Lord, the Monitor is also requesting that this Court grant the Monitor with the ability
11 and power to complete sales of assets without the approval of the Court for any
12 transaction that does not exceed half a million dollars, so long as CWB and any other
13 creditor with the valid and perfected security interest in the specific property to be
14 included in the proposed transaction agrees and consents to the sale.

15
16 The purpose and benefit of this requested power is being able to complete sales in a
17 quicker and more prompt manner, especially where the purchaser has an urgent need for
18 these assets, which has come up from time to time in these proceedings, as well as to be
19 able to complete these sales in a more cost-effective manner since the professional costs
20 associated with bringing sale applications within these parameters would be completed
21 without Court approval and save the cost for the estate.

22
23 This half a million dollar figure is, in the Monitor's view, a reasonable transaction
24 threshold, given the value of the assets, the number of assets left to be liquidated, the size
25 of the offers that it's seen to date, and the concern that all stakeholders have about costs of
26 these proceedings.

27
28 I guess for clarity, My Lord, I will add that if the purchasers specifically want a vesting
29 order, if one or more of these directly-affected creditors do not consent or agree to the
30 sale, or the proposed sale price exceeds a half million dollars, the Monitor could still
31 apply for Court approval in respect of the sale if it still sought to do so.

32
33 It's certainly the Monitor's submissions, My Lord, that this proposed power provides
34 efficiency and cost advantages, while also protecting the interest of the creditors who
35 would be directly affected by the sale of these assets since they would either consent to
36 the sale or they -- or the Monitor be required to seek Court approval over the objection of
37 the creditors.

38
39 Subject to any questions you have, My Lord, those would be my submissions. And I will
40 let my friend, Mr. Smith, speak to his application, and I will respond to it.

41

1 THE COURT: Is there anything from the rest of the counsel as
2 regards to the increased powers sought by the Monitor in respect of other sales?

3
4 All right. Then I will just confirm for you that I have examined that matter. I take it,
5 however, that it is tied in, as well, with your applications for sealing of information in
6 respect of the sale of the confidential information, as well as approval of activities. Do
7 you have an order that isolates the matter of the approval of the sale from those residual
8 items.

9
10 MR. QUINLAN: I do not, My Lord. But given that we're here for
11 two days, if Your Lordship preferred that that order be separated, I'm happy to do it
12 tonight and then give it to you tomorrow morning for execution.

13
14 THE COURT: Why don't we do that, so that it does not get
15 lost. Mr. Smith?

16
17 MR. SMITH: My Lord, I do have one comment about the
18 expanded powers of the Monitor, just to be clear.

19
20 THE COURT: Sure.

21
22 MR. SMITH: I can leave that to the rest of my presentation.

23
24 THE COURT: No. Let us hear it now. If you are saying that
25 the expanded powers of the Monitor is something you wish to push back on, go ahead.

26
27 **Submissions by Mr. Smith (Monitor Expansion of Power)**

28
29 MR. SMITH: My client's not opposed to the expanded
30 powers.

31
32 But in regard to property that's located on the property -- like, personal property that's
33 located on the property that my client has a mortgage on, we want to be included in the
34 parties that approval needs to be sought from first, mostly just for the purpose of being
35 informed about what's going on. And --

36
37 THE COURT: Isn't that really subsumed by what your
38 submissions are going to be in respect of this particular matter?

39
40 MR. SMITH: Yes. Absolutely, Sir.

41

1 THE COURT: I have your point, but I think that, quite frankly,
2 Mr. Smith, it is something that I will hear you on as it relates to the interests of the
3 Hadfields. Okay?

4
5 MR. SMITH: Very good, Sir.

6
7 THE COURT: Thank you.

8
9 **Ruling (Monitor Expansion of Power)**

10
11 THE COURT: I will confirm, then, from this Court's
12 perspective that the objectives as identified by the Monitor as it concerns the costs of
13 seeking Court approval and the process by which this liquidation proceedings has taken to
14 date that the matter should be approved to a ceiling of \$500,000 with the terms that have
15 otherwise been proposed.

16
17 I further confirm -- and, Mr. Quinlan, you can prepare an order -- that would isolate these
18 matters that I am addressing as you had contemplated: The activities of the Monitor for
19 this reporting period, as well as the sealing of the confidential portions of the proposed
20 sale pending further Court disposition, much along the same lines as have been in
21 previous orders.

22
23 Is there anything else that requires clarification there?

24
25 If not, then I think I will turn to Mr. Smith.

26
27 Go ahead, Sir.

28
29 **Submissions by Mr. Smith (Information Request)**

30
31 MR. SMITH: Thank you, Sir.

32
33 Sir, I'll start by explaining on my client's interest in this -- these particular assets that are
34 located on this property.

35
36 In 2000 --

37
38 THE COURT: If I can just short circuit that, I read your
39 materials -- notwithstanding that they are obviously just yesterday and came to my
40 attention first thing this morning -- but I know the vendor take-back position of your
41 client and the original purchase by your client back in '96. Briefly familiar with the way

1 in which this thing has developed. What you are looking for is specific remedies.

2
3 So I will invite you to go through that.

4
5 MR. SMITH: Yes, Sir. And we're not seeking any declaration
6 of priority or any distribution --

7
8 THE COURT: Right.

9
10 MR. SMITH: -- at this point.

11
12 What we're simply seeking is information and preservation of any proceeds of sales.
13 We'd like to have an accounting of the sales that have already occurred in regard to
14 personal property that might have been located on this land and -- because we do feel that
15 we do have an interest in this personal property by virtue of the mortgage.

16
17 Clause 7.5 states that: (as read)

18
19 The mortgagee shall have full power, right, and licence to enter, seize,
20 and to strain upon the mortgage premises.

21
22 And in our view, that gives us a right to seize the personal property on that if the
23 mortgage is in default where there's --

24
25 THE COURT: But it has been in default for how long?

26
27 MR. SMITH: Since June of 2017.

28
29 THE COURT: Okay. And any steps taken in respect of the
30 powers under 7.5?

31
32 MR. SMITH: Not that I'm aware of, Sir.

33
34 THE COURT: All right. And that is the difficulty that you face
35 is that you are in context of a liquidation out of the CCAA proceedings on property. If you
36 have got steps that you want to freeze the Monitor's powers in respect of, you have got to
37 take some steps that would purport to protect the interests that Clause 7.5 might present.

38
39 MR. SMITH: And I understand that, Sir. Of course, we don't
40 necessarily want to take further proceedings, when this matter is already before the Court,
41 simply just to establish our rights.

1
2 And, again, we're not asking for a declaration of whether we actually have those rights or
3 not.

4
5 THE COURT: No. I understand that.

6
7 MR. SMITH: We just simply want information and just some
8 assurances that these assets will be preserved.

9
10 THE COURT: What steps have been taken outside of the court
11 proceedings, though, that you, as a secured creditor, have access to the Monitor full
12 reporting. He is an officer in respect of the responsibilities under the *CCAA* to know of
13 this. I mean, are we talking blindly, or do you know that there are assets that are still
14 available and other assets that have been sold?

15
16 MR. SMITH: Yes, Sir. In my client's affidavit, there is a list
17 of assets that he has --

18
19 THE COURT: Right.

20
21 MR. SMITH: -- observed that are still on the site.

22
23 Now, if you're saying that we need to preserve our rights is to take action on those, we
24 have a couple of problems when we realize that there's a stay of proceedings. But I'm
25 just -- we're not asking for a declaration at this point. We just want information and
26 preservation. And those kinds of things can be left for another day. If you're --

27
28 THE COURT: What -- maybe I was not very clear -- what
29 information do you say that you do not have that you have been asking from the Monitor?

30
31 MR. QUINLAN: He hasn't asked for anything.

32
33 MR. SMITH: My friend has indicated that we haven't asked
34 for anything up until this point, and that's true. We'd like that information now.

35
36 THE COURT: And what is the inventory of information that
37 you want from them now?

38
39 MR. SMITH: The count --

40
41 THE COURT: Do you want conformation of what your clients

1 deposed to having seen on the property that it is there? Is that what you are asking for?

2
3 MR. SMITH: No. Just an accounting on any assets that have
4 been sold that were located on the land. So in other words, what they were and what they
5 sold for.

6
7 THE COURT: Anything else?

8
9 MR. SMITH: And just a notice, if you'd like, about any
10 attempts to sell assets in the future.

11
12 And just for the record, we're not opposed to the sale of the WRC Assets as they've been
13 described today. You know, we're quite well aware of the market, and, you know, if
14 there's any sale to be had, it's probably something that should be moved on. We realize
15 that, and we certainly don't want to interfere with that.

16
17 THE COURT: Okay. All right.

18
19 So there is essentially two components. You want an accounting in respect of any assets,
20 if indeed there are any, that have been sold from that property.

21
22 And, secondly, that you want notices of any future sales in respect of that?

23
24 MR. SMITH: Yes, Sir.

25
26 THE COURT: All right.

27
28 MR. SMITH: Yes.

29
30 THE COURT: I will hear from them.

31
32 MR. SMITH: And my friend has indicated that the sale
33 property -- or the proceeds of the sale has been put into trust and is not being disbursed at
34 this time. And from that, I am satisfied that it is being preserved.

35
36 THE COURT: Right. Okay. Okay. I hear you. All right.

37
38 Mr. Quinlan or Mr. Bieganek?

39
40 **Submissions by Mr. Quinlan (Information Request)**

41

1 MR. QUINLAN: Yes, My Lord.

2
3 I think a couple of points here. I hear my friend say we just want notice of -- if a sale's
4 going to be occurring. But that's one thing -- or of sales going to occur. That's one thing.

5
6 But my friend's application actually says: (as read)

7
8 Directing the Monitor to obtain consent of Jeff and Jackie (phonetic)
9 Hadfield to sell, convey, transfer lease, or assign any property on that
10 land.

11
12 And that's a bigger problem because the Monitor, while agreeing that Mr. Smith's clients
13 have a secured interest in the land, the Monitor does not agree that that secured interest
14 applies to these camp assets.

15
16 THE COURT: Okay. Let me, again, try and short circuit. I did
17 not hear him say what was in his application --

18
19 MR. QUINLAN: Okay.

20
21 THE COURT: -- and I did not put that question to him, but it
22 seemed to me that he was backing away from, you know, any sense that there was a need
23 for approval on the sale itself, which his clients do support and see as being in the best
24 interest of current disposition.

25
26 He is looking for funds to be earmarked, as it were, and he said nothing about consent.
27 Clearly, the Monitor has the power to liquidate, and that is the most -- it is not as though
28 this is otherwise property that is owned in the sense of wanting to use by the Hadfields.
29 They assert a power under the vendor take-back mortgage clause by 7.5 or whatever it is.
30 And that is for another day.

31
32 But is the two -- are the two components of what I have heard from him today of an
33 accounting for any assets that may have been sold and notice of future sales, not with the
34 ability to prevent those from occurring, but so that they are kept apprised of the inventory
35 that is on that land.

36
37 Are those matters that are problematic?

38
39 **Submissions by Mr. Bieganek (Information Request)**

40
41 MR. BIEGANEK: Well, Mr. Hadfield is the person who's actually

1 at the site looking after it for the Monitor --

2

3 THE COURT: Right.

4

5 MR. BIEGANEK: -- so he knows what's there.

6

7 He knows what's there. That's how we got his information, so -- but if he wants a --
8 sorry to interfere --

9

10 THE COURT: Well -- sorry -- it is not, it is not to confirm. He
11 did not say that he wanted to confirm --

12

13 MR. BIEGANEK: No, no. I understand that.

14

15 THE COURT: -- what is in the affidavit.

16

17 MR. BIEGANEK: M-hm.

18

19 THE COURT: But in terms of a sale of any of those assets --

20

21 MR. BIEGANEK: What I -- I haven't had a chance to obtain
22 instructions from the Monitor, nor has Mr. Quinlan -- what I would suggest is if there are
23 sales to be affected from that land, we will provide information to Mr. Smith on the basis
24 of the same confidentiality undertaking we've provided to everybody else.

25

26 THE COURT: Right.

27

28 MR. BIEGANEK: But we don't accept for a moment that he has a
29 right to that equipment. So --

30

31 THE COURT: No. But that is for another day, and so it is --

32

33 MR. BIEGANEK: -- but, but --

34

35 THE COURT: Yes.

36

37 MR. BIEGANEK: -- but my point is, if he's got a problem with the
38 sale, then he should be the one forced to bring the court application. The Monitor
39 shouldn't be forced to bring the court application.

40

41 THE COURT: Quite understand.

1
2 MR. BIEGANEK: Right. So that if what we're trying to do is
3 manage expenses, then we should put the onus on him to deal with that and pay the price.
4
5 THE COURT: And to address -- well --
6
7 MR. BIEGANEK: Right.
8
9 THE COURT: -- ostensibly, as least, to be at risk of having to
10 pay the price of that court application.
11
12 MR. BIEGANEK: Correct. Well, for his own -- to his own -- for
13 his own account, in any event.
14
15 THE COURT: Right.
16
17 MR. BIEGANEK: Right.
18
19 But the Monitor is keeping track of sales because we have a number of parties with
20 interests in it. So I don't know that we need to do anything further than what the Monitor
21 is already doing.
22
23 And as this vesting order does, it preserves the interests of anybody who has a claim in the
24 cash.
25
26 THE COURT: Okay. So his affidavit does list four or five
27 items that were, to his knowledge -- and that included certainly the dorms -- but have
28 there been sales that --
29
30 MR. BIEGANEK: I don't know the answer to that. I don't know
31 the answer -- Mr. Quinlan --
32
33 MR. QUINLAN: I don't know the specific answer to that,
34 My Lord.
35
36 But if I may, you'll recall when we were before Your Lordship in December -- you had
37 ordered the Monitor to file a subsequent report on the 28th of this month.
38
39 And as you would have seen from a few -- you might recall -- from a form of order that
40 we circulated to you that was agreed to by all the counsel, one of the things was an update
41 on the sales that are achieved to date and the sales that are -- or the assets that's left to be

1 liquidated. So to the extent that my friend wants information in that respect, I suspect if
2 it's not already in an existing report, it will be in that report.

3
4 And might I just say that if my friend has any further or followup questions of the Monitor
5 with respect to something like that, he can simply ask the Monitor, and we will get back
6 to him.

7
8 THE COURT: Okay. But to be clear, the accounting is
9 available on the Monitor's records for all sales that will be or have been to date affected
10 from assets on that property?

11
12 MR. QUINLAN: That's correct, My Lord.

13
14 I mean, the Monitor knows what has been sold and the purchase price for it. When we
15 use the term "accounting," if that is meaning, well, how did those funds get split up or go
16 or what went to costs, that hasn't been achieved yet because that won't happen until the
17 final costs allocation in these proceedings.

18
19 THE COURT: Quite so. All right.

20
21 Mr. Smith, I believe from review of the Monitor's activities to date that your client's
22 interest and ability to track the funds in respect of those properties are within the records
23 and will remain within the records of the Monitor on a go-forward basis.

24
25 I am not sure that you have put your mind to the effect of the December order that would
26 have an update on sales by the end of January -- January 28th, I think?

27
28 MR. QUINLAN: That's correct, My Lord.

29
30 THE COURT: -- of this year.

31
32 But off of what you have heard from Mr. Quinlan, you would have full opportunity to,
33 then, follow-up on questions from that reporting at the end of this month. I am not sure
34 that there is more that is required, recognizing that you are not, at this point, asking this
35 Court to rule on 7.5.

36
37 **Submissions by Mr. Smith (Information Request)**

38
39 MR. SMITH: Yes, Sir. If the -- if what I'm being told is that
40 the information is fully available to me upon request or upon my own investigation, that's
41 all that I really want.

1
2 THE COURT: Okay.

3
4 MR. SMITH: However, in future sales, we do want to be able
5 to review them before they actually occur to, to give an objection or perhaps take other
6 action. Now --

7
8 THE COURT: I am not sure how that would distinguish itself
9 from any of the other liquidations that are ongoing though.

10
11 There are secured interests on a number of properties of CNC that will have to be
12 reconciled as to ownership or priorities. Some of these, certainly amongst the most
13 problematic, dealing with 726, will get dealt with today. Other, such as yours, may or
14 may not be problematic later on. You may be able to reach an understanding that is
15 workable.

16
17 I am not going to predict what would happen. That is for another day. But the idea of
18 specific sales of chattels on one property, which is your client, the Hadfields, having to
19 have a specific accounting or review process, much less an approval, is not within the
20 purview of the way in which this Court is trying to get this all dealt with expeditiously.

21
22 MR. SMITH: Well, I have a couple of comments, Sir.

23
24 Me and my client weren't aware that these assets to going to be specifically be sold until
25 we got the application materials served on us last Friday. So --

26
27 THE COURT: But why would -- all right -- in concept, it might
28 have been that the offer did not come in until February of 2019. But your client has
29 known for some number of months -- you have been on the service list -- that we are in
30 liquidation. We are no longer in a mode of preparing any kind of proposal.

31
32 And so I am not sure how I would isolate out the Hadfields from any other asset that the
33 Monitor is responsible for selling in the best interests of all secured creditors.

34
35 MR. SMITH: Yes. To that, Sir, I would suggest that the
36 proposed order and regarding the Monitor's power of sale does apply to my client because
37 they do have an interest in this property, and they would be affected by it.

38
39 THE COURT: Well, then -- but you see, that is forcing the
40 Court to address 7.5 of your take-back mortgage because that is, that is the whole premise
41 on which you make that statement, is they have that interest.

1
2 MR. SMITH: Right. And have the interest of the other parties
3 been established to that degree? I mean --

4
5 MR. BIEGANEK: Yes.

6
7 THE COURT: Well --

8
9 MR. SMITH: -- our proof of claim has been submitted, and
10 there has been no objection to it.

11
12 MR. BIEGANEK: Their proof of claim was submitted late, just so
13 you know, and the Court gave leave to do that.

14
15 THE COURT: Yes.

16
17 MR. BIEGANEK: The proof of claim only addressed the mortgage
18 and the Monitor accepts that they have a valid vendor take-back mortgage. But that
19 doesn't extend to interest in chattels which are not fixtures on the land. That's basic.

20
21 THE COURT: I know. And --

22
23 MR. BIEGANEK: So --

24
25 THE COURT: -- I hear from both sides --

26
27 MR. SMITH: Yes.

28
29 THE COURT: -- that you want me to get to 7.5, and I am not
30 prepared to go there, and I am not --

31
32 MR. SMITH: No. And we don't, we don't want to do that
33 today either. But --

34
35 **Ruling (Information Request)**

36
37 THE COURT: I understand. But just as he is saying this is the
38 basis on which we do it is our entitlement under 7.5, you are saying, well, no, he does not
39 have that because we do not accept that there is anything but the mortgage that is a
40 recognized secured interest in the land.

41

1 I have heard you, Mr. Smith. I tell you that you can -- it does not require any specific
2 order of the Court. It is recognized that you have crystallized that you treat as a live issue
3 the entitlement of your client under 7.5 of that specific mortgage to include more than just
4 the land.

5
6 And I am telling you that the only remedy that I am prepared to accord to that is
7 consistent with the accounting responsibilities that any sale of assets on that property, you
8 will at least have the right -- if you cannot otherwise resolve it in these proceedings -- to
9 have that matter determined in the fullness of time.

10
11 But the assets will not be individualized for review, accounting, or approval by your
12 client. It will only be that the funds representative of the receiver's best efforts -- the
13 Monitor's best efforts for sale will either be subsumed -- as I anticipate the \$500,000
14 would probably deal with those remaining items -- or be brought to court for Court
15 approval if, indeed, it is all of those other chattels that are on there. You will have your
16 day at some point down the road.

17
18 MR. SMITH: Very good, Sir. I'm satisfied with that. I'll
19 make the request for information directly to the Monitor.

20
21 THE COURT: Thank you very much.

22
23 Do I understand it then, Mr. Bieganek, that we're at the point where we deal with the
24 application for adjournment.

25
26 MR. BIEGANEK: I was just going to advise My Lord that I think
27 Mr. McAllister also wanted to speak to the sale.

28
29 THE COURT: Oh, I apologize. You indeed did, and you
30 alerted me. I am sorry.

31
32 **Submissions by Mr. McAllister (Sale)**

33
34 MR. McALLISTER: No. It's -- that's fine, My Lord.

35
36 Sorry. I just -- I wanted to speak to the sale with respect to some of the Wandering River
37 assets simply because, like, as we'll get to in the next couple of days, there's the what
38 we've been calling the equipment swap.

39
40 Now, there's a -- my friend had mentioned the six-unit rec dorm. I believe that within the
41 materials, those are known as the "FX dorms," and indeed those were the actual -- those

1 were the subject. They're on the purchase order with 726, and they're the subject of much
2 more argument, you know, to go on.

3
4 But actually, if I could just get clarification from the Monitor on one particular issue
5 because I was just looking at the Monitor's Twenty-First Report here, and I just wanted to
6 confirm whether the FX dorms were encumbered by the ECN finance lease.

7
8 MR. QUINLAN: Yes, that's correct.

9
10 MR. McCALLISTER: Okay. Thank you.

11
12 So 726 -- the position with respect to the swap, it's very clear. And also particularly in
13 respect of the FX dorms, it's that -- well, the FX dorms do appear on a purchase order
14 between 726 and Canada North Camps, and that the -- there were monies that flowed
15 consistent with that purchase order subsequent to that. That wasn't what was delivered.

16
17 726 has taken the position -- just to cut to the chase -- since then, that no bills aren't ours.
18 So ones that are -- or do belong to 726 are the ones which are -- or were at Kilometre 147,
19 which were subsequently moved to the 726 compound yard.

20
21 726 doesn't want to stand in the way of the sale, given the fact that they've taken the
22 position the FX dorms didn't belong to it, and the ones that they did, in fact, purchase are
23 the ones that they have in their possession currently.

24
25 However, the Monitor has not necessarily accepted the position that the dorms that were,
26 in fact, in the possession of 726 were the ones that were affected by that sale.

27
28 So we don't want to stand in the way of this, but there are implications with respect to that
29 particular issue and whether -- or, like -- and what -- or for that sale.

30
31 That's what I wanted to say, My Lord.

32
33 THE COURT: Well, I am not sure you can do much more than
34 just put a caveat or caution on your not having objected to the sale, as proposed, is
35 without prejudice to your rights in respect of the swap.

36
37 MR. McCALLISTER: Right. Well, I mean, in a sense, it almost is with
38 prejudice because we are saying those aren't ours.

39
40 THE COURT: That is not a very compelling prejudice, so --
41 but I hear your point.

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41

MR. McCALLISTER: Yes.

THE COURT: It is what it is. It certainly cannot be seen to prejudice your position that you are not objecting.

MR. McCALLISTER: So, I mean, I don't know if that -- like, the implications with respect to that swap do have implications with respect to the Monitor's application. So I mean -- yes -- who owns that -- those assets is at issue.

So, again, I'm not going to stand in the way of this application, but our caveat, as you said, is noted for the record, Sir.

MS. NICHOLSON: My Lord?

THE COURT: Ms. Nicholson.

MS. NICHOLSON: Thank you.

Submissions by Ms. Nicholson (Sale)

MS. NICHOLSON: I just wonder if I might supplement anything that my friend -- co-counsel has said about this particular matter, just so that it's really clear. Because right now, the Monitor's asking this Court to approve a sale of those swapped assets, which presupposes that is has, indeed, the right and the ownership in which to do -- a way in which to do that.

So I don't know if setting this particular matter over until after you've had the benefit of hearing the full argumentation relating to the swap, which Mr. McAllister is going to address on behalf of 726, would ensure that a decision that you come to now -- stating that the Monitor has the ability to sell, in effect, those swapped assets -- is not potentially contradicted by the determinations that you may make on the swap application itself in terms of who actually owns that equipment.

So it -- that's the concern is that if that -- if you hear that, and decide that, and stamp approval on the Monitor's ability to sell the swapped assets to now, then upon hearing the application, you may be hamstrung, and you may, conceivably, find yourself wanting to have made a different determination with respect to those swapped assets, the ownership of those, and the ability of the Monitor to sell them.

THE COURT: You are saying that in the event that -- contrary

1 to the position that you are advancing that the Court would find that these assets that I am
2 approving for -- or would approve for sale are indeed 726 assets and that the Monitor had
3 no power to sell them? Is that what you are saying, in effect?

4
5 MS. NICHOLSON: Conceivably. Now, it's important -- its
6 importance -- that's exactly the point.

7
8 And it's not -- it's only to say that -- I would respectfully submit -- that it would be more
9 prudent and better to just put that matter over until you get the benefit of the full hearing
10 on the swap, which is going to be heard.

11
12 THE COURT: Okay. I am not interested with that argument as
13 holding up a sale, so to, to liquidate. The jeopardy to the offer -- often the due diligence,
14 the amount of work that has gone into this, the time that is consumed in bringing it
15 forward, the interest the Hadfields having been presented to this Court -- I have on record
16 that your client is asserting that by its not objecting to this, it urges the Court to at least
17 see some momentum to its position that there is a valid swap or that there ought to be on
18 endorsement of that.

19
20 It does not, quite frankly as I say, impress the Court. There is either an assertion of the
21 property in relation to the assets that your client is saying, or there is not. And I am not
22 prepared to jeopardize that sale.

23
24 It almost seems to me that your position contradicts what Mr. McAllister is urging, which
25 is that, okay, by our not objecting to it, that kind of builds some momentum for our
26 position. You are saying, well, no. Let us hold it off, and let the Court hear the whole
27 picture, and make a decision informed as to whether the swap is a valid characterization
28 of what has taken place here.

29
30 MS. NICHOLSON: Well, only so that the Court has the benefit of
31 that. And that's only so that the application that it brought on a short notice is heard
32 tomorrow, rather than today. That's all. It's adjourned to be heard tomorrow after you've
33 heard the submissions on the swap. That's all. That's all that I'm -- that's all that's being
34 requested.

35
36 And those are all of my submissions.

37
38 THE COURT: Okay. Thank you.

39
40 **Submissions by Mr. Bieganeck (Sale)**

41

1 MR. BIEGANEK: Sir, often in insolvency proceedings, there are --
2 I mean, in a perfect world, there's one claimant for one asset.

3
4 THE COURT: Yes, right.

5
6 MR. BIEGANEK: The reason we all have jobs is because the
7 world's not perfect. And in this case, as in many others, there are multiple parties who lay
8 claim to certain assets.

9
10 The template vesting order, which is all we're relying on here, is -- allows for the sale of
11 whatever right, title, or interest the applicants have in those assets, but vests them in the
12 purchaser free and clear of everybody's claim --

13
14 THE COURT: Right.

15
16 MR. BIEGANEK: -- and transfers the claim to the money instead
17 of the assets. So we're fighting over 500 grand instead of fighting over --

18
19 THE COURT: Property.

20
21 MR. BIEGANEK: -- units that are sitting out there in 30 below,
22 and we may have to be faced with the cost of removing or keeping further secured over
23 the winter.

24
25 The vesting order clearly, in my submission and for the record, preserves whatever
26 position they have and doesn't bind Your Lordship in making any particular finding about
27 the swap or the assets. If you've determined that, yes, these are 726's assets, it still raises
28 priority issues because ECN has security against them, as does CWB, as does --

29
30 THE COURT: Yes.

31
32 MR. BIEGANEK: -- 726. So that issue on who's entitled to the
33 cash will be sorted out at another day.

34
35 But -- and, again, that brings us into the *PPSA* regime -- but there's nothing in this vesting
36 order which is going to bind your hand in making a determination about the effect of that
37 swap or the validity of it and whether or not that affects 726's interest. You'd still be
38 completely live, in my respectful submission.

39
40 So this need to preserve --
41

1 **Ruling (Sale)**

2

3 THE COURT:

4 Well, I do not feel the least bit constrained by
5 this. I have heard Ms. Nicholson. I have heard Mr. McAllister. I think I tracked a little
6 bit better than that, but I hear Ms. Nicholson. She is saying, well, to adjourn to this to
7 tomorrow when I have a fuller appreciation of the swap issue.

8

9 I do not feel constrained. I have the benefit of the briefs on this. So I know that it is a
10 very live issue as to the swap, but I do not find that there is anything that ought to impede
11 the appropriateness, the test under *Soundair*, and the legislation for this property in that I
12 am not, in any way, hampering the ability -- well, indeed the responsibility -- of this Court
13 to deal with the swap issue today or tomorrow as that evolves. Thank you very much.

14

15 I will, then, confirm, Mr. Quinlan, that I have, as I have alluded to, in making those
16 comments, examined the criteria in respect of this proposed sale. I find it just and
17 appropriate, within the criteria of the legislation and the *Soundair* factors, for the sale to
18 be affected.

19

20 It does not require additional language that it is without prejudice to the rights of the
21 parties, that is a matter of law in respect of priorities, and all of the live issues that remain
22 in the aftermath of the disposition.

23

24 MR. QUINLAN:

Thank you, My Lord.

25

26 And I confirm that after we adjourn proceedings today, I will go back, and we will split
27 out the -- into two orders, one dealing with the (INDISCERNIBLE) of the Monitor's
28 power, the other dealing with the approval of the sale.

29

30 And as we have typically done, I will include approval of the Monitor's activities and
31 sealing in that. I don't know if you need to hear any submissions on that, but we -- the
32 sealing aspect is well-tread material.

33

34 And the form of approval of the actions, of course, says that the usual caveats that the
35 approval -- and I'll just read it for the benefit of everyone in the courtroom -- that the:
36 (as read)

37

38 Twenty-First Report and Confidential Supplement and activities of the
39 Monitor, outlined therein, are approved, provided; however, that only
40 the Monitor, in its personal capacity and only with respect to its own
41 personal liability, shall be entitled to rely on or utilize any such
approval.

1
2 Thank you, My Lord.
3
4

5 THE COURT: Quite so. All right.
6

7 And, once again, I apologize, Mr. McAllister, for not having kept a clipped attention to
8 your having me alerted to your points. Thank you very much.
9

10 So are you ready to go?
11

12 **Submissions by Ms. Nicholson (Adjournment)**
13

14 MS. NICHOLSON: Good morning, My Lord.
15

16 I think Mr. Bieganek has indicated I act, along with Ms. Zao Han at my office and
17 Mr. McAllister of his own firm up here in Edmonton, on behalf of three applicants,
18 726 Mode Accommodations Ltd., 726 Modular Finance Ltd., and Remote Asset
19 Management LLC. We refer to these in the material -- these entities throughout as --
20 collectively as "726 Group" or "726."
21

22 THE COURT: Thank you.
23

24 MS. NICHOLSON: Now, this is an application, My Lord, for an
25 adjournment of the hearing of a number of matters and including the application lately
26 brought by Canadian Western Bank, which I will come to and which I've addressed in
27 detail in our brief of argument.
28

29 As we stated in our brief, My Lord, there's a lot at stake with respect to these Bonnyville
30 issues. Our client, 726, purchased them for \$21 million, and we say that we continue to
31 own. And we say that there is no lease in respect of them, which I think is agreed upon by
32 everyone.
33

34 So this is different case than all of the other three leases, which are also the subject of
35 these proceedings. That's an important point, and I don't think there's any dispute among
36 the parties about that.
37

38 So, My Lord, just by way of background, the starting point -- at least from me -- was my
39 first attendance by conference call before Your Lordship on an application here on
40 November the 21st, 2018, when directions were given by Your Lordship as to the
41 bringing forward of various matters.

1
2 I -- as I said, was brand new to the file. I had been retained by 726 and certain other
3 interests, which were engaged in connection with the three leases I mentioned which,
4 prior to my involvement, had not been registered on behalf of 726 at the PPR.

5
6 It was this non-registration of the lease -- the leases, the three leases -- and the potential
7 consequences associated with that, which was the basis of my retainer as co-counsel with
8 Mr. McAllister. Importantly, the three leases were granted by 726 to certain limited
9 partnerships, which did not include the Bonnyville Limited Partnership.

10
11 My retainer had nothing to do with the Bonnyville matters. It had only to do with the
12 leases and the consequences in effect of non-registration of those.

13
14 Mr. McAllister continued to have carriage of the Bonnyville matters. And to our
15 knowledge, there was no -- or to my knowledge and to our knowledge, there was no
16 reason to engage me or that I be engaged in respect of the Bonnyville issues.

17
18 Now, when we attended on the --

19
20 THE COURT: Can I just --

21
22 MS. NICHOLSON: Yes My Lord?

23
24 THE COURT: -- stop you there because my notes reflected --
25 recognizing you were on the phone -- but the distinction that was being made was that
26 Mr. McAllister was and would continue to be involved in respect of ownership issues and
27 that you were involved in priority matters.

28
29 That was the distinction that I took away from your involvement. I did not know exactly
30 how that was going to work -- welcome to the file -- but that is the distinction that I
31 understood was being made, not Bonnyville versus the three leases.

32
33 MS. NICHOLSON: Sure. And I don't think that that's necessarily
34 wrong. I had trouble hearing on that telephone call, you may remember.

35
36 THE COURT: Yes.

37
38 MS. NICHOLSON: And I was about to get to some of the things that
39 I didn't hear and that I heard were said.

40
41 But the bottom line is Bonnyville is, in effect, an ownership issue. And so that's how we

1 envisioned it. That was the point.

2
3 THE COURT:

Right.

4
5 MS. NICHOLSON:

And so Mr. McAllister was continuing to deal
6 with the ownership issue. That's really the point, and that's not inconsistent with what
7 was said to you.

8
9 THE COURT:

Okay.

10
11 MS. NICHOLSON:

So anyway, back to that conference call -- or the
12 appearance where I was on the conference call.

13
14 So I recall that application enquiring of Mr. Bieganek as to whether the Monitor had filed
15 an application respecting the various matters that were to be addressed by the Court at the
16 hearing.

17
18 And as I said, I could not hear well on that call, so I don't know what Mr. Bieganek's
19 response was. But Mr. McAllister advised me that he understood Mr. Bieganek to say
20 that there had been an omnibus application filed by the Monitor, putting all the matters
21 that were the subject of a hearing before the Court. So that is, at least, Mr. McAllister's
22 understanding.

23
24 Now, on behalf of 726, I sought at that application and was granted leave to file an
25 application by Your Lordship on behalf of 726, together with further affidavit evidence.
26 The desire of the Court at that time -- and it continues to be -- to advance these matters, as
27 you have rightly pointed out, as quickly and efficiently, and to use the Court's time as
28 efficiently as possible to minimize cost to the estate, as always is the objective in these
29 receivership proceedings with which I have much familiarity -- not these particular ones
30 but, in general, in the practice of insolvency.

31
32 Now, there's a huge amount of water at that time under the bridge when I stepped in as
33 co-counsel. And so we work under tremendous time pressures with Mr. McAllister and
34 our office to file that application and the affidavit within less than the seven days that we
35 were given to do that.

36
37 So prior to filing that application, which we did on November the 28th, we had -- and
38 enquiries had been made by Mr. McAllister of Ms. -- of the Monitor's counsel as to the
39 position the Monitor was taking with respect to the Bonnyville assets. And as I said,
40 those Bonnyville assets did not involve a lease.

1 Now, from the briefs, My Lord, you may recall that for those Bonnyville assets, the
2 evidence is that 726 purchased the Bonnyville assets or at least certain of them -- we say
3 the fulsome total of the assets, and there's some dispute about what exactly was
4 purchased -- but we purchased them for 21 million.

5
6 And then pursuant to the Bonnyville Limited Partnership Agreement, 726 provided them
7 to the Bonnyville Limited Partnership where they were to continue to have been owned
8 by 726 until such time as certain distributions totaling 28 million were paid to each of the
9 partners under that Limited Partnership Agreement.

10
11 And if -- My Lord, if I could turn you to that now, that Limited Partnership Agreement is
12 at Exhibit D-16 to the cross-examination of Mr. McCracken.

13
14 THE COURT: Give me a minute because it is in a box.
15 Madam Clerk, if you can help me ...

16
17 It is in what tab of Mr. McCracken's transcript?

18
19 MR. BIEGANNEK: It would be tab 20. It's tab 20 of the exhibit
20 binder.

21
22 THE COURT: Thank you very much.

23
24 MS. NICHOLSON: Thank you.

25
26 At page 9 of that document, My Lord, Article 14 sets out the commitments by the
27 partners, and you can see that, I guess, page 1 is an appropriate starting place, where this
28 is called an "Amended and Restated Bonnyville Lodge Limited Partnership Agreement,"
29 dated December 10th, 2014, and it says: (as read)

30
31 As amended and as stated on --

32
33 And then the blank day: (as read)

34
35 -- of 2015, the parties being Bonnyville Lodge GP Ltd. --

36
37 So that's Bonnyville General Partnership, but if I call it the GP or Bonnyville GP --

38
39 THE COURT: Sorry. Are you reading from the front of this, or
40 you on Article 14?

1 MS. NICHOLSON: I was on page 1. I'm sorry. I just went back
2 to --

3

4 THE COURT: Okay. I was at page 14.

5

6 MS. NICHOLSON: Yes.

7

8 THE COURT: So take me back. I am at --

9

10 MS. NICHOLSON: So let's go to page 1.

11

12 THE COURT: Yes. Okay. It is blank. I understand.

13

14 MS. NICHOLSON: It's blank. And the parties are the general
15 partner --

16

17 THE COURT: Yes.

18

19 MS. NICHOLSON: -- Bonnyville General Partner, Canada North
20 Group LP Holdings Ltd. -- if I call that "CNG" throughout these proceedings, that's to
21 whom I'll be referring -- and 726 Mode Accommodations as "726." Those are the
22 partners of this general partnership.

23

24 THE COURT: M-hm.

25

26 MS. NICHOLSON: And now, taking Your Lordship to page 9 at
27 paragraph -- Article 14. This article explains the commitments of the two partners --
28 commitments of CNG -- and then 14.2, it gives the commitments of 726.

29

30 And you'll see that for CNG, it says under 14.1: (as read)

31

32 CNG shall provide the following to the partnership.

33

34 And it is to provide certain things, but (b) says: (as read)

35

36 The land owned by CNG or an affiliate for a term, beginning the
37 effective date, until such time as an aggregate profit distribution equal to
38 28 million has been paid.

39

40 So CNG is, in effect, providing to the partnership its land. And 14.2 explains that 726 --
41 its contribution as a partner to this partnership is to provide the equipment that's set out in

1 paragraph 14.2(b). And that is, in effect, the Bonnyville equipment. Okay.

2
3 And it's to do that for the period: (as read)

4
5 Until the partnership have made distributions of 20 million to 726 --

6
7 Which was, incidentally, the amount that 726 paid to buy the stuff originally minus the
8 GST. So 21 million was the total amount paid; 1 million of that was GST; \$20 million
9 was the actual purchase price.

10
11 And they were also to pay \$8 million to receive distributions from the partnership of that
12 for their 8. So the total -- the concept is CNG provides its land for use by the partnership
13 until such time as \$28 million in distributions have been received, according to this
14 formula -- 20 and 8 -- at which time CNG is to deliver -- transfer the title of the land to
15 the partnership.

16
17 Similarly, 726 is to do essentially the same thing. It is to pay -- it is to deliver the
18 equipment, and then those distributions are made -- \$20 million pursuant to this -- its
19 obligation, then, is to transfer -- convey the equipment to the partnership. Until those
20 things are met, the -- CNG continues to own its land, and 726 continues to own the
21 Bonnyville assets.

22
23 Now, this arrangement is different than the other arrangements because the other
24 arrangements have leases. So all of the other Limited Partnership Agreements don't have
25 this provision business, but they refer to leases.

26
27 And also of interest, My Lord, if I could take you to page 18 of this document, Article 20,
28 which deals with dissolution. 20.1(b) explains how the partnership can be dissolved at
29 page 18.

30
31 THE COURT:

I have it.

32
33 MS. NICHOLSON:

34 And interestingly enough, My Lord, as I
35 mentioned, this is the amended and misstated agreement. What was the Bonnyville
36 agreement? What's new?

37 One of the things that's new in the amendment and our statement of this agreement is
38 Article 20.1(b). This 20.1(b) is different than we see in the other agreements. As I said,
39 the other ones dealt with leases, and we see paragraph (a) deals with leases, but paragraph
40 (b) was added to cover the concept that any assets that a limited partner or its affiliates or
41 (INDISCERNIBLE) has contributed to the partners shall be distributed to that on 90 days'

1 notice.

2
3 So the idea is each maintains its ownership -- one of the land, the other of the assets -- and
4 to the extent they want to dissolve it, they can rely on paragraph (b) to give notice and
5 come and remove their assets. So that's what I say are the material terms of the
6 Bonnyville Limited Partnership Agreement that differs from the other three that involve
7 leases.

8
9 Now, My Lord, when Mr. McAllister enquired of the Monitor as to what the position of
10 the Monitor was with respect to the Bonnyville assets, the Monitor referred the parties
11 essentially to the Seventeenth Report that they had filed.

12
13 Now, that was filed on September 10th, 2018, and if Your Lordship could pull that up --

14
15 THE COURT: Not easily.

16
17 MR. BIEGANEK I can --

18
19 THE COURT: Is it part of your documents that --

20
21 MR. BIEGANEK I didn't include it, but I have my -- you can have
22 my copy here if you'd like, My Lord. I'll take my --

23
24 THE COURT: I am a bit concerned to be taking the Monitor's
25 copy.

26
27 MR. BIEGANEK I've taken out any flags or notes.

28
29 THE COURT: Oh, I did not mean it that way. I just meant that,
30 while the Court has got to have complete copy at some point of all of this stuff, I could
31 not bring everything.

32
33 MR. BIEGANEK I appreciate that. If you want to look at --

34
35 THE COURT: I might take Mr. Russell's copy.

36
37 MR. RUSSELL: My Lord, I was going to offer it. I suspect that
38 Mr. Bieganek's going to be more in a dogfight with Ms. Nicholson than I will on this
39 point.

40
41 THE COURT: Thank you. You make sure, Madam Clerk, that

1 that gets back to Mr. Russell.

2
3 THE COURT CLERK:

Yes, Sir.

4
5 MS. NICHOLSON:

Thank you, Mr. Russell.

6
7 So at paragraph 23, the Monitor addresses its position with respect to 726 and that
8 Bonnyville issue. And it says that it's considered the comments and has advised 726 that
9 the Monitor does not anticipate challenging 726's ownership claim in respect of the
10 claimed assets on the Bonnyville campsite. And they go on to make it clear that unless
11 there's a material change in relation to the information or the documents that come to
12 light that alter the accuracy and/or legitimacy of the information obtained in the review
13 today.

14
15 So that's what they say. And in paragraph 24, they go on to say, as we've already
16 discussed, that it doesn't appear that there was lease between 726 and the applicable
17 Bonnyville LP. And, as such, the Monitor doesn't anticipate at this time making any
18 priority claim in respect of the 726 dorms at the Bonnyville camp if that ownership claim
19 is accepted by the Court, again, subject to further material or documents being received
20 by the Monitor.

21
22 So that's their position. At paragraph 37, they go on to talk under a heading which says
23 "Priority Dispute between 726 and 185." They say that they obtained personal property
24 registry searches in respect of these camps, and they talk here about Peace River,
25 Wandering River, and Kilometre. There's no mention under this "Priority Dispute" about
26 Bonnyville under the heading "Priority Dispute."

27
28 So there, we're talking about the three entities in respect of which there are leases. And
29 they indicate in those paragraphs -- 37 -- there that there were all pack security
30 registrations from the LPs in favour of -- they say -- 185. We've called that entity "CNC"
31 throughout.

32
33 So they say that they found that. And then they go on in paragraph 38 to talk about the
34 indebtedness, as they understand it from the records that they have, regarding those three
35 entities, again not in respect of Bonnyville.

36
37 Paragraph 39 is important here because it states that the Monitor has been provided with
38 general security agreements executed by CNC by its registered office counsel, that they
39 will share with 726 and CWB, and that copies of those GSAs are attached as Schedule C
40 to this report.

41

1 So we turn to Schedule C. We see here three --

2
3 THE COURT:

Just give me a minute. I do not have it tabbed,

4 so ...

5
6 MS. NICHOLSON:

Okay. It starts with "General Security Agreement between Kilometre 147 LP and Canada North Camps" about halfway through, I'd say.

7
8
9
10 THE COURT:

I have Schedule C.

11
12 MS. NICHOLSON:

Thank you.

13
14 And the first document there is a "General Security Agreement," made March 29th, 2017,
15 between Kilometre 147 LP by its general partner -- Kilometre 147 GP Ltd. -- and Canada
16 North Camps Inc.

17
18 If we keep going in that schedule, we will see another security agreement, this one with
19 Peace River Lodge, dated the same date, and with CNC, again.

20
21 The final General Security Agreement that we'll see in Schedule C is that with Wandering
22 River Lodge LP by its general partner -- Wandering River Lodge GP -- and Canada North
23 Camps Inc., again dated March 29th, 2017.

24
25 Now, these documents were also marked as Exhibits I, N, and T to the affidavit of
26 Mr. Roman on October the 2nd. Because that's what we questioned about, so I just want
27 to bridge you from this Monitor's report into the -- what was cross-examined on. That's
28 all I'm mentioning it for.

29
30 So the bottom line here, though, and the point I'm making is that no GSA in respect of
31 Bonnyville is provided in these materials.

32
33 And if we, then, turn to paragraph 40, we see of the Monitor's report -- Seventeenth
34 Report -- it just goes on to talk, again, about the leases and that the lease agreements were
35 never registered at the PPR 5726. That's what they say.

36
37 Now, this is on page 15 of the report itself, paragraph 40. So paragraph -- no -- since
38 then, of course, those leases have been now registered. And if we turn now to
39 paragraph 49 --

40
41 THE COURT:

That is November 28th -- those registrations, as

1 I understood?

2

3 MS. NICHOLSON: That's correct, My Lord.

4

5 THE COURT: Go ahead.

6

7 MS. NICHOLSON: If you look at paragraph 49 under the heading
8 "726 Dorms," the Monitor just repeats, essentially, that the Monitor does not anticipate
9 challenging 726's ownership claim in respect of the assets claimed by it, located at the
10 Bonnyville camp.

11

12 And then, there is also the next report of the Monitor, the Monitor's Eighteenth Report.
13 That was filed October 11th, 2018. And there's just a couple of paragraphs that I wanted
14 to point out to Your Lordship.

15

16 Paragraph -- oh, we probably don't have that.

17

18 THE COURT: That is correct.

19

20 UNIDENTIFIED SPEAKER: Nor do I.

21

22 MR. RUSSELL: My Lord, I'll volunteer mine again.

23

24 THE COURT: I am grateful.

25

26 MS. NICHOLSON: Thank you.

27

28 THE COURT: Go ahead.

29

30 MS. NICHOLSON: If you, My Lord, turn to paragraph 36 -- well,
31 just above that is the heading "726 Property Claim," and it's just respecting the priority to
32 the 726 claim.

33

34 This section outlines information and work that the Monitor has done, essentially
35 concluding, on the following page at the bottom of paragraph 39, with a statement that
36 until -- that they want to question -- they've been instructed to question Mr. McCracken.
37 And until such time as questioning is complete, the Monitor is not in a position to finalize
38 its report, and the matter's not in a position to properly be heard or addressed.

39

40 And they go on at the next -- paragraph 44 there to say that they are providing no opinion.
41 And they're in the process of providing an opinion to Monitor with respect to the validity

1 and enforceability of the claims and any priority issues. And they likely can't complete
2 that until the questioning of the affiant, Paul McCracken, has been completed. And it
3 says these issues, as well, will need to be addressed at that time.

4
5 So it's against that -- so they're looking essentially -- they need more time before they can
6 -- I may need more time; they need more information before they can figure out their
7 position. That's what they're, what they're saying.

8
9 Now, it's against this backdrop, My Lord, that 726 filed its application on November
10 the 28th. And I can take Your Lordship to that application.

11
12 THE COURT: That I do have.

13
14 Do you want to deal with the amended one or the original? I have got the amended in
15 front of me is all.

16
17 MS. NICHOLSON: Well, that's fine. We can use that, My Lord.

18
19 THE COURT: So let us use that.

20
21 MS. NICHOLSON: No. Let's use that. Nothing turns on that --

22
23 THE COURT: Okay.

24
25 MS. NICHOLSON: -- in this regard.

26
27 So the first point is about setting -- paragraph 1 sets a number of definitions for -- and
28 we'll get to that.

29
30 But paragraph 2 deals with the Bonnyville issue about ownership. And it's important here
31 to note that the request is for an order that declares that the Bonnyville equipment -- the
32 Bonnyville ancillary equipment and the Peace -- and the Bonnyville ancillary equipment
33 is owned by 726 essentially. There's also reference to Peace and Kilometres, as well.

34
35 But with respect to Bonnyville, which is what we're talking about here, we asked for a
36 declaration that it is owned by 726. That's it. That's all there is in the application about
37 Bonnyville. And this is important to point out because the brief of the Monitor
38 incorrectly suggests otherwise at page -- at least could be construed to incorrectly indicate
39 otherwise at paragraph 88 of their brief.

40
41 They set the issues here in paragraph 88, and they say the 726 group is claiming

1 ownership of or priority to everything at Bonnyville in paragraph 88. And the point here
2 -- they do say "or priority." I just -- the point is we are claiming ownership, but we are
3 not claiming relief in respect of a declaration that we have prior security or in respect of
4 the priority issue. We're not seeking a determination of that. That's the point.

5
6 And, My Lord --

7
8 THE COURT: But if asked, you would certainly acknowledge
9 that that ought to be subsumed in a determination by this Court trying to sort out the
10 various claims affecting 726 that -- as your brief comes to address, that if I do not have
11 ownership, I have got to have priority. Right?

12
13 MS. NICHOLSON: No. I mean, our issue is that we own it outright.

14
15 THE COURT: I realize --

16
17 MS. NICHOLSON: Yes.

18
19 THE COURT: -- but if you do not ...

20
21 MS. NICHOLSON: Well, if we don't own it, I --

22
23 THE COURT: Sorry. No. That is a poor characterization.

24
25 MS. NICHOLSON: No.

26
27 THE COURT: I agree. I am with you.

28
29 MS. NICHOLSON: Okay. You're with me.

30
31 THE COURT: Sorry. Yes.

32
33 MS. NICHOLSON: Okay. No problem.

34
35 THE COURT: Yes.

36
37 MS. NICHOLSON: So now if we turn to --

38
39 THE COURT: But to better characterize what was running
40 through my mind, even if you own it, you still have to establish priority.

41

1 MS. NICHOLSON: If we own it, we need to establish that there is
2 no --

3
4 THE COURT: Just another way of putting it.

5
6 MS. NICHOLSON: -- that we own it --

7
8 THE COURT: Right.

9
10 MS. NICHOLSON: -- outright-- that we own it outright.

11
12 And if another claimant seeks to suggest that it has security over it, that claimant would
13 need to prove it up, which is what Mr. -- CWB is now brought forward their application,
14 which we've asked them to do.

15
16 We say we own it. We say, please, please, if you are making assertions about our
17 ownership claim, please bring forward any claims you have about priority or about
18 security.

19
20 THE COURT: I see. Okay.

21
22 MS. NICHOLSON: Okay. And that's why we say, we didn't
23 advance that. We didn't put that in issue, and we said if you intend -- if the intention is
24 that that be addressed, that somebody needs to advance it in order that the matter can be
25 properly before the Court, and so that we can properly have a hearing about that.

26
27 And so Mr. Russell and his client acceded to that and -- for which we are pleased. And
28 the only part about us not being pleased in that regard is that we've asked for an
29 adjournment now that it is properly before the Court; so that we can cross-examine with
30 respect to it, now that we have notice of the application; so that we can adduce evidence
31 to meet the case that Mr. Russell has now advanced, which is now that we have notice of
32 it. An application after the cross-examinations occur, after all of the issues we thought
33 were before -- that we were addressing on the cross-examination had been addressed. We
34 thought all of that had happened, but now we learn during the cross-examination that that
35 was not the case, that they had this in mind. And now that they've advanced it -- they've
36 now advanced it. It's just after all the cross-examinations had taken place.

37
38 So now, the Court has before it an application, in respect of which we, 726, are affected
39 and wish to cross-examine, take evidence. And I'll go into exactly why that is, and what
40 exactly we need to find out, and why it's imperative. Okay?

41

1 So back to our application. We also, you will see, address in paragraph 3 the lease -- the
2 GSAs respecting the leased equipment. Important, again, as I said, because we're not
3 addressing in this provision -- seeking relief about the GSAs the Bonnyville GSA. It's not
4 been raised with us. We've never heard about it. It is not in a Monitor's report at the time
5 that we file our application.

6
7 So we, 726, are seeking relief in respect of the GSAs that are in favour of CNC not in
8 relation to Bonnyville because we don't know about that. So the Bonnyville CNC GSA is
9 not the subject of our application.

10
11 Now if I can turn Your Lordship to paragraphs 12 and 13 of our brief, I think this fairly
12 reflects what you were referring to earlier, My Lord, which is that the spirit of what was
13 intended back in September when the original order was made, was for everyone to bring
14 forward their claims and seek appropriate relief. And that is also -- and with respect to
15 paragraph 13, it references Ms. Taha's affidavit, which states that the CWB needed to see
16 the affidavits filed by 726 and others before advising its position.

17
18 And so it did that; it got the benefit of that evidence; and now it's filed this application.
19 It's not -- it's consistent, in effect, that the CWB has done what it said it was going to do.
20 It's just that it's now filed its application after it got the benefit of certain evidence upon
21 which it now relies in bringing its application.

22
23 Now, if Your Lordship turns to paragraph 15 of our brief, it was during that
24 cross-examination of Mr. Roman, which took place here in Edmonton on the third day in
25 which we had all been together for cross-examinations of Mr. McCracken and
26 Mr. Roman, that the Monitor and CWB hinted at this idea that CWB intended to argue
27 that it holds this lingering security interest in the Bonnyville assets, which 726 claims to
28 own.

29
30 So at this time, My Lord, at paragraph 17 of our brief, we say that we were concerned that
31 CWB and the Monitor were purported to argue issues that were not before the Court, and
32 that there hadn't been an application setting out those issues, and, therefore, no notice of
33 those issues had been provided to 726. And as a result, 726 had not been purported an
34 opportunity to cross-examine the witnesses or supply supplemental evidence to support its
35 position.

36
37 And two undertakings were requested at that application -- sorry -- at those
38 cross-examinations. A number of undertakings were requested. And they include two of
39 them, which are the subject of the Monitor's and CWB's brief -- or are addressed there --
40 are in respect of which 726 refused to answer. They were taken under advisement
41 originally, and then they were ultimately refused.

1
2 And one of -- and the reason they were refused, in part, was on the ground of relevance
3 and privilege. So what were those questions? The questions were to provide any *PPSA*
4 searches from Stikeman Elliott's file and to review the Stikeman file for any
5 correspondence to CWB asking them -- CWB -- to waive the GSA with respect to the
6 Bonnyville equipment, as in -- like a no-interest letter that they were looking on the file to
7 receive.

8
9 And at that time, this was not in issue insofar as Mr. Russell had not yet filed any
10 application in respect of this. So he's seeking information to purport to support an
11 application about him -- his client continuing to have security over the assets.

12
13 Remember, 726 purchased the assets for \$21 million. The claim by CWB -- in its
14 application that we're looking to have adjourned, among other things -- is that their
15 security attached and continued to attach to this equipment when -- by the time it was
16 purchased by my client. So they say, we had security on it at the outset, and our security
17 continued on. And when you bought it, you didn't buy it free and clear of our security.
18 That's what they're arguing, and that's what their application is about.

19
20 And that's why they were asking these questions. And that's because there was no
21 application in front of Your Lordship or before the Court, which drives the relevance of
22 questions on cross-examination at that time. Only our application was before the Court,
23 and this was not. So we objected.

24
25 And my friends say now, well, we ought to have an adverse inference drawn against us --
26 that's what the brief say -- for failing to answer those questions. So we'd dispute that
27 that's the proper assertion or fair, especially in the circumstances.

28
29 Now, are they relevant questions now, My Lord? I believe they are. They are certainly
30 relevant. And you will recall one of the things we wrote to Your Lordship about that --
31 unfortunately, we didn't get your response on until more recently but for which we now
32 thank you -- is this issue of those undertakings. So that was also part and parcel about
33 what was a concern, ought they to -- ought we to be required to answer those undertakings
34 in the absence of any application before the Court putting those issues in relevance to the
35 Court.

36
37 And now we file the application, so we appreciate that those undertakings are now
38 relevant to what CWB is seeking. And subject to privilege, it would be our intention to
39 respond to those, now that we've got the application, as part of dealing with and eliciting
40 other evidence that I'll get to.
41

1 So, My Lord, immediately following these cross-examinations, what we did was we wrote
2 to counsel because we were very concerned that, for the first time, we had heard that a
3 new claim was being asserted by CWB. That we hadn't heard about, that was not on the
4 record, that had not been filed.

5
6 And so I don't know if Your Lordship had an opportunity to review the affidavit of
7 Balmara Machenova (phonetic) from our office, which kind of just outlined our request in
8 the circumstances and the urgent circumstances, please, we can't answer these
9 undertakings because it's not relevant. But to the extent that you wish to bring this
10 forward, please do so, so that we can consider everything and bring everything forward.
11 And we can, in a fair way, bring forward and introduce our evidence and -- to have the
12 issues dealt with. So that's what we asked.

13
14 And finally, CWB acceded to our request, and they filed this application after the
15 cross-examinations were in and just before our briefs were due. So ...

16
17 Now, if you turn to paragraph 15, My Lord, of the Monitor's brief. Page 15 -- I'm sorry --
18 paragraphs 92, there's a reference here because I think you need to understand the factual
19 -- that some of the facts and the related law that are engaged as you consider this
20 adjournment request.

21
22 So if you turn to paragraph 92, paragraphs 92 through 103 set out the position, which is
23 the subject of CWB's late-filed application. Okay. So we received this brief before CWB
24 filed its application. So we have Mr. Bieganek arguing about matters in this brief which
25 are not the subject of an application and are not properly before the Court.

26
27 So --

28
29 MR. BIEGANEK: I hesitate to interrupt my friend, but the
30 application was filed December 12th.

31
32 THE COURT: Right.

33
34 MR. BIEGANEK: This brief is December 17th.

35
36 MS. NICHOLSON: Okay. I'm sorry. I apologize for that.

37
38 What we are dealing with, though, is we are dealing with -- for clarity, we are dealing
39 with the filing of the application after the evidence is in. That's the important part, and
40 I'm sorry. I misstated. Thank you for clarifying.
41

1 So we're getting arguments in from paragraphs 92 through 103 on points that we have not
2 had the benefit to adduce evidence on.

3
4 So if we turn to paragraph 30 -- paragraph 30(6), where what my friends argue -- the
5 Monitor is saying under the *PPSA* is that where goods are sold or leased by the buyer that
6 that buyer takes free of any secured interest perfected in their Section 25 if the buyer
7 bought or leased the goods without knowledge of the security interest and the goods were
8 not described by serial number.

9
10 So this is an argument -- these facts, i.e. without knowledge of security interest -- are now
11 engaged by the CWB application and by the legal test here that's set out.

12
13 And the Monitor goes on -- up to paragraph 1035 -- to argue all about the matters that
14 were just lately filed by CWB. And here, we have the Monitor pursuing the
15 cross-examination of the witness to obtain answers on questions, which relate to matters
16 that haven't been disclosed at that time to 726 because there's no application before the
17 Court at the time of the cross-examinations.

18
19 So Mr. Bieganek got some -- got an opportunity to examine our client, Mr. Roman, and
20 seek admissions about what he wanted or what he had in mind to support his position that
21 the buyer, our client, had knowledge of the secured interest, that is CWB's security
22 interest at the time we purchased.

23
24 THE COURT: I know it would be difficult to avoid -- and
25 Mr. Russell alludes to it -- as to where the dust-up may be most profoundly.

26
27 I think it is really important that there be a distinction between seeking of certain
28 information that would support a particular position and the seeking of information which
29 allows the Monitor to determine what issues need to be decided by the Court.

30
31 There is a distinction there. And I would ask you to just stand back a little bit from the
32 advocacy with Mr. Bieganek, and recognize that his role is not to advance Mr. Russell's
33 position, but to advance to the Court what it is that his assessment is on the evidence that
34 is provided.

35
36 MS. NICHOLSON: My Lord, I would normally entirely agree with
37 you. And that's maybe part of the challenge that we have a little bit here because we have
38 the Monitor acting now as an advocate. Right? It is asserting on behalf of CNC that it's --
39 I mean, that's -- it is --

40
41 THE COURT: That is his entity. That is its --

1
2 MS. NICHOLSON: Exactly. Exactly. So it is kind of now in the
3 fray in -- and as a litigant now.
4

5 And so we've got a little bit of a tension as to -- you know, that's the Monitor saying that's
6 my job is to look after the estate, bring as much into the estate as possible. And to the
7 extent that there are improper claims or to the extent that the estate needs to assert rights,
8 we will do such things in order to protect the estate.
9

10 So it's -- I'm not at all taking issue with the Monitor doing that.
11

12 THE COURT: Okay.
13

14 MS. NICHOLSON: It's just that it is, in fact, doing that, which is not
15 always the case. Sometimes the Monitor, perhaps, is more neutral, but right now, it is
16 acting to assert the --
17

18 THE COURT: Well, would it be fair to say that the Monitor
19 was more neutral in its Seventeenth Report --
20

21 MS. NICHOLSON: Yes.
22

23 THE COURT: -- but then obtained information, which obliged,
24 from its perspective, at least, that there be an advocacy on behalf of CNC.
25

26 MS. NICHOLSON: I think that's totally fair, which is what I was
27 going to say, which is what seems to have happened is that the Monitor's position has
28 changed, you know, mid-course, based on information that it's received. And there's
29 nothing --
30

31 THE COURT: Well, I do not know if that is a little bit
32 overstating it.
33

34 MS. NICHOLSON: Well --
35

36 THE COURT: The description is fairly neutral. We do not
37 know. We do not have enough information.
38

39 MS. NICHOLSON: -- well, I want to say mid-course, but it -- I'm
40 saying, it's perhaps neutral, as you say, and then it becomes more engaged. And that's --
41 that is not a -- I'm not making a complaint about that. That's -- it's doing its job --

1
2 THE COURT: It is all right.
3
4 MS. NICHOLSON: -- and that's really important, too --
5
6 THE COURT: Okay.
7
8 MS. NICHOLSON: -- because I want to give it its fair due for doing
9 its job. But the thing is, it can't do that job, in our respectful submission, at the expense of
10 the parties' interests.
11
12 And so that in the event that it does come to a view that it needs to make assertions on
13 behalf of the estate, then it, then, needs to bring before the Court its applications in the
14 normal way that a litigant in effectively (sic) does. It is -- albeit, it is the Court's officer,
15 but it does not -- because of that -- mean that this Court doesn't ensure that matters -- that
16 it has before it applications that give it the grounding in which to make decisions.
17
18 Because now, we say, you have before you the application by 726 about the Bonnyville
19 equipment -- ownership. You now have a claim by CWB about security in respect of that.
20 That's excellent. Now, that matter can be heard. And the Monitor, now, in its brief
21 begins now to take different positions.
22
23 So it seems to be suggesting that 726 owns -- pardon me, 726 -- the limited partner --
24 Bonnyville Limited Partnership owns those assets. So it's now saying that certain of the
25 assets -- the majority of the Bonnyville assets -- are owned by the limited partnership
26 under this Limited Partnership Agreement.
27
28 Because you'll recall we can -- my client provided those assets under the Limited
29 Partnership Agreement to the partnership, so we provided those assets to the partnership.
30 And Mr. Bieganek and the Monitor are now saying that that was a security arrangement;
31 that was a conditional sale; and that is, effectively, title transfer to the LP at that time.
32
33 And so that, My Lord, is a -- something that is not currently before you. So, like, there is
34 only our request that we be granted a declaration that we own it. We don't have the
35 corollary to that -- their assertion -- but 726 owns it -- or pardon me -- the LP owns it. We
36 don't have anyone asserting that the LP owns it.
37
38 And so it's the -- so that is not being advanced, and so that's --
39
40 THE COURT: Sorry. Not being advanced when? You say that
41 today?

1
2 MS. NICHOLSON: I -- there's no application for a declaration.
3
4 THE COURT: Right. But the Court has got a live issue as to,
5 all right, so who owns this property?
6
7 MS. NICHOLSON: Well, it has a live issue as to Bonnyville being
8 owned by our client.
9
10 THE COURT: Right.
11
12 MS. NICHOLSON: Yes.
13
14 THE COURT: And so it has got to determine whether that is a
15 valid claim.
16
17 MS. NICHOLSON: Exactly.
18
19 THE COURT: Okay.
20
21 MS. NICHOLSON: So it would presumably, like, I guess, dismiss
22 that application if it's not --
23
24 THE COURT: Well, it may not -- that is -- yes.
25
26 MS. NICHOLSON: Right. And so --
27
28 THE COURT: In order to determine that, it has got to establish,
29 well, is there anybody else that has a better claim or, you know, is the proper owner?
30 That is the only in which you can determine ownership is to assess on all of the evidence
31 what claims there are -- crystallized, competing. I do not think that really matters.
32
33 It is what is the position, as well. Is 726 truly the owner?
34
35 MS. NICHOLSON: Yes. Yes, My Lord. I agree with that.
36
37 THE COURT: Okay.
38
39 MS. NICHOLSON: But if we turn to the security claims -- so the
40 ownership issue, as you rightly point out, is does our client own it?
41

1 THE COURT: Right.

2
3 MS. NICHOLSON: And I guess my friend is arguing that it does
4 not; and 726 -- pardon me -- the LP owns it; and that there's a security claim in respect of
5 it. I think that's its position, which is contrary, incidentally, to what it said in its brief in
6 its Monitor's report, but it had a caveat on that. It never locked down and promised that it
7 would never raise other issues.

8
9 THE COURT: Right.

10
11 MS. NICHOLSON: So anyway, I'm just pointing that out.

12
13 Now, we also -- and on the security claims, we have CWB now having advanced its
14 application. But the important thing is, is remember that only the GSAs from CNC,
15 relating to the leases and not Bonnyville, are in evidence.

16
17 And if we look at -- turn to paragraph 90(b) of the brief of the Monitor, here we have the
18 Monitor saying that if 726 -- so this is an alternative argument. So if we win and we did
19 acquire the Bonnyville assets, they now say, Are those assets nevertheless subject to the
20 security interest of CNC for debts due and owing to it by Bonnyville LP?

21
22 So the issue there is they are seeking now, it seems, a determination about that issue -- the
23 validity of the CNC GSA granted by Bonnyville LP. But the problem is, to my
24 knowledge, that document and that issue -- well, that issue is not before the Court, nor is
25 that -- even that document in evidence.

26
27 So we have a request for relief about -- that affects my client from the Monitor for relief
28 in respect -- claiming that that security -- some security -- I haven't seen that document --
29 the CNC security in respect of Bonnyville granted by the Bonnyville LP in favour of CNC
30 that that is valid. But I haven't seen that document, and I haven't seen that application.

31
32 So if that is a desire on the part of the Monitor to bring that issue forward, then I think it
33 should be brought forward. And I think that it should be heard, together with all of these
34 applications, which is all of the matters dealing with Bonnyville, we say -- ownership and
35 security -- ought to be adjourned, so that these matters can all come forward and be dealt
36 with.

37
38 Now, if you turn to why that is -- I'll just in our brief, we set out the kinds of questions
39 that we would like to ask and that we would need answers to, now that we have the CWB
40 application before us. If you -- it's page 10, paragraph 34(a).

41

1 Here we say that -- and actually before we go there, let's turn to the CWB brief because
2 the CWB brief that was filed on December the 20th, it echoes the position of the Monitor
3 in large part at paragraph 5. It says it concurs with the analysis of the Monitor. And then
4 at page -- at paragraph 6, it states its position, which we are -- explain and talk about
5 already, that it claims that it has this security interest -- even if my client owns it, it has a
6 secured interest in the equipment. That's what it says. It carries forward.

7
8 And it now -- and it points to Section 28. It also refers to Section 30, which the Monitor
9 referred to, but Section 28 talks about collateral -- where collateral is dealt with or
10 otherwise gives rise to posting the security interest, it says: "Continues in the collateral
11 unless the secured party expressly or implyably (sic) to be authorized to deal."

12
13 So this is exactly the kind of question that was contemplated by the undertaking request
14 that was refused because it wasn't relevant at the time, but now that the application is filed
15 is now relevant and before the Court. And now, we need to adduce evidence on -- from
16 CWB, cross-examine its witness -- to determine whether -- and ask questions around
17 whether it expressly or implyably authorized that deal.

18
19 We also need to address the question that both the Monitor and Mr. Russell for CWB
20 raise, which is whether the goods were sold in the ordinary course of business of the
21 seller.

22
23 Now, the seller under the bill of sale was CNC. Now, whether or not -- when we came
24 forward and brought our application, we were under the impression this was not going to
25 be an issue. In general, we understood there was a reservation. But having said that, we
26 were not focused on adducing evidence with respect to whether it was -- whether actually
27 CNC -- which is on a bill of sale -- whether they were the actual seller.

28
29 We'd like to ask Mr. McCracken more about whether CNC was an agent under that bill of
30 sale, whether it was actually the seller because -- and whether or not -- because we do
31 now -- on account of this application having been brought, we've now got information and
32 searched out information that we would like to put in evidence that deals with other
33 transactions that CNC or the company in which -- into which was amalgamated into,
34 whether that company did -- or that company did other transactions that were similar to
35 this big transaction for \$20 million.

36
37 So our -- we need to probe, for the Court's benefit, whether or not this was made in the
38 ordinary course. Who actually sold it? It now really matters. It matters in what capacity
39 CNC acted. It now really matters what -- whether the sale was in the ordinary course. So
40 we need to probe into that for the Court's benefit, so that it can have before it the
41 information it needs in order to decide this.

1
2 Now, paragraph 8 of the CWB brief says that we have the onus of establishing that CWB
3 expressly or implyably authorized the sale of the Bonnyville equipment. And what we
4 say is if that's the case, we really would -- we really do need the opportunity to fairly
5 attempt to meet that onus, which is what Mr. Russell has told us we need to do.

6
7 And we just haven't had that chance. We haven't had that chance to ask the witness, and
8 that's something we refer to in paragraphs 34(c) of our brief. We say we'd like to
9 cross-examine Jessie Taha and Mr. McCracken, as to whether CWB released the security
10 interest including -- and other things.

11
12 Now, Mr. Bieganek also, in his brief, refers to in paragraph 97 some evidence that he got
13 relating to -- from Mr. Roman about financial statements because he is now arguing in
14 this brief that 726 had knowledge of the security interest.

15
16 So we need an opportunity -- I just want to pull up those financial statements which are
17 exhibited. These are -- were answers -- partly answers to undertaking of Mr. Roman, and
18 they are at tab B to undertaking number 1 -- transfers of questioning held in respect of --
19 Mr. Roman.

20
21 Do you have that, My Lord?

22
23 THE COURT: Madam Clerk, I am going to need the other
24 binder.

25
26 MS. NICHOLSON: If you, My Lord, turn to -- it's tab 2(B).

27
28 These are the financial statements that Mr. Roman, the representative of my client, put --
29 deliver by way of answering undertakings.

30
31 THE COURT: I am quite familiar with them. I am just not
32 finding them yet.

33
34 MS. NICHOLSON: Okay.

35
36 THE COURT: I thought they were in the binder that the clerk
37 provided to me in the back of the transcript questioning.

38
39 MS. NICHOLSON: Yes.

40
41 MR. BIEGANEK They should be, My Lord.

1
2 THE COURT: More than 1(B). Perhaps that is the problem.
3
4 MR. BIEGANEK Yes. It's -- it'd be under tab 2 is the transcript of
5 Mr. Roman --
6
7 THE COURT: Yes.
8
9 MR. BIEGANEK -- and then there's subsequent tabs, A, B, C, D.
10
11 THE COURT: I have it now.
12
13 MS. NICHOLSON: Okay. Thank you.
14
15 THE COURT: Go ahead.
16
17 MS. NICHOLSON: So, My Lord, if you turn -- there are three
18 financial statements -- 2013, 2014, and 2015.
19
20 THE COURT: Right.
21
22 MS. NICHOLSON: On the 2013 financial statements at tab 5, there's
23 a reference to short-term borrowings, and that's what my friend is -- he's referencing that
24 as an indication that our client would have had notice of a general security agreement.
25 And our client has something to say about that, and it would like the opportunity to
26 respond to that.
27
28 And if we turn to -- and it's also important to bear in mind that -- to look at this financial
29 statements at 2014, the CNC financial statements at 2014. There at note number 9, it
30 talks -- do you have that, My Lord?
31
32 THE COURT: Yes.
33
34 MS. NICHOLSON: Okay. At the very bottom there, it's referencing
35 the Bonnyville interest there and the sale.
36
37 And it talks about the company continuing to retire data of \$4.4 million. So that is
38 something that is material to the transaction whether CWB was paid out, whether -- and
39 similarly, the same point can be made with respect to September 30th, 2015 financial
40 statements.
41

1 THE COURT: Paid out what? Any money or all of it?
2
3 MS. NICHOLSON: And for which it gave release, especially if you
4 look at paragraph --
5
6 THE COURT: Do I not have information from CWB as to what
7 it received on that transaction?
8
9 MS. NICHOLSON: I'm not sure.
10
11 THE COURT: Right.
12
13 MS. NICHOLSON: I'd have to defer to Mr. --
14
15 THE COURT: I believe you would find it indeed --
16 Mr. Russell's supplementary brief does clarify what was received.
17
18 MS. NICHOLSON: I --
19
20 MR. BIEGANEK: Tab 4, My Lord.
21
22 MS. NICHOLSON: Let me double check that. Thank you.
23
24 THE COURT: I mean, I have your point. It is something that
25 does not yet have to be -- further to proceed, but it is a matter --
26
27 MS. NICHOLSON: I just want to make sure I have that.
28
29 MR. BIEGANEK: It's the first brief I had filed December 20th,
30 tab 4.
31
32 THE COURT: Thank you.
33
34 MS. NICHOLSON: Oh, on the first brief. Thank you.
35
36 Yes. I'm familiar now that I see that with this. But it doesn't address exactly whether a
37 relief -- a no-interest letter was given in respect of this by the bank. So they received
38 these proceeds, and in return, they are permitting the sale to go through, and they are
39 giving a no-interest letter. They are implyably or expressly not asserting their security
40 interest in respect of it.
41

1 So that's the exact kind of things that need to be before the Court, pursuant to the legal
2 test under the PPR tests, including those discussed earlier.

3
4 Now, if you turn to September 30th, 2015, the financial statements there, it says that the
5 assets -- this is at 10 -- the tenth note on page 8 of the 2015 financial statements.

6
7 THE COURT: I am sorry. Did you say note 10 now?

8
9 MS. NICHOLSON: I did, My Lord. It says -- heading "Sale of
10 Assets" at the top of the page -- page 8.

11
12 THE COURT: I have it.

13
14 MS. NICHOLSON: It says in the second line at the end: (as read)

15
16 The assets at the time of the transaction had related debt of \$4.48 million
17 that was retired from sale proceeds.

18
19 So, again, as we say in our brief, we want to ensure that all of the relevant filed material,
20 including Heather Barnhouse of Dentons who acted -- who was the subject matter of
21 certain undertakings that were requested but were not received from Dentons about these
22 kinds of matters, that need -- we need to get to the bottom of that. We need to get to the
23 bottom of whether or not the bank actually released its security, and we need an
24 opportunity to question and/or make other enquiries in that regard.

25
26 And so these are the -- this is essentially the laundry list of the kinds -- that is, at
27 paragraph 34 of our brief -- of the kinds and enquiries that we submit need to be made in
28 order for the Court to have before it the appropriate information that would allow it to
29 make a determination that is -- has the benefit of all of the evidence.

30
31 And so what we would submit, My Lord, is that all of the applications that -- we have the
32 CWB application now. And if Mr. Bieganek, the Monitor, wish to adduce evidence or to
33 bring an application about the CNC guarantee -- or pardon me -- the CNC security that --
34 from Bonnyville, the Bonnyville CNC GSA -- if they want the Court to make
35 determinations about that issue, they need to file an application and put that document
36 into evidence, so that we can potentially, if necessary, examine Mr. McCracken about that
37 and see that there is -- that it exists, I'd like to -- before we have an application about its
38 validity make sure that it exists, and signed, and that much. Anyway --

39
40 THE COURT: Are you clear that you do not have -- have not
41 seen this GSA --

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41

MS. NICHOLSON:

I invite my friends to speak to that.

THE COURT:

Okay.

MS. NICHOLSON:

It's not in -- to my knowledge. I've done the best I can in the short period as I can --

THE COURT:

M-hm.

MS. NICHOLSON:

-- to get up to speed.

But that's part of the problem is that we need -- we can't have an ambush. We have to deal with things in -- where the applications are brought, so that my client can respond. It's -- there's a lot of money at stake here.

THE COURT:

Oh, I understand all of that.

MS. NICHOLSON:

So that's all. That's all we're asking.

THE COURT:

It has been at stake since the receivership got turned from a -- it turned into a liquidation.

MS. NICHOLSON:

Right. And on that, you know, the other thing is, we've now been retained. Good news is, we have been retained because there's an assertion, of course, now that that assets -- the Bonnyville assets are the subject of a conditional sale, and it should have been registered.

So now, like the lease issues, I -- my clients, including 726 and their related interests that I am representing, they now are engaged on account of the assertion that there's non-registration in respect of the conditional sale.

So that's a good thing. You know, we now -- at least based on the briefs and the CWB application, we're now engaged and can deal with that Bonnyville issue.

Now, once all of the matters are properly before the Court -- and we are not anticipating or desiring to delay. We did everything we could to meet these difficult time constraints, and we want to advance this as quickly as possible. So that is not the objective here. We understand insolvency proceedings. We understand the need to bring things with haste and to get things done. So we are not standing in the way of that.

1
2 We just need to be sure that we have -- that our client is being treated fairly with notice of
3 these matters. And now that we have an application by CWB late filed after all of the
4 cross-examinations were taking place -- or had taken place, we need an opportunity to
5 deal with that -- cross-examine. And also for Mr. -- the Monitor to bring forward any
6 claims that it wishes to make in respect of CNC Bonnyville GSA.

7
8 THE COURT: Okay.

9
10 MS. NICHOLSON: And in doing that, a timetable could be set, and
11 we could fairly -- we would advance that with as much haste as we could.

12
13 Those are the reasons why we need and respectfully seek an adjournment of the
14 Bonnyville-related issues.

15
16 THE COURT: Thank you.

17
18 MR. BIEGANEK: Sir, we haven't given the clerk a break yet.

19
20 THE COURT: I -- exactly what I am going to address. I
21 believe we should reconvene at 1:30.

22
23 MR. BIEGANEK: That's fine.

24
25 THE COURT: Okay.

26
27 MR. BIEGANEK: Thank you.

28
29
30
31 PROCEEDINGS ADJOURNED UNTIL 1:30 PM
32
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41

Certificate of Record

I, Devyn Borman, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench, held in Courtroom 516 at Edmonton, Alberta, on the 10th day of January, 2019, and that I was the court official in charge of the sound-recording machine during the proceeding.

1 **Certificate of Transcript**

2
3 I, J. Aubé, certify that

4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8
9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.

11
12
13 Janice Aubé, Transcriber

14 Order Number: AL-JO-1002-2983

15 Dated: February 15, 2019
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta
 2

3
 4 January 10, 2019 Afternoon Session
 5
 6 The Honourable Mr. Justice Hillier Court of Queen's Bench of Alberta
 7
 8 D.R. Bieganek, Q.C. For the Monitor
 9 R. Quinlan For the Monitor
 10 C.L. Nicholson For 726 Group
 11 Z. Han For 726 Group
 12 D. McAllister For 726 Group
 13 C.P. Russell, Q.C. For Canadian Western Bank
 14 B. Smith For Mr. and Ms. Hadfield
 15 S. Chimuk For Great White Sand Tiger Lodging
 16 S. Delblanc For Mr. McCracken
 17 D. Borman Court Clerk
 18

19
 20 **Discussion**
 21

22 THE COURT: Mr. Bieganek, I'm going to ask you to sit down
 23 for just a few moments. I have got a few things that I have got to address.
 24

25 MR. BIEGANEK: Okay. Certainly.
 26

27 THE COURT: Okay.
 28

29 First, Madam Clerk, I would like you to hand back the Seventeenth Report that was
 30 kindly provided to me. I do not know that I am going to need the Confidential
 31 Supplement or the Eighteenth. I am just going to leave them up there, and you will not
 32 forget, I know.
 33

34 MR. RUSSELL: I won't, My Lord.
 35

36 THE COURT: Thank you.
 37

38 The clerk alerted me that there was something that you wanted addressed.
 39

40 MR. RUSSELL: Yes, My Lord.
 41

1 (OTHER MATTERS SPOKEN TO)

2

3 THE COURT: All right. Before I get to Mr. Bieganek then,
4 Ms. Nicholson, I want to confirm a few things. You have obviously confirmed you have
5 got full retainer on the issues that are before the Court.

6

7 And can I confirm, you are not pursuing an objection to the jurisdiction of the commercial
8 court in respect of these issues. Is that correct?

9

10 MS. NICHOLSON: That's correct.

11

12 THE COURT: Thirdly, that you are not taking any objection to
13 the CWB application that was filed. Indeed, you have confirmed that that is quite
14 appropriate for -- to be in front of the Court. Is that accurate?

15

16 MS. NICHOLSON: Yes.

17

18 THE COURT: And then, I take it that you are seeking approval
19 -- because I am not sure that it never got filed -- but to your amended application, I did
20 not see a filed copy of it in any event.

21

22 MS. NICHOLSON: It was filed on December the -- I'm sorry -- yes.
23 It was December the --

24

25 THE COURT: It was dated the 20th. Is it --

26

27 MS. NICHOLSON: -- I'm looking at a filed copy, December 20th.

28

29 THE COURT: Okay. All right.

30

31 In any event, that, too, needs an approval process, and I want to just address what is it that
32 Mr. Russell and yourself have done because I see those as being important clarifications
33 of what is at issue. All right?

34

35 MS. NICHOLSON: Yes, My Lord. You're identifying that this was
36 filed on December the 20th.

37

38 THE COURT: Yes.

39

40 MS. NICHOLSON: As late, as well.

41

1 THE COURT: Correct.

2
3 MS. NICHOLSON: Yes.

4
5 THE COURT: Exactly. Okay. So I just want to deal with the
6 two late applications, if I can characterize them in that fashion.

7
8 MS. NICHOLSON: Yes. Thank you.

9
10 THE COURT: Just in addressing that there really is not any
11 objection to what has been filed, as such, I want to confirm for the record, then -- I had
12 looked at this in advance -- I have no difficulty granting leave to CWB. I cite for you the
13 uncertainties that were expressed in Ms. Taha's affidavit, October the 4th, which invited
14 clarification of the basis for the claims in ownership.

15
16 Secondly, the uncertainties as to the position that was being taken by 726 in its initial
17 October filing and the supplemental filings in the period that led up to the questioning.

18
19 I am, thirdly, impacted by the evidence of Mr. McCracken on the questioning, including
20 the prior positions advanced and profiled by him on behalf of CNC that the inventory that
21 is now in dispute was part of CNC's assets, and, therefore, I believe that further supports
22 the utility and appropriateness of CWB's application.

23
24 And fourthly, concerns that have been expressed by the Monitor, as well as CWB, as to
25 the business history surrounding the assets themselves.

26
27 I want to confirm, as well, granting leave for the late filing of 726's application for some
28 of the same reasons, but noting, as well, that the evidence of Mr. McCracken is being
29 relied upon to support some of the arguments that are being advanced and that the retainer
30 of counsel on the issues came in mid-November. It is not entirely surprising to this Court
31 that there would be some fresh perspective from securities counsel that would address
32 matters such as the bailment, the revocation, or the relief from forfeiture as had been
33 profiled in the amendments.

34
35 So I am recognizing that there have been significant investment in where we are at. There
36 are significant monies that are impacted by the positions of these parties. Those do
37 properly need to be crystallized on a timely application.

38
39 And in the course of retrieving my own copy of the Monitor's Seventeenth Report, I also
40 came across and wanted to give you an opportunity for input before I hear from
41 Mr. Bieganek and others, Ms. Nicholson -- and I am reading here from his

1 correspondence to the Court seeking the date that ultimately became the conference on
2 December 4th that we have contemplated might be by telephone, but which I believe most
3 counsel were able to attend in person.
4

5 But he says on page 2 in paragraph B --
6

7 MS. NICHOLSON: But, My Lord, sorry --
8

9 THE COURT: It says --
10

11 MS. NICHOLSON: -- point me to it. It's the Seventeenth Report.
12

13 THE COURT: No, no. This is the correspondence --
14

15 MR. BIEGANEK: I think the Court's referring to the letter to
16 request the case management conference that adjourned the matters that were set for the
17 4th to today.
18

19 MS. NICHOLSON: Okay.
20

21 MR. BIEGANEK: I don't have that with me but ...
22

23 MS. NICHOLSON: Okay.
24

25 THE COURT: It is dated November the 15th --
26

27 MS. NICHOLSON: Okay.
28

29 THE COURT: -- and it is shown as having gone to the service
30 list. It is written to Ms. Hinz as the coordinator. And it states: (as read)
31

32 With respect to the 726 issues, the Monitor seeks some case
33 management direction from you. Christa Nicholson of JSS Barristers in
34 Calgary has recently been appointed counsel for 726 and other interests
35 which may be engaged in relation to the issues which are before the
36 Court to deal with the priority and certain ownership issues. The
37 retainer is just in the process of being finalized. The parties had
38 scheduled a questioning of Mr. McCracken and Barry Roman, 726's
39 affiant, for tomorrow.
40

41 So that would have been the 16th: (as read)

1
2 But given the late retention of insolvency counsel, that questioning
3 cannot proceed. Ms. Nicholson is not available to proceed tomorrow
4 with the questioning of Mr. McCracken. The Monitor and others are not
5 prepared to proceed with the questioning of Mr. McCracken and
6 Mr. Roman on separate days, despite Mr. Roman's availability on
7 November 16th, 2018. Pushing the questioning to Ms. Nicholson's
8 available dates will not afford the parties adequate time to put together
9 briefs or transcripts for December 4th or 5th.

10
11 While the Monitor and certainly others recognize new counsel need to
12 be accommodated, the Monitor is quite concerned with delaying this
13 application inordinately as the issue of entitlement to the units claimed
14 by 726 is holding up progress in terms of bringing this matter to some
15 form of conclusion. It affects everything. Simply by way of
16 explanation, if the units are declared to be owned by 726 and not subject
17 to any security of, for example, the bank, then that is going to have an
18 effect on additional recovery and, by extension, the cost allocations. If
19 the units are declared to be property of the applicants and subject to
20 CWB security, they will then need to be liquidated and that, too, will, by
21 extension, have an effect on recovery and the cost allocations.

22
23 And I just wanted to give you an opportunity to comment on that in the context of the
24 questioning that took place of both of those officers in early December.

25
26 **Submissions by Ms. Nicholson (Adjournment)**

27
28 MS. NICHOLSON: Well, My Lord, with respect to the first part of
29 that, which I don't think is your focus, but in terms of my retainer, I -- what was clear in
30 that letter is that we were retained with respect to matters that were before the Court,
31 which was with respect to our application.

32
33 THE COURT: Quite so.

34
35 MS. NICHOLSON: So -- and that's the first point.

36
37 With respect to his other points, My Lord, the issue that we talk about is a status and a
38 role of the Monitor in a way. And they are currently, in effect, advancing the interests of
39 the estate as a party litigant, so to speak. So the question is, to my mind, whether if
40 matters are to be advanced and declarations and relief is to be sought, whether that occurs
41 in a context where the matters are properly before the Court.

1
2 So applications are important because they set out what it is that people are asserting,
3 what relief that they're asking the Court to grant, and what evidence upon which it is
4 they're relying, so that one can frame questions at the cross-examinations, for example,
5 and be entitled, for example, to object to questions to the extent that they are not the
6 subject -- proper subject of what's before the Court. So --

7
8 THE COURT: But doesn't that beg exactly what I am inviting
9 your input on? Is it not quite clear going into those questionings that there are two
10 possibilities: 726 is not subject to any security of the bank or that they are subject to
11 security of the bank.

12
13 MS. NICHOLSON: That -- well, we even touch on it, I suppose, at
14 the cross-examination, but those issues were touched on at the, at the application -- or
15 sorry -- at the cross-examination.

16
17 THE COURT: But you are asking for more time to do more
18 than touching on, and I am just wondering why if -- what Mr. Bieganek, on behalf of the
19 Monitor and indeed a number of other parties ostensibly, is expressing that they do not
20 want inordinate delay, and it did move from the December dates to January to
21 accommodate your attendance. And now we are being affected by a request that, no, but I
22 need more time to be able to ask more questions in relation to what issues are now better
23 crystallized, from your perspective, by Mr. Russell's application.

24
25 MS. NICHOLSON: Okay. So, My Lord, I have never understood
26 until I received the brief of CWB, the basis upon which it was asserting that it had
27 security. I have never -- that is what -- that is not clear.

28
29 THE COURT: Okay. But then help me to --

30
31 MS. NICHOLSON: So, so --

32
33 THE COURT: -- grasp what your understanding is of what
34 Mr. Bieganek is saying there of there being two options. You are either subject -- 726 --
35 you are either subject to the bank, or you are not. What is -- for security counsel, what is
36 the issue there?

37
38 MS. NICHOLSON: I don't, I don't know actually. When I read that,
39 I don't know how it is that it is, it is subject. How does 726 who buys the asset, how is it
40 subject to the security?
41

1 I mean, I now know it's pursuant to Section 28(1) of the *PPSA* that Mr. Russell's client,
2 CWB, now is asserting that its security interest followed and travelled from --

3
4 THE COURT: M-hm.

5
6 MS. NICHOLSON: -- the seller, which, I mean, there's -- now
7 there's issues about the seller potentially, CNC, or that we would want to canvass about
8 that -- but it travelled, and it now attaches and continues to attach to 726's interest.

9
10 So that is a, that is a first time. Normally, if you've got an application, which we now
11 have, he relies on this, so that we can know that that is being asserted, so that we can
12 review the statute, review the regulations, review the law, and then ensure that questions
13 are posed in relation to that, rather than just -- and we asked on numerous occasions of the
14 Monitor, what is the position until such time as we receive the CWB application, we had
15 that, but we didn't know the basis. I mean, now we know. It's Section 28.1 of the *PPSA*,
16 so that's great.

17
18 What is it -- what's the law? The law requires that it be demonstrated that a secured party
19 expressly or implyably authorize the dealing. So now, we now know, based on the
20 application, that this is what we need to cross-exam in respect of.

21
22 Likewise, 30.2 deals with buyers or lessees selling goods in the ordinary course of
23 business. We now know thankfully what it is -- the case that it is that has to be met, the
24 evidence that needs to be adduced in order for the Court to fairly hear this matter.

25
26 And so that's why applications and notice are important, so that the parties actually can
27 bring and ask the witnesses the appropriate questions. So now that we have the
28 application, we can do that.

29
30 So there was nothing -- I mean, I understand Mr. -- and the CWB's position was that they
31 wanted to find out what the evidence was. They wanted to, you know, search around, see
32 if they could get anything good in terms of asking the witnesses, and then, if they felt they
33 had a good case based on questions that they asked, they now advance the application,
34 which is what they've done.

35
36 So to wait and do that means, in my respectful submissions, that the only fair way to deal
37 with that is to ensure that questions get to be put that are material and evidence needs to
38 be proffered -- the opportunity given to the parties to do that, which if Your Lordship does
39 not grant the adjournment, we will never have -- the Court will never know the fulsome
40 picture on the question of express or implied authority. We'll never have that information,
41 nor will it ever have the information, including from Mr. McCracken or others, about

1 ordinary course sales, in respect of which I just even now over the lunch hour learned a
2 whole lot more about. Just now.

3
4 So if the Court doesn't get that information, then it is going to be making a determination
5 in the absence of crucial potential evidence that bears on this. And it's -- that's all.

6
7 THE COURT: Thank you.

8
9 Mr. Bieganek?

10
11 **Submissions by Mr. Bieganek (Adjournment)**

12
13 MR. BIEGANEK: Sir, I think it goes without saying in this
14 particular courtroom and this setting on commercial matters under the CCAA that one of
15 the hallmarks is that we work efficiently, we do our utmost to deal with matters as
16 expeditiously as possible, and as best we can try and work with complete information in
17 evidence. It's also a hallmark of the proceedings that, while generally the debtors put to
18 the good faith and due diligence test, certainly one of the hallmarks of the proceedings is
19 transparency and clarity.

20
21 I've heard Ms. Nicholson's position on this point with respect to not knowing the case that
22 needs to be met for quite some time. The fact of the matter is that in this particular
23 instance, the way that the -- I'll call it the proving process was set up by Your Lordship in
24 September was a method of trying to cut to the chase and deal with things in light of the
25 umbrella claims of the municipal government for advancing tax claims, and I believe --
26 although I wasn't there for that meeting with Your Lordship -- that was brought at the
27 instance of the Municipal District of Greenview who wanted to get some direction to deal
28 with things.

29
30 And at that time, Your Lordship agreed with the majority of counsel present that we
31 needed to await direction from the Court of Appeal in Virginia Hills but took up
32 Mr. Russell's suggestion that it would be appropriate for all parties to provide essential
33 affidavits proving their claims to ownership, security, and priority. And that was all laid
34 out and put into your order of September 6th.

35
36 The Rules of Court do not necessarily require an application in all instances. The Court
37 has the ability to set those issues. We have been operating under the rubric of your
38 September 6th order and that is what the Monitor has been guided by.

39
40 In a normal proving process, as we did with many other creditors -- most of them in the --
41 when we were in a -- what we thought was a restructuring proceeding -- parties would file

1 their material with the Monitor. The Monitor would give an opinion and reject, vary, or
2 accept everybody's claims. That's not the process that we have in this instance right now.
3 We have something else.
4

5 But the Monitor with the orders that had been given didn't given an opinion -- wasn't
6 asked to give an opinion -- but were advancing causes, so that we can get to the root of
7 who's entitled to what, so that among other things, once we understand where matters are
8 going with municipal taxes, we know at least who's ox is going to be gored with it.
9

10 So if, for the sake of discussion, 726 proves its claim in its entirety, that still doesn't end
11 the matter from a municipal tax perspective. There's still issues there. It may enlighten
12 their burden in terms of what their assets are visited with -- whether they're visited with
13 any costs associated with the proceedings. It's probably less likely if there need to be full
14 owner without any security. But other than subject to a municipal tax claims is a
15 completely different matter.
16

17 Now, Your Lordship refers to the letter of -- my letter of November 15th. I'd like to point
18 out or just remind the Court if I didn't at that time that the -- that letter was approved and
19 edited by counsel for 726, both Ms. Nicholson and Mr. McAllister.
20

21 Now, taking you back again to your order of September 6th, you did give a direction that
22 any and all secured claims with respect to property now or previously owned or operated
23 by all or any of the companies or any prior applicants in the proceedings should be the
24 subject of those affidavits. Right? And that was granted on September 6th.
25

26 And as Your Lordship is aware, the Seventeenth Report came out on September 10th, so a
27 mere four days after the granting of that order and without the Monitor having had the
28 benefit of everybody's affidavits asserting the various claims. Certainly, we're aware of
29 the CWB claim. Ms. Taha had sworn and filed affidavits previously in the proceedings
30 when the bank was proceeding with its application to appoint a receiver. But in respect of
31 the material, certainly of 726, all that we had was, at that time, material that they had
32 provided to the Monitor, either in meetings or through email to support the basis of their
33 claim. And as was pointed out by Ms. Nicholson in the report, while the Monitor felt at
34 the time -- and keep in mind, too, that at this point in time, the Monitor's view was all that
35 726 was claiming was the serial numbered units.
36

37 So at that time, the Monitor's initial assessment was they may be right, but subject to
38 anything material that arises -- and it has -- we may need to look at it. And this spoke to
39 ownership and questioned perhaps whether priority would need to be addressed, but there
40 was no conclusive findings, and certainly, the Monitor did not seek any order at that time
41 affirming 726's ownership or priority position with respect to the assets at Bonnyville.

1
2 Also as part of -- just double-checking -- yes. I think -- I believe it's again in the
3 Seventeenth Report, the Monitor, at paragraph 60, starts a discussion about what it
4 intends to do with the small wares. At that time, no adverse claims to the small wares nor
5 other claims to ancillary equipment had been advanced.

6
7 We now have claims to small wares and ancillary claims being advanced, but those were
8 not fully advanced until after Your Lordship agreed to adjourn, arising out of my
9 November 15th letter, and gave 726 leave to file not only an application but a
10 supplementary affidavit advancing further claims. So they got the advantage there to
11 advance further claims.

12
13 And while the Monitor certainly indicates -- and to be clear, we're not advancing a claim
14 to ownership to the serial numbered assets that were sold as part of the bill of sale in the
15 material. And just for reference sake, My Lord, I think I appended it to the -- well, it's
16 right in my reply brief -- the bill of sale is at tab 2 of my reply brief. That just merely lists
17 the serial numbered units. It doesn't list any additional or other equipment.

18
19 Now, Mr. Roman filed a two-volume affidavit on October 4th, which included that bill of
20 sale. The bill of sale indicates in it at paragraph 1(d) that the equipment is free from any
21 charge, lien, claim, mortgage, security interest, or encumbrance of any kind. And the
22 vendor is specifically listed as Canada North Camps Inc. That is now 185.

23
24 The issue we say of whether the equipment was purchased free and clear, consistent with
25 your directions on September 6th, to determine priority and whether assets formally held
26 by any of the applicants which is included -- which CNC has included is still subject to
27 security is fully raised by that statement in the bill of sale.

28
29 We look at the affidavit of Jessie Taha, sworn October 3rd, and in there at Exhibit G,
30 which is in the larger book of evidence, is a November 30th, 2011 security agreement
31 from CNC to CWB, wherein they take a security interest in all present and after acquired
32 personal property. That was a perfected interest, but to the Monitor's knowledge at that
33 time, CWB had not registered against any of the serial numbered assets, which were listed
34 in the bill of sale.

35
36 Now, Mr. McCracken was questioned extensively over a day and a half. Questions were
37 put to him by counsel for the Monitor, myself. They were also put to him by
38 Ms. Nicholson. And this is -- I'm going to get -- well, I might as well take you to that
39 now, so if you can turn -- if you have the transcript of Mr. McCracken before you,
40 My Lord. I'll give you a moment.
41

1 THE COURT: I have it.

2
3 MR. BIEGANEK: Okay. We start with page 115, and here at
4 line 5, Ms. Nicholson asks Mr. McCracken -- could I turn you to Exhibit C of the
5 October 2nd, 2018 affidavit. That's Mr. Roman's affidavit. This is a Unanimous
6 Shareholders' Agreement, dated December 10th, involving the Bonnyville Limited
7 Partnership.

8
9 THE COURT: I am sorry. I said I had it, but I just needed to --

10
11 MR. BIEGANEK: Find the different binder.

12
13 THE COURT: -- retrieve it from up the top part of the dais.

14
15 Page 115 did you --

16
17 MR. BIEGANEK: 1-1-5, correct.

18
19 And here, I'm getting to the Bonnyville GSA.

20
21 THE COURT: Yes.

22
23 MR. BIEGANEK: This is a Unanimous Shareholders' Agreement,
24 dated December 10th, involving the Bonnyville Limited Partnership and a Unanimous
25 Shareholders' Agreement pertaining to that -- yes -- to the general partner relating -- in
26 relation to that Bonnyville Lodge GP Ltd.: (as read)

27
28 A Yes.

29
30 Q Okay. And did you sign this Unanimous Shareholders'
31 Agreement on behalf of CNC?

32 A Yes.

33
34 Q And did you do so again in your capacity as a director or that
35 entity?

36 A Yes.

37
38 Q And the parties to the Unanimous Shareholders' Agreement,
39 to the best of your knowledge, are as stated therein?

40 A Yes.

41

1 Q And there are no others?

2 A Yeah, that's correct.

3
4 Q Okay. Thank you. Did you review this -- each of these? If I
5 call these collectively a Unanimous Shareholders' Agreement
6 involving the G -- pardon me -- the Unanimous Shareholders'
7 Agreement involving each of the Bonnyville project, the
8 Kilometre project, and the Peace River project -- if I call all of
9 those the Unanimous Shareholders' Agreement, you'll
10 understand?

11 A Yes.

12
13 Q If you turn to Article 4 of one of those GSAs, do you have that
14 in front of you?

15
16 Mr. Delblanc says, "Yes, we have it." Yesterday -- this is Ms. Nicholson: (as read)

17
18 We asked if Article 4 was the only section in the Wandering USA that
19 dealt with how the directors of the Wandering GP could borrow from
20 and grant security to others, and I believe you specified that you -- to the
21 extent that you learned of any other sections, you, of the USA, that dealt
22 with the issue you would advise.

23
24 Mr. Delblanc says, "That's fair. We said that." (as read)

25
26 Q And would you kindly provide the same undertaking with
27 respect to these USAs that we've just looked at?

28 A We will do that.

29
30 And they did provide those answers.

31
32 Then if you turn to page 163 -- because as part of this, there's a couple of issues that deal
33 -- come out of not just Bonnyville -- and that's where I've got some real trouble because
34 these leak over into the other pieces, too, My Lord -- that is the authority of
35 Mr. McCracken to sign on behalf of those limited partnerships and general partners. And
36 among the documents he signed were not only GSAs to CNC but also the guarantees to
37 the bank. And there is some germaneness to that issue on certainly the other three aspects
38 of it. So I'll get to that in a moment -- but you -- the bigger concern, I think, in all of this.

39
40 Now, starting at page 163, line 5: (as read)

41

1 And if we could now turn to Exhibit T, as in Tom, to the October 2nd,
2 2018 affidavit of Mr. Barry Roman.

3
4 MR. DELBLANC: We have it.

5
6 Q MS. NICHOLSON: That is the security
7 agreement, dated March 29th between Kilometre 147 LP and
8 CNC, correct?

9 A Yes.

10
11 Q It is signed by you?

12 A Yes.

13
14 Q And you signed in your capacity as the Kilometre 147 GP?

15 A Yes.

16
17 Q As an officer and director of that entity?

18 A Yes.

19
20 Q And if I call, there is three General Security Agreements
21 granted by three LPs in respect of Canada North Camps,
22 correct?

23 A Yes.

24
25 Q So from my perspective -- and you can correct me if you have
26 different information -- the form of the GSAs is the same in
27 all cases, and the only difference is with respect to the
28 particular LP, which is the party. Is that also your
29 information?

30 A I believe that's correct.

31
32 Q Okay. So in order to try and save time, I'm going to reference
33 the Wandering GSA and then ask if you will confirm that it is
34 applicable, the same evidence with respect to the balance of
35 the GSAs. All right?

36 A Okay.

37
38 Mr. Delblanc interjects: (as read)

39
40 Could you put me back to that exhibit, please.
41

1 And then the other Mr. Gallant (phonetic) says, "I have it. Thank you."
2

3 MS. NICHOLSON: Okay. Just off the record for a moment.
4

5 Then we have an off the record discussion. Then we go back on: (as read)
6

7 Q MS. NICHOLSON: Mr. McCracken, it's my
8 understanding and thanks to the Monitor's counsel who has
9 confirmed that there is a further General Security Agreement,
10 dated March 29th, 2017, in respect of the Bonnyville LP in
11 favour of Canada North Camps. Is that your information, as
12 well?

13 A Correct.
14

15 Q When you get a copy of that, I would like to mark that as an
16 exhibit?

17 A That's fine.
18

19 Q And then they're collectively referred to -- all of the Peace
20 River GSA, the Kilometre 147 GSA, and the Bonnyville GSA
21 as the GSAs together with the Wandering River GSA?

22 A Sure.
23

24 And then there's further questions answered and asked about that.
25

26 Now, we break for lunch shortly after that, and I am unable to confirm whether I provided
27 a copy of that GSA to Ms. Nicholson. One exists -- we have it here with us -- but it was
28 there; it was discussed; it wasn't entered as an exhibit, so it's not in evidence.
29

30 I did go back to see if there were any other references to the GSA in the evidence, and in
31 the Monitor's Fifteenth Report -- additional copies of which I have -- there's no reference
32 to the GSA, per se, but there is a reference at paragraph 36 to the registrations that 185 --
33 Canada North Camps -- had made against all of those partnerships while in addition to
34 HML --
35

36 THE COURT:

I am sorry. What paragraph are you at?

37
38 MR. BIEGANNEK:

36, My Lord.

39
40 THE COURT:

Thank you.
41

1 MR. BIEGANEK: So it's there.

2
3 And, as well, while Ms. Nicholson says there wasn't much discussed about it, in
4 paragraph 18 of Mr. Roman's affidavit, sworn October 2nd, you can just jot this down. I'll
5 read it out to you, My Lord, and he attaches the -- he attaches the PPR search: (as read)

6
7 On or about March 29, 2017, CNC registered a purported security
8 interest in the Alberta Personal Property Registry as against some or all
9 of the Bonnyville equipment. Attached as Exhibit D is a copy of the
10 personal property registry search for registration number 17032937455
11 identifying the Bonnyville equipment therein.

12
13 So --

14
15 THE COURT: And that was at paragraph -- what -- of his
16 affidavit?

17
18 MR. BIEGANEK: 18.

19
20 THE COURT: Thank you.

21
22 MR. BIEGANEK: So I appreciate Ms. Nicholson's comments
23 about the role the Monitor's now playing, given the liquidation that we have, but it's the
24 role that we're playing. I mean, we're taking the Court's direction.

25
26 As I pointed out earlier, if were in a claims-proving process, the Monitor would be able to
27 ask questions of party claimants to deliver up information to support their claims and
28 support their priority, and those parties would have to deliver.

29
30 We asked certain questions of both Mr. McCracken and Mr. Roman during the course of
31 the questioning about various -- what I consider to be very simple things, regardless of
32 whether there's an application or not before the Court on the point. The Court had
33 directed us to make a determination of priority, not only to assets which are held, but
34 assets which may have formally been held by any of the applicants. That's the direction
35 of the September 6th order.

36
37 That questions we asked both of them: Did you get a release letter from the bank? And
38 now we hear this morning -- twofold things -- well, for the first time.

39
40 Number one, with respect to the Bonnyville GSA that we never had a copy of it. Well, it's
41 unfortunate it wasn't in evidence, but we did discuss it on more than one occasion. I am

1 uncertain today with my failing memory, My Lord, as to whether or not I provided a copy
2 to Ms. Nicholson. There were a lot of additional documents that were brought forward
3 and provided during the course of that hearing. But at no time between the date of the
4 questioning or even after we filed our brief, which clearly articulated our position and our
5 reliance on that GSA, nor even in their reply brief do we hear about this void until today
6 that the GSA they've never seen.

7
8 So I'm -- I apologize to the Court for that if the fault rests with me. But I simply pose the
9 question rhetorically, pick up the phone and ask. And particularly since we've discussed
10 it and it appears to have been missed by all counsel to enter that document as an exhibit
11 during the course of Mr. McCracken's questioning.

12
13 The second bit is that they now consider their request that we made of certainly
14 Mr. Roman to provide evidence of any PPR searches on the Stikeman file or whether or
15 not they had a release letter from Canadian Western Bank to be relevant and material
16 because the bank filed its motion days before I filed my brief. And we've had a lot of
17 water in terms of time flow under the bridge of parties. And I appreciate there was a
18 Christmas break, but if there were additional things that needed to be done, in my
19 experience, counsel generally work to get those done, so that we're able to address all of
20 the issues before the Court on the dates that are set by the Court.

21
22 Now, I also want to add that prior to the questioning of -- the questioning of
23 Mr. McCracken and the questioning of Mr. Roman, Ms. Nicholson did avail herself of the
24 opportunity to pose written interrogatories to Ms. Taha -- I'm sure Mr. Russell will speak
25 to that -- but there was never a subsequent request made to do more of those things.
26 There were simply requests made to adjourn with nothing more.

27
28 THE COURT: Remind me, Ms. Ta (sic) --

29
30 MR. BIEGANEK: Ms. Taha is the bank's representative.

31
32 THE COURT: Oh, sorry. Taha -- I apologize.

33
34 MR. BIEGANEK: Taha. Right.

35
36 THE COURT: Of course. She is here.

37
38 MR. BIEGANEK: So there was some written interrogatories --

39
40 THE COURT: Yes.

41

1 MR. BIEGANЕК: -- that were provided. They've not been put
2 forward, so I assume they don't have or need or consider themselves needing to rely on
3 those. But there were answers provided to the questions posed, and those were done in
4 writing.

5
6 And I appreciate that this does -- I mean, the allegations certainly made by the bank --
7 raise significant issues. I would also say though, My Lord, that for counsel who practice
8 in this area and practice banking generally, it seems obvious that if there's a \$20 million
9 transaction and there is even the prospect that there might be some debt upon those assets,
10 that would be investigated as part of any ordinary due diligence and attempts would be
11 made to ensure that appropriate letters of release or discharges were obtained. That's all
12 we're trying to get at.

13
14 But what they're asking for now is yet a further adjournment to deal with further things
15 expanding even more. I've heard Ms. Nicholson say at least twice now that we've got new
16 information available to us that now we know who actually sold the assets. And, well, the
17 point -- it'd be the bill of sale already. Are you telling us now that somebody else sold
18 those assets to you, 726?

19
20 While I did not articulate it aloud on our case management being before you coming out
21 of my letter of November 15th, the worst fears of the Monitor have come to pass, and that
22 is we have -- are going to have and this Court is going to have an extremely hard time
23 relying on any information that comes forth from Mr. McCracken.

24
25 And now, we've got a situation where 726's position -- because they've put up obstacles
26 and information hasn't been provided -- and those obstacles included were not retained
27 properly on this piece or there's no proper motion before the Court and I've already took
28 you through where I thought the rubric was, now we're going to -- we need another
29 chance to backfill further, just like we did with our supplementary affidavit.

30
31 I mean, Sir, they're not just claiming the stuff that they've got listed in serial numbers.
32 They're claiming everything -- and when we get to that application or those pieces, I will
33 point out to you how that's not the case -- but they claim everything.

34
35 And my concern -- on behalf of the Monitor and I'm sure all the bank, although
36 Mr. Russell can speak to it -- is that we never know what we're going to get, but we seem
37 reasonably certain that it's not going to support the position of the Monitor, and I hate to
38 say that in front of the Court, but it seems to be true. The information that we've had from
39 Mr. McCracken in the past said one thing. The information we get now says another.

40
41 And in the absence of having paperwork that was done contemporaneously with the

1 transactions in question, we do not believe the Court's going to be in a position to accept
2 anything that Mr. McCracken might say and to the extent that 726 is relying upon that,
3 that's also a detriment.

4
5 Now, I get that they might want to ask the bank questions. Why didn't they do it over the
6 last month?

7
8 THE COURT: What was the scope of the written
9 interrogatories, and what gave rise to it?

10
11 MR. BIEGANEK: Mr. Russell can speak to that. I didn't pay a lot
12 of attention to that piece, but -- go ahead.

13
14 MR. RUSSELL: Thank you, My Lord.

15
16 Ms. Nicholson had sent a letter basically trying to clarify what the security position was
17 that CWB had with respect to the limited partnerships. And what we did was prepare
18 affidavit number 7 in answer to that, which Ms. Nicholson advised had satisfied her on
19 the interrogatories.

20
21 THE COURT: So that was a request made when?

22
23 MR. RUSSELL: Prior to the questioning.

24
25 THE COURT: Yes.

26
27 MR. RUSSELL: I'm just looking for the date of the seventh
28 affidavit either -- the seventh affidavit was sworn December 3rd, 2018, so that was one
29 day before the start of questioning.

30
31 THE COURT: Right.

32
33 MR. RUSSELL: And the interrogatories had preceded them.

34
35 But, Sir, the interrogatories, there was no substantive discourse between Ms. Nicholson
36 and I on the interrogatories. Instead, I provided affidavit number 7 --

37
38 THE COURT: I see.

39
40 MR. RUSSELL: -- which answered the questions she had been
41 asking.

1
2 THE COURT: And it was surrounding clarification of security?
3
4 MR. RUSSELL: Of CWB's security position.
5
6 THE COURT: In relation to the limited partnerships.
7
8 MR. BIEGANEK: Correct.
9
10 MR. RUSSELL: Yes.
11
12 What I did was I attached to the -- because Ms. Taha's first affidavit and sixth affidavit
13 were dealing with the overall security position of the, the bank, largely with regard to
14 CNC and, you know, the primary borrowers. But there was reference to the LPs having
15 given guarantees.
16
17 In affidavit number 7, we put into evidence the guarantees and the assignments of
18 (INDISCERNIBLE) that had accompanied the guarantees at the time. And Ms. Taha
19 deposed that CWB -- it continues to rely on the guarantees and the assignments of
20 (INDISCERNIBLE).
21
22 I do have some additional comments, My Lord --
23
24 THE COURT: Of course.
25
26 MR. RUSSELL: -- once Mr. Bieganek is done.
27
28 THE COURT: Thank you very much.
29
30 MR. BIEGANEK: So as I've said, I appreciate there's a significant
31 jeopardy here to 726. But in this particular instance, the fact of the matter is that some of
32 these questions did arise during the course of the questioning. Mr. McCracken gave an
33 undertaking to ask Ms. Barnhouse if she received a letter of no interest. We don't have a
34 response to that yet. He could have been asked questions arising out of that during the
35 course of the questioning but wasn't.
36
37 And as I've said, the -- I would submit to the Court that the issue, certainly -- and this goes
38 to whether or not the CWB release had happened -- was alive. When we talk about the
39 CNC General Security Agreement, I've taken you through the questioning of
40 Mr. McCracken. It was done -- not by me -- by Ms. Nicholson on the issues and the
41 ability of Bonnyville to give security. And it is unfortunate that that document wasn't

1 entered, but it's there. Everybody was aware of it. And I don't recall being asked to
2 provide a copy, assuming I hadn't provided one, at that time. And I just, as I said, can't
3 remember.

4
5 But my -- I think the bigger concern of all of this, Sir, is the Bonnyville issue has
6 expanded beyond your -- you know, it's clear to beyond your ownership. But similar
7 issues are extant in respect of each of the partnerships.

8
9 So if we're talking about the validity and forcibility of the CNC GSA, as an example, if
10 we just adjourn Bonnyville, well, Bonnyville's going to be subject to whatever
11 determinations you make on the other three because the issues the same. Did
12 Mr. McCracken have the authority to grant those on his own in the absence of the
13 Unanimous Directors Resolution? If not, what's the consequence of it?

14
15 The answer, it seems to me, is the same in all four. And now we've got issues with
16 respect to small wares. Some of those things may be able to be addressed, but my biggest
17 concern is that we're not going to be able to address everything in a very fulsome manner
18 because the legal issues and the facts appear to be virtually identical on those points in all
19 four.

20
21 Now, I'm not hearing Ms. Nicholson ask that they be adjourned, but I don't believe for a
22 minute she's prepared to say she'll take whatever you decide in one in the other, unless
23 she's prepared to admit that now. But the fact of the matter is it's -- well, each of these
24 limited partnerships has different nuances to them. When it goes down to -- aside from
25 the issue, aside from the issue with respect to whether or not CWB released its interest on
26 the sale -- the \$20 million sale or provided a release of interest, all the remaining issues
27 are very similar. The law's the same. The contractual matrix is similar. The effect and
28 nature of consideration is similar. All of those things are similar, so I don't believe those
29 issues can or should be hived off, and nor am I suggesting that you should hive off the --
30 we'll call it the big one on Bonnyville -- and that's whether the CWB security in the
31 underlying assets still exist.

32
33 But my bigger concern is unless they're prepared to accept whatever ruling you make on
34 the other three as binding on Bonnyville, we can't just -- it's not a function of hiving off
35 the camp. We have to hive off issues. And in my respectful submission, the only issue to
36 hive off would be if there is one -- and I know Mr. Russell's position on that is the same as
37 mine -- but if there is one, the only issue would be that one --

38
39 THE COURT:

Sorry.

40
41 MR. BIEGANNEK:

-- whether or not the Canadian Western Bank

1 released its interest. And if not, whether or not those assets remain subject to its security.
2 The rest should not be delayed. But if they insist on delaying Bonnyville, it delays
3 everything.
4

5 So unless Your Lordship has any further questions of me, our position is there ought not
6 to be an adjournment. If the Court is inclined to give one, then I think there's an issue of
7 throwing away costs that needs to be spoken to.
8

9 And just to give the Court some idea of what was spent in December alone, the Monitor
10 received a bill from us for 63,000 and change. So -- and I think they got a good deal at
11 that price. But aside from that, the -- there was a significant amount of work that went
12 into that piece in December, and we would be looking to have some addressed to that.
13

14 THE COURT: Just give me a minute.
15

16 Do I have any evidence that would disclose what a PPR search on Bonnyville would have
17 provided if Stikeman had done that search in the fall of 2014?
18

19 MR. BIEGANEK: I don't -- there's nothing before you that shows
20 what it was in December of 2014 to my knowledge.
21

22 THE COURT: Okay.
23

24 MR. BIEGANEK: I certainly don't have it of that historical notion.
25

26 It would have been -- I think, My Lord, in thinking about it, the Bonnyville Limited
27 Partnership was not established until December of 2014. So the search that would be
28 germane is what -- keep in mind. Bonnyville Camp was already set up.
29

30 THE COURT: Right.
31

32 MR. BIEGANEK: Right. So it's there. And Canada North is
33 operating it. I don't -- my assumption -- and just take that for what it is -- is that it's a
34 Canada North Camp sitting on land that's owned by -- I believe it's in the name of 137
35 right in Bonnyville.
36

37 Then there is a paper transaction which saddles a list of assets to 726 with the bill of sale
38 for \$20 million plus tax. The limited partnership is established and those assets are on
39 paper given over to -- from 726, they're inserted into the Bonnyville partnership. That's
40 their contribution, as Ms. Nicholson took you through, in the amended and restated
41 partnership agreement this morning. So that's their contribution.

1
2 But to all outward appearances, it's (INDISCERNIBLE) Canada North is operating it to.
3 There's an operating agreement in service here. So they're still running show. It's just the,
4 the question is who's the underlying owner, and it appears on the bill of sale that 726
5 purchased it.

6
7 But did they purchase them free and clear of security that was given by Canada North
8 Camps at the time? So the -- we do need to see a search about November, December of
9 2014, and that's why the request was made of the review of the Stikeman file to see what
10 was there if you find from Canada North what's there because we've got the financial
11 statements.

12
13 THE COURT: Right.

14
15 MR. BIEGANEK: Now, I'm hearing there's further evidence to be
16 given about those, but Mr. Roman said he had financial statements and did some financial
17 investigations. I assume the '14 statements are never dated January '15. So whether it
18 was backdating or the dates happened, he had something in hand at some point. And at a
19 minimum, the 2013 statement showed some interest of Canadian Western Bank.

20
21 So we say under the *PPSA*, knowledge of a corporation is something that should be
22 brought -- like, a reasonable person would take cognizance of. Did Stikeman get a search,
23 right? I don't need to see the opinion, but the search itself would be nice. And if the
24 answer's no, okay. But we don't have that. That's why we ask. We can't -- unfortunately,
25 with a PPR, you can't really do historical searches. They're only as good as the day you
26 run all, so ...

27
28 THE COURT: Right.

29
30 Ms. Nicholson, points to -- no, sorry.

31
32 I am going to ask you, Mr. Bieganek, three areas in particular that they would like to
33 make enquiries on. One is the questioning of approval or no interest by Canadian
34 Western Bank. Your answer is that she had her opportunity in the interrogatories and was
35 satisfied by the affidavit, while it does not specify that particular question that that was a
36 live opportunity that the Court ought to assess in exercising discretion on the denial of the
37 adjournment in the context of all of the other things that have done.

38
39 MR. BIEGANEK: I would, I would -- in the context of the original
40 request for information from the bank, perhaps not, but right after the bank filed its
41 application, we all know the date we were looking for. If they had information or had

1 wanted to know that information, they had opportunities to ask for it. I mean, we asked it
2 of them, and they declined. Right? Now they're saying, well, we should be able to ask
3 the bank if they got to. Trying to be neutral, I said, sure. Go ahead and ask. But they
4 didn't.

5
6 MS. NICHOLSON: Begged for an adjournment.

7
8 MR. BIEGANEK: Well, asking for an adjournment and asking for
9 the information are two different things.

10
11 And then if something comes of that or if the answer's no, then nothing arises from that.
12 But we need -- we go from there. But *CCAA* proceedings and insolvency proceedings in
13 general aren't intended to be drawn out pieces of litigation. They're real time, and in this
14 case, the real time urgency is trying to get everything sorted out as quickly as we can,
15 convert everything we can to cash, and then see what comes out of any determination of
16 priority within the municipalities so we can wrap this thing up.

17
18 And that's what the January 29th report is made of. And so we're, we're working to get to
19 that point. So that's, that's, I think -- I hope that answers your first point.

20
21 THE COURT: Well, that is right. That is my first.

22
23 The second that she references is whether CNC made the sale for the 20 million assets in
24 the ordinary course of business.

25
26 MR. BIEGANEK: Okay.

27
28 THE COURT: Any submission I took -- and maybe your body
29 language even here in the courtroom -- reflects what's in your brief to say that that ought
30 not to trouble the Court at all.

31
32 MR. BIEGANEK: That's correct.

33
34 THE COURT: Okay.

35
36 And then, thirdly, whether Mr. McCracken was acting as agent in some capacity.

37
38 MR. BIEGANEK: I'm not sure what that means, what that's
39 intended to do. Mr. McCracken was a director and officer of CNC. He was a director of
40 each of the GPs. I can't recall off the top of my head whether he was an officer, but my
41 recollection is he had some capacity. Him and his wife were running the camps through

1 Canada North, so they, they ran the business. They -- the document matrix, that
2 eventually I hope to get to take you through, shows quite clearly that Canada North is
3 running the camps. And to all outward appearances, it would -- anybody running through
4 there would know it's a Canada North Camp. So --

5
6 MS. NICHOLSON:

My Lord, if I might just clarify one point
7 because I'm not sure if you're taking my submission as being that Mr. McCracken was the
8 agent. That wasn't -- if that was your understanding of my concern and my wish to
9 examine Mr. McCracken, it was in respect of whether CNC was merely an agent for
10 another company, a part of the related group, and it was not actually owning.

11
12 My information is that CNC was actually leasing some of these, so it wasn't itself an
13 owner. I've just learned a lot of this. So -- and then -- so the question is what we -- the
14 tracing of the ownership of the assets because if the assets were not owned by CNC, then
15 how is it that CWB's security affects them -- attaches to them. That's the issue.

16
17 So examining Mr. McCracken to understand what is the business of CNC, whether it does
18 in an ordinary course do this, whether these goods were actually leased, whether it had
19 title to them when it gave a bill of sale. It never represent -- these representations about
20 ownership in that bill of sale. It specially states that it does not give representations in
21 that regard, so the sale or as-is wares in that regard.

22
23 So those are questions that are now live on account of the CWB application. So I just
24 wanted to clarify that one point, My Lord, that I wasn't arguing that Mr. McCracken was
25 an agent.

26
27 THE COURT:

Okay. That was what my notes reflected, but in
28 any event, thank you very much.

29
30 Mr. Bieganek, in light of your friend's clarification whether it was CNC in some fashion
31 acting as agent for some other entity.

32
33 MR. BIEGANEK:

Sir, the information that's been provided to the
34 Monitor and played out in reports previous to the requested affidavit material, the
35 information that we've had to this point shows that the bill of sale was signed by CNC; the
36 money went into an account of CNC's; and was subsequently disbursed.

37
38 We understand that some loans may have been paid and that a -- one of them might have
39 been a small amount at BDC but -- and that was outlined actually in one of the answers in
40 undertaking that was given by Mr. McCracken and his questioning. And Mr. Russell took
41 you through that because it was an appendage to his brief. So it would show where the

1 money went. I didn't see in that, but it went to -- I missed it. Which tab was that, Chuck?

2

3 MR. RUSSELL: Tab 4 of the first brief.

4

5 MR. BIEGANEK: Tab 4. So just so we're clear, there were -- if
6 you have tab 4 to Mr. Russell's brief?

7

8 THE COURT: I do not unfortunately.

9

10 MR. BIEGANEK: Okay. Why don't I hand you up this copy --

11

12 THE COURT: Yes. Let me take a quick look.

13

14 MR. BIEGANEK: -- sure -- so you can see. That's the -- I asked
15 for an accounting where --

16

17 THE COURT: Oh, I do, I think, although this here -- you got
18 the tabs for -- I just do not --

19

20 MR. BIEGANEK: Okay. That -- we asked for an undertaking from
21 Mr. McCracken to provide an accounting of where the 20 million went. And you'll see a
22 few -- there's two or three small -- relatively speaking, small payments to lessors in the
23 hundreds of thousands of dollars. CWB appears to have received some payments on
24 loans, but it doesn't fully account for all 20 million. If my math is correct, it is about
25 6 million shy, and I think there's an accounting for 13 in that.

26

27 So -- now, maybe the other 6 went to pay another equipment lessor, but that's not the
28 information we have. We don't know what it is. I did ask where is the other 6, but I don't
29 have it.

30

31 So in terms of -- there were other things sold -- okay, I see that. But even as you can tell
32 from our brief, the longer the *PPSA* is reasonably straight forward. It's been around for --
33 well, since 1990 -- leases for terms of more than one year, subject to the *Act*. We don't
34 have searches of what was in place at the time, but even if it's a true lease, it might be
35 subject to secondary security if there's a problem with it, assuming the first lessor are
36 registered.

37

38 I've had one Master call a statutory theft, but that's essentially the effect of the *Act*, right?
39 It becomes a contest in priority between security claims, as defined under the *Act*. So
40 how does it affect -- how is it affected by CWB? We'd have to look at what the nature of
41 those leases were to begin with -- if they were financing leases, then any equity in it goes

1 to the general security. If they're true leases, less likely opportunity for that to happen, but
2 they're still subject to the *Act*.

3
4 So in this case, we weren't talking about a recovery. We're talking about a buyout or
5 payout. But Canada North conveyed the assets to 726, and that bill of sale is what 726 is
6 relying on to assert their ownership position.

7
8 So I think it's -- I see that CWB got some money, and it's a live issue. Did they discharge
9 -- were they -- did they know? And did they give a release of their interest in those
10 assets? It's a simple question.

11
12 THE COURT: If the Court is mindful of some aspects of the
13 fairness argument that your friend makes --

14
15 MR. BIEGANNEK: M-hm.

16
17 THE COURT: -- what do you say is the maximum amount of
18 time or the appropriate amount of time?

19
20 MR. BIEGANNEK: Well, that depends on availability of the Court.

21
22 THE COURT: Of course.

23
24 MR. BIEGANNEK: Because at this stage, I don't think -- well, we
25 need Your Lordship to hear it. I would not want to see this become a free-for-all. There
26 are very narrow issues now that are identified as in the answer.

27
28 And I would think that those narrow issues could be addressed through written
29 interrogatories. Before we go any further, we need the undertakings that were given
30 answered. I mean, the first things first. What's sauce for the goose is sauce for the
31 gander, and 726 should come forward with that information. There's no reason not to
32 now. There hasn't been since the bank filed their application.

33
34 THE COURT: What if I gave overnight to get the answer from
35 CWB on the first question as to the matter of approval of the sale or a notice of no
36 interest, which I recognize is his answer. But I am just saying, timeline-wise --

37
38 MR. BIEGANNEK: Like, I'm ready to argue.

39
40 THE COURT: -- you are ready to go.

41

1 MR. BIEGANEK: I'm ready to argue. I've prepared to argue --
2
3 THE COURT: Right.
4
5 MR. BIEGANEK: -- based on what we've got.
6
7 THE COURT: Okay.
8
9 MR. BIEGANEK: Because my assumption is there isn't one.
10
11 THE COURT: Right.
12
13 MR. BIEGANEK: Right?
14
15 THE COURT: Okay.
16
17 MR. BIEGANEK: So --
18
19 THE COURT: But to at least cover that one off.
20
21 MR. BIEGANEK: Yes.
22
23 THE COURT: Secondly, the -- well, I am not even sure there is
24 a second one because I am not --
25
26 MR. BIEGANEK: Well, the undertaking that was asked of
27 Mr. McCracken was to speak with Ms. Barnhouse and determine if --
28
29 THE COURT: Oh, yes. No. That is on the other side of the
30 equation.
31
32 MR. BIEGANEK: Yes.
33
34 THE COURT: Get that information, so that we were not
35 dealing with adverse inferences.
36
37 MR. BIEGANEK: Right.
38
39 THE COURT: We would know what the answer is. To get
40 those points, I am not much impressed that \$20 million can be in the ordinary course of
41 business. I do not need Mr. McCracken. I don't know that I would rely on his evidence if

1 he said it. But the -- and then this agency, that is a matter of law. There needs to be some
2 outward indicator.

3

4 MR. BIEGANEK: Yes. We see he paid out other parties.

5

6 THE COURT: Right.

7

8 MR. BIEGANEK: Okay. We accept that.

9

10 THE COURT: Right.

11

12 MR. BIEGANEK: We're not going to challenge that.

13

14 THE COURT: No.

15

16 MR. BIEGANEK: We just want to know where the money went.

17

18 THE COURT: Exactly.

19

20 So if those two points were covered overnight from the Monitor's perspective as an officer
21 of the Court, you are saying you would be ready to proceed in the morning.

22

23 MR. BIEGANEK: You bet.

24

25 THE COURT: Okay.

26

27 Mr. Russell?

28

29 MR. RUSSELL: Are you through with Mr. Bieganek for the time
30 being?

31

32 THE COURT: I have no idea. That is a very good question.

33

34 **Submissions by Mr. Russell (Adjournment)**

35

36 MR. RUSSELL: Okay. Well, I will speak until I'm told to sit
37 down, My Lord -- have finished what I want to say.

38

39 Let me -- if I understood what the agency argument was, I think I've got the answer here.
40 And I'm looking at the audited financial statements, and these are the -- this is in the
41 binder called "Involving Answers to Undertakings."

1
2 THE COURT: M-hm.
3
4 MR. RUSSELL: And the -- it's under tab 1. And I have to admit,
5 I may very well have completely misunderstood what the -- this argument was, but --
6
7 MR. BIEGANEK: I think, My Lord, if -- the binder you're going to
8 need to look at is the transcript binder, and you would be under tab 2. And it would be
9 tab 2, so that's the transcript of Mr. Roman, and it's -- if it's the 2013 statements or 2014
10 statements?
11
12 MR. RUSSELL: 2014 statements, yes.
13
14 MR. BIEGANEK: So it's the second set of financial statements
15 under tab B of that binder.
16
17 THE COURT: Sorry. 2014?
18
19 MR. BIEGANEK: Yes.
20
21 MR. RUSSELL: Yes.
22
23 THE COURT: I just happened to have tabbed that. That was
24 not so hard as it sometimes is. Go ahead.
25
26 MR. RUSSELL: All right. Well, Sir --
27
28 THE COURT: This is -- are we into the notes?
29
30 MR. RUSSELL: I'll take you through just a couple of places if I
31 could.
32
33 THE COURT: Okay.
34
35 MR. RUSSELL: First of all, these are audited financial
36 statements.
37
38 THE COURT: Right.
39
40 MR. RUSSELL: Secondly, if you look at the consolidated
41 balance sheet, which is probably about four pages in -- or second page in after -- first page

1 after the audit certificate.

2

3 THE COURT:

I believe I have that.

4

5 MR. RUSSELL:

Now, the property -- I'm just going down the
6 assets about six or eight lines down -- "Property, plant, and equipment" had a value of
7 \$56 million at that point.

8

9 Then, if you turn to note 3 --

10

11 THE COURT:

Sorry. You took me to 56 million just on the --

12 I have it.

13

14 MR. RUSSELL:

Yes. Just on the property, plant, and equipment.

15

16 THE COURT:

Right. Okay.

17

18 MR. RUSSELL:

Then, five more pages in is note 3.

19

20 THE COURT:

I have that.

21

22 MR. RUSSELL:

And you'll see, Sir, that it's an analysis of the
23 original cost -- 75 million -- accumulated appreciation, and the net book value, then,
24 coming down to the \$56 million.

25

26 THE COURT:

Where am I reading from on paragraph --

27

28 MR. RUSSELL:

Okay. Note number 3.

29

30 THE COURT:

-- 3?

31

32 MR. RUSSELL:

Take the bottom line of numbers. So there's
33 columns -- four columns --

34

35 THE COURT:

It is a note 3 that --

36

37 MR. RUSSELL:

Yes. Note number 3?

38

39 THE COURT:

Yes?

40

41 MR. RUSSELL:

"Property, plant, and equipment"?

1
2 THE COURT: Right?
3
4 MR. RUSSELL: Okay. It's the -- the first item is "land." The
5 cost is 9 million.
6
7 THE COURT: Of course. Yes.
8
9 MR. RUSSELL: Okay. Yes.
10
11 So if you just go down to the very bottom --
12
13 THE COURT: Yes.
14
15 MR. RUSSELL: -- the total of the plant, property, and
16 equipment --
17
18 THE COURT: Okay.
19
20 MR. RUSSELL: -- \$75 million was the cost, accumulated
21 depreciation is the 18 million, and that leaves the 56 million.
22
23 THE COURT: I see. Yes. That is how we get to that number.
24 Yes.
25
26 MR. RUSSELL: Right.
27
28 THE COURT: Yes.
29
30 MR. RUSSELL: And then the next line down says, "included in
31 the above are camp trailers, equipment, et cetera, under capital lease."
32
33 So there's no doubt that CNC was a lessee.
34
35 THE COURT: Yes. Okay.
36
37 MR. RUSSELL: And, in fact, in number 6, the long-term debt --
38 it gives for the particulars of that -- and then, note number 9 is the subsequent event, and
39 this is where the auditor is certifying that the company sold 9.5 million of assets in the
40 Bonnyville camps for cash consideration of \$20 million.
41

- 1 THE COURT: Okay.
- 2
- 3 MR. RUSSELL: So I don't see how 726 is going to be able to
4 demonstrate that the evidence that they have on the agency is -- trumps the -- this audited
5 report.
- 6
- 7 THE COURT: What you are saying is that -- what is the
8 acronym -- the GAA -- the generally accepting accounting principles, is it?
- 9
- 10 MR. RUSSELL: Yes.
- 11
- 12 THE COURT: -- would say that in the event that there was
13 some other agency component to this, the audited report would require that you report
14 that.
- 15
- 16 MR. RUSSELL: Absolutely.
- 17
- 18 THE COURT: Okay.
- 19
- 20 MR. RUSSELL: Unless the auditors were negligent, and I don't
21 think anybody's been suggesting that.
- 22
- 23 THE COURT: Right. Yes. All right. I have that point.
- 24
- 25 MR. RUSSELL: The next point, My Lord -- if I could have you
26 look at the affidavit of Christina Kiss (phonetic) from our office.
- 27
- 28 THE COURT: I have no idea where that is. I have read it.
- 29
- 30 MR. RUSSELL: Perhaps, then, I'll just -- at tab B, Sir, page 7.
- 31
- 32 THE COURT: Yes.
- 33
- 34 MR. RUSSELL: So this is where I had been making the pitch for
35 having everybody lay their cards on their table under oath, so that we knew the matrix that
36 we were dealing with going forward.
- 37
- 38 THE COURT: Yes.
- 39
- 40 MR. RUSSELL: And at page 7, line 7, Your Lordship says after
41 making -- after having a discussion with Mr. Quinlan with regard to, with regard to

1 whether the Monitor supports this or not -- line 7, Your Lordship asks me: (as read)

2
3 Is there anything else from your perspective? I hear you on both the
4 ownership and the nature of claim, security clarifications, or what your
5 request would be for affidavits to assert those on a timely basis.
6 Anything else from your perspective.
7

8 My answer is: (as read)
9

10 No, My Lord. Once we've seen certainly the property ownership claims,
11 once we've seen the evidence of that, we can determine whether CWB
12 sees an argument that they have a challenge to that. We may want to
13 have some questioning, but I suggest that we can, through counsel, try to
14 get that rolling, as long as we get the first step of the affidavits tabled.
15

16 So that, Sir, was the kind of matrix -- a conclusion of the, of the request for the actual
17 matrix.
18

19 The next thing is Ms. Taha's affidavit of October 3rd. And, My Lord, I'll just -- I'll
20 paraphrase. There's no need to turn to it, but it's paragraph 15. Your Lordship's already
21 referred to this at the beginning of this afternoon. Paragraph 15, what I -- what Ms. Taha
22 says is: (as read)
23

24 In essence, CWB is claiming a first charge through the CWB GSAs to
25 all collateral over which any of the claimants do not have a valid
26 ownership interest that is not defeated by the CWB GSAs.
27

28 So I'm sorry that Ms. Nicholson had not grasped that this was a reference to Sections 28
29 and 30 of the *PPSA*, but I don't see any other explanation that anyone could have thought
30 when I'm saying, we will -- we claim a first charge, even on the own assets if our GSA
31 defeats them.
32

33 THE COURT: That was paragraph 14 or 15?
34

35 MR. RUSSELL: Paragraph 15, My Lord.
36

37 THE COURT: 15.
38

39 MR. RUSSELL: 14 gave some further particulars of the, of the
40 clients, including mentioning 726 in particular.
41

1 THE COURT: Okay.

2
3 MR. RUSSELL: The next point, Sir -- and I'm trying not to till
4 the same ground as Mr. Bieganek did -- but I certainly support his position, other than I
5 don't think it's necessary to have an adjournment of the CWB priority issue.

6
7 The -- but the next point, Sir, with regard to that is Mr. Bieganek's November 15th letter.
8 So that, with Ms. Nicholson's concurrence, tables the fact that there was going to some
9 priority issues here involving CWB and the 726 assets.

10
11 Then on November 21st, Ms. Nicholson had been -- had advised Your Lordship this
12 morning that she had questioned the Monitor as to what their position was with regard to
13 the Bonnyville assets, and there was some discussion with respect to what response at that
14 point the Monitor had taken.

15
16 But, Sir, she did not pose that same question to CWB. Now, had she on November 21st, I
17 just took it she did -- or she would understand what these points were. Had she asked, I
18 would have said, yes, we're looking at whether there's a security agreement that has
19 continued on the 726 assets.

20
21 I, then, filed the -- sorry -- we filed then the --

22
23 THE COURT: Sorry. The question is put to the Monitor on the
24 21st?

25
26 MR. RUSSELL: On the 21st of November, the Monitor -- as I
27 understood the discussion this morning -- Ms. Nicholson had asked the Monitor what
28 their position was with regard to the Bonnyville equipment --

29
30 THE COURT: Right.

31
32 MR. RUSSELL: -- and what the issues were. That question was
33 not asked of CWB.

34
35 THE COURT: Okay.

36
37 MR. RUSSELL: We did, then, get the interrogatories, but that
38 was just before the questioning.

39
40 THE COURT: Okay.

41

1 MR. RUSSELL: And we filed affidavit number 7 in response.
2 There was no request to question Ms. Taha on affidavit number 7.

3
4 There was some question with regard to the timing of our filing of the application. And,
5 Sir, we filed the application on -- let me step back a moment. December 10th,
6 McCracken's counsel responds, and says, we've asked Barnhouse if there was a letter of
7 no interest provided by CWB. And December 12th, we, then, got the answer to
8 undertaking from Mr. McAllister indicating that they weren't going to answer that
9 undertaking.

10
11 THE COURT: So firstly, McCracken says, we have enquired.

12
13 MR. RUSSELL: Asked. Yes. But no answer.

14
15 THE COURT: Do not have an answer.

16
17 MR. RUSSELL: Right. And then, Mr. McAllister says, no, we're
18 not going to provide the answer. And that day, we filed our application.

19
20 THE COURT: Okay.

21
22 MR. RUSSELL: Because by then, we knew two things that we
23 didn't know before that.

24
25 The first is that CWB got an -- I believe they got \$3.5 million, Sir, out of the proceeds.
26 There's been different numbers banding around, and the answers to undertakings have
27 been inconsistent. But according to the Royal Bank records, CWB got 3.5 million.

28
29 THE COURT: Okay.

30
31 MR. RUSSELL: So we then knew --

32
33 THE COURT: And I have that in evidence.

34
35 MR. RUSSELL: Yes. At tab 4.

36
37 THE COURT: Right.

38
39 MR. RUSSELL: And we also knew that they didn't have a letter
40 of no interest that they could throw in our face.

41

1 THE COURT: Right.

2
3 MR. RUSSELL: And those were two things -- or at least if they
4 did, they weren't going to share it with us.

5
6 And those were two things we needed to know in order to know whether there was any
7 basis whatsoever for going forward.

8
9 The last point I want to make, Sir, Ms. Nicholson suggests that the Monitor and CWB
10 hinted -- she actually used the word "hinted" -- at the conclusion of the questioning on
11 December 6th that there was going to be this priority issue with CWB saying that the
12 collateral continued on.

13
14 Sir, the hinting took the -- this tone. I advised my friends after the questioning by starting
15 off by saying, just to be clear, CWB is asserting a claim to continuing security interest in
16 the collateral, and that was in the context of Mr. McAllister having taken under
17 advisement whether he would check the Stikeman files for the letter of no interest.

18
19 So, Sir, I think that's significantly more than a hint. It's probably a slap in the face, if
20 anything. But the point is that at that time -- and this is December 6th -- my friend could
21 have asked to question CWB, could have answered undertakings if there was evidence to
22 support the position that there has been a letter of no interest.

23
24 And really, we're here now when we have first been clear with regard to what we -- where
25 we were going with this at the September 6th application and then successively thereafter.
26 And this should not have come as a surprise to knowledgeable insolvency counsel.

27
28 So, My Lord, I'm suggesting an adjournment of even the CWB matter -- claim is
29 inappropriate. The ship has sailed. They had their chance, and they did not avail
30 themselves of it.

31
32 THE COURT: What do you say of the question that I put to
33 Mr. Bieganek, so that the Court is not left in any doubt as to what he might infer in
34 relation to there being no letter of no interest, as well as to get an answer from counsel --
35 leaving Stikemans alone -- but getting a letter from counsel from Dentons,
36 Ms. Barnhouse.

37
38 MR. RUSSELL: When I was having the conversation after the
39 questioning where I was saying to be clear --

40
41 THE COURT: Yes.

1
2 MR. RUSSELL: -- I also, at that point, advised that CWB had no
3 record of having given a letter of no interest.
4
5 THE COURT: So sorry?
6
7 MR. RUSSELL: CWB had -- I advised counsel --
8
9 THE COURT: Right.
10
11 MR. RUSSELL: -- that CWB had no record of having given a
12 letter of no interest.
13
14 THE COURT: I see.
15
16 MR. RUSSELL: And that's why it's important --
17
18 THE COURT: You have already told them that.
19
20 MR. RUSSELL: Yes. And that's why it was important to find out
21 from them if they had one, and we had simply lost it.
22
23 THE COURT: I see.
24
25 MR. BIEGANEK: And to be clear, Sir, it's our understanding that
26 Mr. McAllister has what he believes to be the Stikeman's file.
27
28 THE COURT: Yes. I recognized he said that in the course of
29 questioning, yet not all of the Stikeman's file.
30
31 MR. BIEGANEK: He may not have all of it.
32
33 THE COURT: No. But he did say --
34
35 MR. BIEGANEK: But he's got some.
36
37 THE COURT: -- he had portions that he was going to review.
38
39 Thank you very much, Mr. Russell.
40
41 MR. RUSSELL: Thank you.

1
2 THE COURT: Ms. Nicholson.

3
4 MS. NICHOLSON: Thank you, My Lord.

5
6 **Submissions by Ms. Nicholson (Adjournment)**

7
8 MS. NICHOLSON: With respect to Mr. Bieganek's concern about
9 how to deal with the CNC GSA, If we received a copy of that and could indeed know --
10 we've seen registrations with respect to it, but if we received a copy of that, I don't
11 anticipate -- maybe he's going to hand it to me as we speak -- I wouldn't have anticipated
12 this would pose an issue in terms of dealing with the authority questions that also affect
13 the lease.

14
15 In other words, this part of the Bonnyville issue could be addressed in the same way, in
16 the terms of the validity of the CNC security. So I wouldn't anticipate that with --

17
18 THE COURT: So we can go on that aspect.

19
20 MS. NICHOLSON: You're right.

21
22 THE COURT: Yes.

23
24 MS. NICHOLSON: And I want to just make it clear that I think that
25 there could be no issue about us proceeding --

26
27 THE COURT: Okay.

28
29 MS. NICHOLSON: -- on that.

30
31 So that's the first important point that I want to make because our goal here is not to cause
32 delay. It is not to create issues. It is to bring and ensure that what is before the Court is
33 the information that it needs to make a fair decision.

34
35 With respect to the point that Mr. Russell made, he took you to the financial statements.
36 He said these are audited financial statements. This tells the whole story. There's no way
37 that they could be refuted.

38
39 The important thing to note here, My Lord, is these are consolidated financial statements.
40 That is exactly the point -- CNC Group Inc.'s consolidated financial statements. So if you
41 turn to -- if you look at September 30th, 2014, tab 2(B), on page -- under note 1. It says,

1 "Basis of Presentation." All of the consolidated financial statement -- the entities that are
2 the subject of these financial statements are listed, which is exactly what I'm speaking
3 about when I -- I'm talking about this other entities, Canada North Structures Inc., Cam
4 Corp. Structures Inc., including its wholly (INDISCERNIBLE) Cam Corp. USA Inc.

5
6 What I am suggesting is that it is important now that we have formally before the Court
7 through the application of CWB -- and we know the case that we have to meet -- we need
8 and have -- we need to have an opportunity to ask Mr. McCracken about these entities
9 and who it is that actually sold -- who owned the assets, who actually sold the assets.
10 That's what I am suggesting.

11
12 So when Mr. --

13
14 THE COURT: Why wouldn't I be entitled to the extent that I
15 find him credible at all on his examinations on affidavit to rely on the answers that he
16 gave? He speaks on behalf of CNC Camps, as I recollect, throughout, and there's no
17 suggestion that anybody else is holding those assets or that --

18
19 MS. NICHOLSON: Oh, I see. My information -- but, again, I'm not
20 sure because I haven't spoken to Mr. McCracken -- but my information is that --

21
22 THE COURT: Oh, but you have though. You had two
23 opportunities and questioned him on both of those instances.

24
25 MS. NICHOLSON: In -- with respect to the Bonnyville issue, that,
26 just to be clear, was Mr. McAllister's. But if you want to say our client had that
27 opportunity --

28
29 THE COURT: All right.

30
31 MS. NICHOLSON: -- that's fine. It's just important to know --

32
33 THE COURT: No. But, but --

34
35 MS. NICHOLSON: -- that I wasn't retained in respect for
36 Bonnyville --

37
38 THE COURT: Okay.

39
40 MS. NICHOLSON: -- in respect of the questions that we were
41 asking.

1
2 THE COURT: But you did, you did have questioning of him
3 twice yourself, apart from Mr. McAllister.
4
5 MS. NICHOLSON: Twice, sorry.
6
7 THE COURT: Seems -- I could be wrong, but after --
8
9 IDENTIFIED SPEAKER: It, it was over a day.
10
11 MS. NICHOLSON: Over a -- it was over a couple --
12
13 THE COURT: -- Mr. Bieganek had completed --
14
15 MS. NICHOLSON: Yes.
16
17 THE COURT: -- it seemed, to me, that you had some
18 re-examination.
19
20 MS. NICHOLSON: I did consider that part of the same questioning,
21 but --
22
23 THE COURT: Well, no. But you see, it's after Mr. Bieganek
24 and, I believe, Mr. Russell, as well, have asked their questions that you say are surprising.
25 But in light of what I've already gone through from at least November 15th, the Court's
26 having difficulty that it should be a big surprise to experienced securities counsel that,
27 indeed, ownership and priorities are live issues.
28
29 MS. NICHOLSON: I was not retained to deal with --
30
31 THE COURT: No. But --
32
33 MS. NICHOLSON: -- on the Bonnyville issue at that time of the
34 cross-examinations.
35
36 THE COURT: No. But you're there for your client.
37
38 MS. NICHOLSON: Yes. I -- but, I mean, like, I can only --
39
40 THE COURT: So you're not going to shut off your skills and
41 ability.

1
2 I'm sorry, Ms. Nicholson. It's been a little while since I was an advocate, but I have not
3 forgotten the nature of my responsibilities. If I see my client's impact -- the fact that I
4 don't have a direct retainer to speak to that issue in the 15 seconds that it would take me
5 talk, I would do it. And I'm prepared to live by that as an operating tenant for legal
6 counsel in these circumstances.

7
8 MS. NICHOLSON: My Lord, with respect, now to the issue of
9 Mr. -- I mean, Mr. Bieganek is essentially indicating that it would be useful to know
10 whether CWB had granted a release. And we've heard from Mr. Russell that, to his
11 knowledge -- and he's already advised us -- that his client did not give a written
12 authorization releasing -- release of its interest.

13
14 THE COURT: M-hm.

15
16 MS. NICHOLSON: So we heard that.

17
18 But the test is whether they implied the authorize. The legal test that he's relying on
19 relates to Section 28, and so that is a good part of what we are saying needs to be explored
20 with Ms. Taha or the CWB.

21
22 The evidence that was given by Mr. McCracken, of course, is that Ms. -- there were a
23 number of people from CWB that he explains. This is at page 61 of Mr. McCracken's
24 evidence that Canadian Western was aware of the partnership agreements well before
25 March 29th, 2017. He says he had a former CWB employee, Mike McInnis: (as read)

26
27 Work with us for an extended period of time. Mike was our acting CFO,
28 and Mike was in constant communication with CWB and our loans
29 officer at the time --

30
31 Who was that Peter Young (phonetic). So he says that: (as read)

32
33 Peter Young was very aware of our partnerships and what was in them,
34 and what wasn't in them, and what was going on, and what wasn't going
35 on.

36
37 And so all I'm saying is there -- they could have -- there could be information that we
38 would like to ask CWB about as to whether there was circumstances, whereby they
39 implyably released their security interest. So that is a live issue.

40
41 With Dentons is a live issue, and that remains, to our mind, the fact that we haven't got an

1 answer from Dentons remains a live issue.

2
3 Now, in --

4
5 THE COURT: Well -- sorry -- have any steps been taken in
6 respect of that from your client's standpoint?

7
8 MS. NICHOLSON: My Lord, just to kind of go back to the time of
9 -- I mean, it's been crushing, just to say the least, about the timeline --

10
11 THE COURT: So let's understand that I've actually become
12 involved since the tragic impact on my colleague, and the whole reason that I'm here is in
13 order to address this on the expedited basis that it deserves.

14
15 MS. NICHOLSON: No. And I'm not aware --

16
17 THE COURT: So --

18
19 MS. NICHOLSON: -- of those circumstances at all, My Lord, as to
20 why you're proceeding. And I'm sorry that you're burdened with this, and I'm sorry if
21 it's --

22
23 THE COURT: Oh, I'm not feeling burdened. I'm feeling great,
24 great concern for my colleague --

25
26 MS. NICHOLSON: Okay.

27
28 THE COURT: -- having lost a daughter.

29
30 MS. NICHOLSON: Oh, dear heavens.

31
32 THE COURT: But that having been said, I tell you, I know
33 what it's all about in terms of trying to come up to speed, and I'm not used to not having
34 the documents at my fingertips in the way I would normally do, and, as counsel, I believe,
35 could alert you, at least, in Edmonton commercial practice.

36
37 MS. NICHOLSON: Yes. And so I'm sorry about the loss --

38
39 THE COURT: Of course. I understand.

40
41 MS. NICHOLSON: -- that you've referred to of our colleague, of

1 which I was not aware.

2
3 My Lord, what happened after Mr. Russell talked about being hit over -- that it was -- hit
4 over the head or that it wasn't so much hinted, it was very clear, which was as to what it
5 was that they were claiming, which is why immediately after, on that very day, we wrote
6 to Darren and Chuck on December the 7th asking about the position and asking whether
7 the Monitor intends to assert at the hearing that CNC owns the Bonnyville equipment. So
8 does it intend to do that? So we asked that question.

9
10 And then, you know, we're asking about the positions. This is the first that we are hearing
11 about this. So --

12
13 THE COURT: No, it is not.

14
15 MS. NICHOLSON: Well, from our perspective. That was why we
16 were writing because -- and we were asking, and he said he didn't ask for -- to examine
17 the witnesses. We asked for an adjournment. We asked so that we could do that, and in
18 the face of all of the deadlines that we had to file.

19
20 So that's what we were looking for. And if my friends said, please, make our witness
21 available to be examined if you have questions, we could have taken them up on that.

22
23 THE COURT: But is there anything in your handling of the file
24 in, what's admittedly, a short period of time that would indicate that if you had made the
25 request that Ms. Taha or, by way of written interrogatories, you couldn't have had that
26 information provided to you on short notice? There's nothing indicating to me that that
27 would have been refused.

28
29 MS. NICHOLSON: Well, we were certainly asking all -- for all --

30
31 THE COURT: No. You were asking for an adjournment, and I
32 think that your friends bristled at that. But there's nothing to indicate (a), that you asked;
33 or (b), that they would have refused to answer questions and further clarification of their
34 position.

35
36 MS. NICHOLSON: But the reason we're asking for an adjournment
37 is that we could consider our position to potentially ask those to bring on new evidence.
38 That's what we were, that's what we were saying we needed an adjournment for.

39
40 So if my friends are willing to volunteer their witness, then that would have gone
41 potentially at a distance to addressing this issue because now we're saying we need to

1 know if you implyably released your security. That's one of the things that we need to
2 know.

3
4 Number two, we need to know what Dentons and discussions were had in that regard
5 regarding that security.

6
7 Number three, we need to ask the bank about these consolidated financial statements,
8 which are being relied on.

9
10 Number four, we need to ask our client about what he understood about these financial
11 statements because the financial statements he got in -- relating to the 2013, they talk
12 about a General Security Agreement. These are less clear.

13
14 So those would -- all of the things that we were looking to potentially bring to the Court
15 to allow it to have the fulsome evidence. That's what we were endeavouring to do.

16
17 And then, Mr. -- so the fact that Mr. Russell filed this application is because he is looking
18 for the Court to declare the security to be valid or continuing to charge the assets that we
19 are claiming ownership in. Well, if the idea was to bring all of the issues forward, then it
20 need to happen, so that we can examine with respect to that in an ordinary way.

21
22 So how is it --

23
24 THE COURT: What does it mean, "ordinary way" --

25
26 MS. NICHOLSON: Well, in --

27
28 THE COURT: -- given that your friends asked questions that
29 related directly to what Mr. Bieganeck spoke to in his November 15th correspondence of
30 being a question of ownership or no ownership and what the consequences would arrive
31 from that? What is there that you're saying in the "ordinary way" or -- would arise? I do
32 not get that.

33
34 MS. NICHOLSON: Well, I'm just saying if somebody's looking for a
35 declaration, like the CWB is now, then they would file that application, and then the
36 parties would assess that and have an opportunity in the ordinary course to question the
37 affiants upon which they are relying.

38
39 That's -- and the fact that we are in a proceeding doesn't change the rules with respect to
40 that, in my respectful submission. My friends, I appreciate, want to advance this quickly.
41 CWB and the --

1
2 THE COURT: No. The Court wants to advance this
3 appropriately to all affected creditors, including your client. That is my mandate.
4

5 MS. NICHOLSON: I understand.
6

7 THE COURT: I expressed it in September, and I see it as
8 extant.
9

10 And I am alert to the context in which Mr. Bieganek said we cannot use those December
11 dates, Sir. We need to get new dates in order to accommodate 726, in the context of
12 previous steps that were taken impacted by 726, not other entities, but your client, and
13 that have continued to move this down to the point where we are now, if your client was
14 to have its way, into some indefinite period of time trying to coordinate schedules yet
15 again.
16

17 MS. NICHOLSON: Well, that is not the objective, My Lord, for
18 sure.
19

20 The objective is to bring and ensure that what is before the Court is the evidence upon
21 which it can fairly make a determination. And now that CWB has filed its application,
22 we have before the Court properly the issues, and we have an ability to process that.
23

24 THE COURT: And on the three issues that you've identified, I
25 tell you that the Court would certainly grant you leave in the event that something
26 tomorrow morning addressed the release or a letter of no interest by Canadian Western
27 Bank. And if, indeed, there's information it now having been put to Dentons, as I
28 understood, I think the responses to undertakings was about December the 12th --
29 somewhere in there -- so it's now a month. If there's something there tomorrow morning
30 that you want to alert me to that's informative, I'm prepared to hold open that the evidence
31 that we would address is appropriately enhanced by those two pieces.
32

33 MS. NICHOLSON: My Lord, would you be prepared to grant an
34 order requiring that they provide that? Because they -- all that we have is Mr. McCracken
35 just asking, and I guess his answer is, jeez, I've asked, but they haven't answered.
36

37 So that's -- you know, that's in issue.
38

39 THE COURT: I need to reflect on that. Obviously, I don't have
40 Mr. Delblanc, but I have his -- or is that a young Delblanc?
41

1 UNIDENTIFIED SPEAKER: Yes.
2
3 MR. DELBLANC: Sorry. Could you say that again?
4
5 THE COURT: Mr. Delblanc, the question is being put
6 indirectly through the Court to you as to steps that may allow for Dentons to provide an
7 answer to the Court by tomorrow morning.
8
9 MR. DELBLANC: I don't think that'll be an issue, Sir. We have
10 actually incidentally been taking some additional steps throughout this week trying to
11 readdress those issues with Ms. Barnhouse again.
12
13 We had some answers which we thought were not overly responsive, and we've asked for
14 some extra clarification on that. I don't think a tomorrow morning timeline would be
15 unreasonable.
16
17 THE COURT: All right.
18
19 MR. DELBLANC: Thank you.
20
21 THE COURT: There we are.
22
23 MS. NICHOLSON: Thank you, My Lord.
24
25 THE COURT: Thank you very much, Mr. Delblanc.
26
27 MS. NICHOLSON: And so then, that would leave Mr. -- my client
28 against Mr. McCracken to -- or pardon me -- Mr. Roman who says in 2013 financial
29 statements that he didn't know over whose -- what security agreement was contemplated
30 by that. The reference to it -- they're having general security.
31
32 THE COURT: Well, I recognize that --
33
34 MS. NICHOLSON: Yes.
35
36 THE COURT: -- that depending on the degree of experience or
37 sophistication, an individual may not know with particularity what the GSA is that's been
38 referred to there. It is only --
39
40 MS. NICHOLSON: Or which entity, which entity because it's
41 consolidated, right? Whether or not --

1
2 THE COURT: Yes and no. I mean, it still raises an issue of
3 due diligence that is not for him to determine. It is for his legal counsel, and that is -- I
4 am not exploring whether Stikemans has that. All I know is that there have been no
5 answer provided to address what is obvious from the review of that consolidated but
6 audited financial statement by September of 2014.

7
8 MS. NICHOLSON: The -- what I'm referring to, though, is the
9 Monitor's brief, where he -- at paragraph 97 -- is talking about -- and the test at
10 paragraph 30(6) of the *PPSA* --

11
12 THE COURT: All right.

13
14 MS. NICHOLSON: -- which he's suggesting that the buyer, my
15 client, bought the goods with knowledge of a secured interest. He is saying and he is -- I
16 haven't -- my guy hasn't had an opportunity to address that. He's never -- and that's my
17 point.

18
19 **Ruling (Adjournment)**

20
21 THE COURT: Well, I realize there is a lot of pages in
22 transcript. But I read them all, and I may not have a photographic memory as I was going
23 through all of that, but I did not read anything in there that would indicate that he was
24 unaware of the security agreement. No steps were described by him as to determining by
25 whom or in respect of entities.

26
27 But that to, at least, address a request for adjournment, it happens regularly in trials that
28 we may not have all of the evidence or the best evidence, but we have what, in the
29 exercise of due diligence by counsel, is a record upon which the Court's being asked to
30 make a determination.

31
32 So I tell you that the two pieces, that I consider to be appropriate as a matter of fairness to
33 your client, would be a further opportunity for Mr. Delblanc's client with urging from the
34 Court -- but not a Court direction -- but urging from the Court that I need this by
35 tomorrow on the question that has been extant with Mr. Barnhouse for some time.

36
37 And secondly, the opportunity for your client to provide any letter of no interest on the
38 part of Canadian Western Bank having issued.

39
40 MS. NICHOLSON: My Lord, thank you very much.

41

1 I -- we may have some further information in relation -- from the transactional lawyers
2 dealing with this matter. So that's another -- and I've referred to that.

3
4 THE COURT: Well, if there is, then I will determine whether I
5 think that is properly admissible, depending on the format in which it appears, and what
6 jeopardy or otherwise it impacts on the submissions that have been made.

7
8 MS. NICHOLSON: And that's referred to in our --

9
10 THE COURT: But I tell you this, in the context that -- as
11 experienced counsel, you will know we do not litigate by instalment. You prepared your
12 briefs on the basis of a significant amount of information admittedly, but I have allowed
13 that there are two pieces that ought to be there or at least an opportunity, given to your
14 client, to add those into the record.

15
16 Whether I would at this very late stage allow for further information, we would have to
17 surely depend on the format and substance of that evidence. All right?

18
19 MS. NICHOLSON: Yes. That's my understanding, My Lord.

20
21 That was one of the things that we alluded to in our brief --

22
23 THE COURT: Okay.

24
25 MS. NICHOLSON: -- potentially bringing forth further evidence
26 from a transactional side as what happened.

27
28 THE COURT: Okay. Okay.

29
30 Mr. Russell.

31
32 **Discussion**

33
34 MR. RUSSELL: My Lord, just out of the interest, Mr. Roman's
35 background is undergraduate in economics, Masters in Finance from Northeastern
36 University in Boston, worked at Bank of Boston as a commercial loan officer for a few
37 years, then started his business.

38
39 This -- he had also in an email that's in evidence had been complaining to Mr. McCracken
40 that the Romans had borrowed \$50 million to finance these things. This is not an
41 unsophisticated individual, and this is a big loan.

1
2 THE COURT: Yes, it is indeed.
3
4 MR. RUSSELL: M-hm.
5
6 THE COURT: All right. How can we make best use of the
7 time here. And I am particularly aware that we have not even touched obviously to either
8 -- there are interrelated issues, but I wonder this, Mr. Bieganek, are there any issues as
9 affect that particular claim that can be isolated?
10
11 MR. BIEGANEK: Well, we had this email exchange yesterday,
12 and I've been concerned whether they could or not, but I appreciate they've got a very
13 narrow piece.
14
15 And it made be a best use of our time now to give the clerk a brief break --
16
17 THE COURT: Break, yes.
18
19 MR. BIEGANEK: -- to allow my friend to make his pitch.
20 Mr. Quinlan will respond to that piece, and then he can decide whether he wants to come
21 tomorrow for the balance of the show.
22
23 But I would just to alleviate him to putting the option of whether he wants to stay but give
24 him the opportunity to put his case forward now because I know he's come from Calgary.
25
26 THE COURT: Quite.
27
28 MR. BIEGANEK: So ...
29
30 THE COURT: Is that satisfactory?
31
32 MR. QUINLAN: Yes. If we could get it done now, My Lord --
33
34 THE COURT: Of course. All right.
35
36 We're going to take ten minutes.
37
38 (ADJOURNMENT)
39
40 THE COURT: Thank you, everyone. Please be seated.
41

1 **Submissions by Mr. Chimuk (Ownership)**

2
3 MR. CHIMUK: Good afternoon, My Lord.

4
5 THE COURT: Mr. Chimuk.

6
7 MR. CHIMUK: Scott Chimuk for Sand Tiger.

8
9 First, I'd like to thank My Lord for the indulgence allowing me to go first and my
10 colleagues for agreeing to same. Given the hour, I'll endeavour to be both witty and brief,
11 although I'll probably only accomplish being brief.

12
13 So the first issue, which I'm sure my friends have prepared substantive submissions on
14 and no doubt have loads of case law, is with respect to the issue of vetting. I can advise
15 the Court that we can put the issue of vetting to rest. It's a non-issue.

16
17 So --

18
19 THE COURT: All right. So we have already accomplished
20 your first objective.

21
22 MR. CHIMUK: So the first submission is that -- with respect
23 and unless my colleagues say otherwise -- there's absolutely no issue with respect to
24 ownership. This is purely the applicability of the *PPSA* regime, how it applies, if it
25 applies; that's it. It's the only issue.

26
27 So we say, with respect, that the first exception with respect to the *PPSA* regime is
28 Section 1(1)(z)(iv), which essentially states that if we're not in a regular business of
29 releasing, then the *PPSA* does not apply.

30
31 Specifically, what we would submit is that we are not in the regular business of leasing
32 televisions and washers and dryers. Right? And so either, we are, or we aren't.

33
34 Now, with respect, we say that we're not, but if we are, the Court would have to infer that
35 when we lease trailers, it's implicit in that, that it's going to include TVs, washers, and
36 dryers.

37
38 THE COURT: But isn't it fair to say that that may be the case,
39 and in other instances, it would not be the case? In fact, are there not operations that you
40 do where you do not supply?

41

1 MR. CHIMUK: A hundred percent. So this is why it doesn't
2 matter because what I'm going to suggest is that either it's a yes or a no, but either way,
3 this bears no impact with respect to my client.
4

5 THE COURT: I see.
6

7 MR. CHIMUK: And that's because the second exception with
8 respect to the *PPSA* is Section 1(1)(z)(v), the very next section -- right -- which says that
9 if our chattels are incidental to the use and operation of those lodgings, then it'd be
10 covered by the *PPSA* registration of the lodging itself. So we say either they're incidental,
11 or they're not. But irrespective, we win.
12

13 So you can apply 1(1)(z)(iv) or you can apply 1(1)(z)(v). But either way, it results in the
14 same result, which is that the *PPSA* regime does not apply with respect to those chattels.
15 Because either, we're not in the business of leasing TVs and washing machines, or the
16 TVs and washing machines are incidental to the use of the lodging itself, in which case
17 the other exception applies.
18

19 So it's a catch 22 in a good way for my client and a bad way for CWC. But irrespective of
20 how you apply it, our point is we don't care what your finding is with respect to that -- the
21 fact because if you find that the chattels are incidental, then we're caught by one
22 exception, and if find that they're not incidental, then we're caught by the other exception,
23 both of which remove us from the *PPSA* regime, such that we're the clear owner and such
24 that the receiver can't sell our goods in order to satisfy another creditors claim.
25

26 And then, finally, the last point, My Lord -- I promised I'd be brief -- is Section 66(1) of
27 the *PPSA*, which, of course, is the commercial (INDISCERNIBLE). I mean, it's the same.
28 And frankly, this is, given the context of *CCAA*, it's within the context of *PPSA* that we
29 have to be commercially practical and reasonable here.
30

31 And to be frank, the idea where the suggestion that CWC issued a loan on the strength of
32 a potential security interest in TVs and washing machines doesn't make any sense. And
33 that's clearly not what was intended. That's clearly not within the scope.
34

35 And to suggest that because my client failed to specifically mention TVs and washing
36 machines somehow means that the *PPSA* registration with respect to the lodging -- the
37 dorms themselves -- doesn't apply, in our submission, is ludicrous.
38

39 What is it that you have to list when you're talking about registering a trailer? Do you
40 have list the washing machines? Do you have to list the toilets? Do you have to list the
41 doorknobs? To just -- to go through and list everything, which is part and parcel of an

1 incidental to the use of the trailer itself? To do so would result in an absolutely
2 commercially absurd result. That's not practical; that's not common sense; and it's not
3 commercially applicable.

4
5 And with respect, subject to any questions that you have and a right to reply, those are our
6 submissions.

7
8 THE COURT: So if I understand what you are saying, when
9 you register the interest in respect of the dorm -- the trailer -- you say that built into that is
10 "and contents."

11
12 MR. CHIMUK: The contents that are affixed to the unit, of
13 course. The washing machine? The --

14
15 THE COURT: Well, sorry. I am not talking about fixtures in a
16 non-removal sense. I am talking about the appliances, the electronics --

17
18 MR. CHIMUK: Yes.

19
20 THE COURT: -- what you have listed -- the televisions, the
21 laundry, washers, dryers, the laundry equipment. I think there was one other category if --

22
23 MR. CHIMUK: Mattress type of thing.

24
25 THE COURT: -- the mattresses.

26
27 MR. CHIMUK: The mattresses, yes.

28
29 THE COURT: Yes.

30
31 MR. CHIMUK: Sheets, no. Now --

32
33 THE COURT: Right.

34
35 MR. CHIMUK: -- it would be very interesting if, what if the
36 sheets were within the washer and dryer? But I guess we'll leave that in issue to another
37 day for another Court to decide.

38
39 But --

40
41 THE COURT: You did say you were going to funny, and I

1 think that everyone would agree that you have managed that twice now.

2
3 MR. CHIMUK: So yes. That -- with respect, My Lord, what
4 we're suggesting is that when you register the trailer itself, items that are incidental to the
5 use of that trailer, such as a washer and a dryer or a TV, would be covered by that *PPSA*
6 registration.

7
8 Or alternatively, if they're not -- if there's something special, if there's something
9 inherently unique or not incidental to the use of the trailer with respect to the TVs and
10 washers, then we got to go back to Section 1(1)(z)(iv), in which case we're not in the
11 ordinary business of leasing TVs. That's not what we do. We lease trailers.

12
13 So either we're caught by the *PPSA* registration, insofar as those items are material to and
14 incidental to the use of the trailer itself. Or if there's something separate and apart, then
15 the exception that's carved out in 1(1)(z)(iv) means that we're caught by that exception
16 because we're not in the ordinary business of leasing TVs. Because we're not, and that's
17 what the evidence is, and that's undisputed.

18
19 So either way, my client's successful. I think that probably it's 1(1)(z)(v), but I can see
20 that it also could be 1(1)(z)(iv).

21
22 THE COURT: And you're saying that if it's 1(1)(z)(v), then --
23 please repeat.

24
25 MR. CHIMUK: Then, if it's 1(1)(z)(v), then the chattels, i.e. the
26 TVs and the washer, the laundry machines -- are incidental to the use of the trailer itself.
27 They're part and parcel with the trailer.

28
29 And therefore, because they're part and parcel with the use of the trailer itself, they're
30 caught by the *PPSA* registration of the trailer. That's what we're saying. So they're
31 included as part of that registration.

32
33 THE COURT: If you are renting a vehicle --

34
35 MR. CHIMUK: Yes.

36
37 THE COURT: -- then the seats in the vehicle, even if they are
38 not level put down --

39
40 MR. CHIMUK: Yes.

41

1 THE COURT: -- are incidental to it.
2
3 MR. CHIMUK: Correct.
4
5 THE COURT: It is quite clear. Trailers can be rented with or
6 without that equipment.
7
8 MR. CHIMUK: Correct. Perhaps a better analogy, Sir, would be
9 a car seat perhaps. Right? And so what I'm saying is if you rent a car with a car seat --
10
11 THE COURT: As in a child's car seat. Is that what you're
12 saying?
13
14 MR. CHIMUK: Yes, Sir. Yes, Sir.
15
16 THE COURT: Yes, okay. Sorry.
17
18 MR. CHIMUK: If you rent a car with a car seat --
19
20 THE COURT: Yes.
21
22 MR. CHIMUK: -- okay -- is that incidental to the use of the car?
23 I would submit that it is.
24
25 But if I'm wrong, are you in the business of renting cars, or are you in the business of
26 renting car seats? I would suggest you're in the business of renting cars. And therefore,
27 that car seat is exempted out from the *PPSA* regime, pursuant to (iv). That's what I'm
28 saying.
29
30 THE COURT: Okay. I understand your point.
31
32 MR. CHIMUK: Okay.
33
34 THE COURT: Thank you.
35
36 MR. CHIMUK: Thank you, Sir.
37
38 THE COURT: Mr. Quinlan.
39
40 MR. QUINLAN: If I may, My Lord, Mr. Russell and I spoke
41 during the break. And given that this is more of a CWB issue, Mr. Russell is going to

1 speak first, and I will clean up after, if that's all right.

2

3 THE COURT: Okay. Thank you.

4

5 Go ahead, Mr. Russell.

6

7 **Submissions by Mr. Russell (Ownership)**

8

9 MR. RUSSELL: Thank you, My Lord.

10

11 I'd like to suggest a third option that matters if my friend loses. I would like to refer to
12 two parts of Mr. McCracken's transcript, Sir, if I could. Hopefully you haven't put it away
13 yet.

14

15 THE COURT: No, I am not.

16

17 Go ahead.

18

19 MR. RUSSELL: So, Sir, this goes to the issue that my friend
20 raised of TVs and beds, et cetera -- I'll just call them chattels -- are an incidence of the
21 rental of dorms.

22

23 And, My Lord, keep in mind that the dorms are modular homes under the *PPSA* and have
24 to be registered by serial number, which there's no doubt Sand Tiger did.

25

26 The chattels, I would suggest, are a different thing altogether. Normally, you would see a
27 general registration -- so you'll see the serial number registrations at the top of the PPR
28 registration form, and then you get to the general collateral. And the general collateral
29 would say all of the chattels that are part of the use of the dorms that are mentioned of as
30 serial numbered goods.

31

32 If they had done that and if they'd registered within 15 days -- because this is -- their lease
33 of term (INDISCERNIBLE) in a year is a PMSI. If they registered within 15 days of
34 delivery of the units to CNC, then CWB's prior all pack registration would come in
35 second. It would be behind their registration of the chattels as general collateral. But
36 that's not what happened.

37

38 THE COURT: So you're saying it would have to have listed
39 those to be properly included.

40

41 MR. RUSSELL: It doesn't have to -- they don't have to say vents,

1 doors --

2

3 THE COURT: Just say all chattels.

4

5 MR. RUSSELL: Just all chattels utilized in connection with the
6 above dorms. Because, then, it would have been notice to the world at large that the --
7 that these dorms came with chattels, which were not necessarily an integral part of the
8 dorms themselves. If they were not fixtures, they were not accessions.

9

10 THE COURT: Right.

11

12 MR. RUSSELL: And clearly, beds, TVs, et cetera, are neither
13 fixtures nor accessions, I would suggest, Sir.

14

15 Now, I --

16

17 THE COURT: I do not think your friend is arguing that.

18

19 MR. RUSSELL: -- two things in Mr. McCracken's testimony.

20

21 At the bottom of page 25, line 20 -- and actually, I'll just put this in context, Sir.
22 Mr. McAllister was asking -- and this goes to this issue of whether the chattels are
23 incidental to the dorms.

24

25 So Mr. McAllister was questioning Mr. --

26

27 THE COURT: McCracken.

28

29 MR. RUSSELL: -- McCracken on what -- on his view of the
30 small wares. And at line 20, Mr. McAllister's talking about Peace River. So clearly, this
31 is not specific to the Sand Tiger issue. These are two general statements I wish to bring to
32 Your Lordship's attention.

33

34 So Mr. McAllister says: (as read)

35

36 Q Peace River -- and what about, like, recreational units? They
37 would come equipped with exercise equipment or pool tables
38 or foosball tables?

39 A Yeah. We were only open for a very short time at Peace
40 River. But whatever was in there was Barry's.

41

1 And the next sentence is the important one. He says: (as read)

2
3 Canada North -- we didn't have the money to put all that stuff in. Barry
4 put up the money to not only build the camp and put it in but also to
5 equip it.

6
7 The next page is 232, line 11.

8
9 THE COURT: Just give me a minute.

10
11 MR. RUSSELL: So the question is, all right. In terms -- we
12 talked a lot about small wares over the last couple of days and Coney Fickordell
13 (phonetic) -- I won't tell you whose asking this question --

14
15 MR. McCALLISTER: It was me.

16
17 MR. RUSSELL: (as read)

18
19 Q I just want to have a better appreciation of what your
20 understanding is a person who works in this industry of what
21 small wares are. Can you tell me that in your own language?

22 A Well, in camp vernacular, it's bed and dishes, pots and pans,
23 not always televisions because a lot of times now, TVs are
24 part of what's provided by whoever's providing the equipment.
25 But shovels, catering supplies in order to do the catering job,
26 in our vernacular -- is our vernacular for small wares.

27
28 Q Okay. But it wouldn't include -- it would not include furniture
29 that would normally be included as part of what you have
30 called the "unit"; is that fair?

31 A Normally part of the unit.

32
33 He doesn't say always -- "normally." Next question: (as read)

34
35 Q And light towers wouldn't be considered small wares?

36 A It's not -- they're expensive. It's not a small item, you know,
37 but sometimes it's included in that vernacular, yes. Depends
38 on what the client wants to be able to bring into the rental
39 program or to the lease program for the equipment.

40
41 And then he just continues on and talks about light towers and the sort.

1
2 The reason I bring those two quotes to your attention is clearly, Mr. McCracken was of
3 the understanding that the small wares were not incidental to the dorms necessarily. They
4 could be, or they might not be.

5
6 Now, my friend --

7
8 THE COURT: So are you just saying what out of that
9 uncertainty, that equivocation?

10
11 MR. RUSSELL: If the industry norm was that always the small
12 wares are included in the rental of the dorms and everybody in the industry knows that,
13 then my friend's argument would have some legs. And that was his point about the
14 chattels being incidental or an incidence of the rental of the units.

15
16 But when they aren't universally known as being incidents of the rentals of dorms, that's
17 when you need the general registration that I described at the outset.

18
19 Now, my friend refers to Section 1(1)(z)(iv) and (v) of the *PPSA*. Let me just deal with
20 sub (v) first. The exception -- and I'm sorry, Sir. Have you got it?

21
22 THE COURT: Yes.

23
24 MR. RUSSELL: The exception is:

25
26 A lease of household furnishings or appliances as a part of a lease of
27 land --

28
29 Not of dorms, not of moveables, not of personal property of the land:

30
31 -- where the goods are incidental to the use and enjoyment of the land.

32
33 This section simply doesn't apply.

34
35 Sub (iv):

36
37 A lease involving a lessor who is not regularly engaged in the business
38 of leasing goods.

39
40 I'll start with Section 67(5) of the *PPSA*, Sir. And these are -- these comments are in our
41 -- both our briefs.

1
2 So 67(5) says:

3
4 Except as otherwise provided in this *Act*, a provision in the security
5 agreement or any other agreement that purports to exclude a duty or
6 onus imposed by this *Act* or that purports to limit the liability of or the
7 amount of damages recoverable from a person who has failed to
8 discharge a duty or obligation imposed on the person by this *Act* is void.
9

10 And the reason I raise that, Sir, is that Sand Tiger has relied on the fact that their lease
11 contemplates TVs, other things that don't -- aren't coming to mind right now. Their lease
12 actually listed some of these things.

13
14 THE COURT: And you are just saying that that does not help
15 the --

16
17 MR. RUSSELL: That -- right.

18
19 THE COURT: -- notice to --

20
21 MR. RUSSELL: That's right.

22
23 THE COURT: -- a financier or --

24
25 MR. RUSSELL: That's right. That's right.

26
27 THE COURT: -- others to the public.

28
29 MR. RUSSELL: And I'm referring to the -- I refer to the *Fast*
30 *Labour Solutions* case, Sir, and I'll just quote -- and I inadvertently put it into the both the
31 first brief and the second brief; I guess it was doubly important -- but the -- paragraph 12
32 of that case, the Court says:

33
34 The *Personal Property Security Act* was designed to sweep away these
35 technicalities and to provide one universal regime and one universal
36 registry, in which all security interests had to be registered. Its ultimate
37 purpose is to define all of those arrangements where registration is
38 required in the public interest because possession has been separated
39 from title. At the highest level of generality, the *Act* should be
40 interpreted having regard to that objective.
41

1 And what that *Act* -- and what the *Act* says is if you've got a PMSI, you have to register
2 within 15 days or you lose out to a prior registered all path.

3
4 My friend relies on or suggest that these things are accessions to the dorms, and the
5 definition of accessions under the *Act* is:

6
7 Goods that are installed in or affixed to other goods.

8
9 And these are not.

10
11 THE COURT: I am so sorry. I was just finishing notes --

12
13 MR. RUSSELL: Oh, I apologize, Sir.

14
15 THE COURT: -- so give me that again. No. That is fine.

16
17 MR. RUSSELL: No.

18
19 THE COURT: Say it again.

20
21 MR. RUSSELL: My friend suggests that the chattels are fixtures
22 or pertinences of the dorms -- of the dorm units and -- but *PPSA* defines accessions as:

23
24 Goods that are installed in or affixed to other goods.

25
26 And these aren't. So that doesn't help my friend.

27
28 My friend does rely on the case of *Planwest*. But in our brief of January 2nd, which was
29 our rebuttal brief after we had seen my friend's brief, we point out that the *Planwest* case
30 is not well received by -- has not been well received by the Court. And, in fact, the Court
31 of Appeal -- and this is at paragraph 10 of the second brief --

32
33 THE COURT: That was Justice Lester's decision?

34
35 MR. RUSSELL: *Fast Labour*? No. That's Court of Appeal.
36 Justices Slatter, McDonald, and Greckol.

37
38 THE COURT: Okay.

39
40 MR. RUSSELL: Paragraph 10 of the brief where I'm going to
41 quote again from the *Fast Labour* case -- and this -- there's just two things that I want to

1 quote here. The first is the Court says:

2
3 As long as leasing is a regular part of the business, it will be caught by
4 the statute, even if leasing is not the predominant or a significant part of
5 the business.

6
7 And the second quote, My Lord:

8
9 Having regard to the overall purposes of the *Act*, one indicia of a
10 business is that the lease is for a commercial purpose and is part of an
11 overall business strategy.

12
13 So what we have here, Sir, I suggest, is just that. Sand Tiger does regularly get involved
14 with the leasing of dorms. As my friend had suggested, it is an incidence of leasing of the
15 dorms that you also lease the TVs and everything else -- all of the chattels. And I would
16 suggest that the case law simply doesn't support that.

17
18 THE COURT: Sorry? The case law does not support --

19
20 MR. RUSSELL: Does not support my friend's position on that.

21
22 THE COURT: Oh, your friend is saying.

23
24 MR. RUSSELL: Section 66(1), what it says is:

25
26 All rights, duties, or obligations arising under a security agreement
27 under this *Act* or under any other applicable law shall be exercised or
28 discharged in good faith and in a commercially reasonable manner.

29
30 But this is talking about discharging rights and obligations. This isn't talking about the
31 terms of a lease.

32
33 And my friend is equating that provision to say that it's only commercially reasonable that
34 the chattels would be included as indices of the dorms. And, My Lord, with respect -- I
35 suggest that section simply doesn't apply.

36
37 I also suggest, Sir -- Section 66(3):

38
39 The principles of common law, equity, and the law merchant, except
40 insofar as they are inconsistent with the express provisions of this *Act*,
41 supplement this *Act* and continue to apply.

1
2 THE COURT: That's 66(3)?

3
4 MR. RUSSELL: Yes.

5
6 THE COURT: Yes.

7
8 MR. RUSSELL: And, Sir, what I'm suggesting is that the
9 registration requirements for a PMSI is the specific provision in the *Act*, which is
10 inconsistent with suggesting that you can just ignore the moveable nature of the chattels
11 and avoid registration.

12
13 And, Sir, lastly, my friend suggested that the test is whether CWB -- or suggested that
14 nobody could say that CWB had loaned money, based on the existence of these chattels at
15 the Sand Tiger dorm. And of course not. Nobody would suggest that. The fact is that's
16 not the test for whether one security interest trumps another.

17
18 I like to think our brief was a bit more eloquent than I was, Sir, but subject to any
19 questions, those are my comments.

20
21 THE COURT: Thank you very much.

22
23 MR. RUSSELL: Thank you.

24
25 THE COURT: Mr. Quinlan.

26
27 **Submissions by Mr. Quinlan (Ownership)**

28
29 MR. QUINLAN: My Lord, I have little to add, as this is primarily
30 an issue between CWB and Sand Tiger. I guess I will simply advise that the Monitor
31 agrees with these submissions of CWB for the reasons Mr. Russell did eloquently set out.

32
33 The two exceptions in the *PPSA* do not apply here. I think there is little doubt that Sand
34 Tiger is normally engaged in business of leasing goods. That seems to be conceded on all
35 fronts. I don't know that the law says that its dismissal type of good, and in other words,
36 they have to lease chattels, as opposed to some other goods. They are regularly engaged
37 in business of leasing, as my friend pointed out.

38
39 With respect to the other exception, I agree with Mr. Russell that the *PPSA* provision
40 specifically says with respect to a lease of land. This is not a lease of land, and that
41 exception has no applicability.

1
2 Finally on this issue of -- I guess for a lack of a high-level term -- commercial
3 reasonability. I agree with my friend, Mr. Russell -- and I think I'll give away
4 Mr. Bieganek's thunder because it's something you will hear a lot of tomorrow likely --
5 but Sand Tiger could have protected themselves and did not.

6
7 As Mr. Russell pointed out, had they registered or given any notice in the general section
8 of their registration of these items -- which Mr. Slice's (phonetic) affidavit terms himself
9 as chattels and not as accessions, which they are clearly not -- then Sand Tiger would
10 have not risked their ownership interest in these items.

11
12 In fact, this case is very similar to the *Fast Labour Solutions* case where, I think it was,
13 Justice Yamauchi indicates had they -- where parties failed to register, they put their
14 ownership interest at risk. And that is the exact point of the *PPSA*.

15
16 Had they registered, they would have enjoyed the PMSI priority, and their interest would
17 not have been at risk. They simply failed to do that, and the *PPSA* case law is riddled
18 with examples of where parties didn't think they had to register, but did, and were on the
19 losing end of it.

20
21 Frankly, Sir, the result is not commercially unreasonable. It's exactly what's supposed to
22 happen in the *PPSA* regime.

23
24 Subject to any questions you have, My Lord, those would be the Monitor's submissions.

25
26 THE COURT: Thank you very much.

27
28 MR. QUINLAN: Thank you.

29
30 MR. CHIMUK: I just have a brief reply.

31
32 THE COURT: Of course.

33
34 **Submissions by Mr. Chimuk (Ownership)**

35
36 MR. CHIMUK: So the three words that my case hinges on are
37 evidence, onus, and ownership.

38
39 With respect, there's no dispute that my client owns the chattels. Therefore, what we
40 would suggest is that the onus with respect to proving and putting forward evidence that
41 the Monitor should be able to sell what is owned by my client, pursuant to the *PPSA*

1 regime, that the onus is on them to show that we fall -- that the goods that they want to
2 sell fall within that regime. It's not on the owner. It's on the person who's seeking to sell
3 another owner's property. And to do so, they require evidence.

4
5 My client's sworn an affidavit with respect to this. He was not cross-examined on it.
6 Both of my learned friends had the opportunity to cross-examine. They had the
7 opportunity to ask Mr. Sloots (phonetic), are you in the business of leasing TVs? Do you
8 include TVs in all your trailers? Do you include washing machines in your trailers? Do
9 you do that?

10
11 And if the answer to that question was yes, then heck, we'd probably be caught by
12 Section 1(1)(z)(iv) because the word "goods" -- are you in the ordinary business of leasing
13 goods? If you do it as a one-off, then you're not. You're exempted by that section. They
14 had the opportunity to ask my client that question, and they didn't ask the question. And
15 what they're seeking to do is take away my client's ownership rights to their property.

16
17 The onus is on them to show that they have an ability to do so, that the goods that they're
18 seeking to sell fall within that *PPSA* regime, but they didn't ask the question. And there's
19 no evidence with respect to that.

20
21 In fact, the only evidence that's properly before the Court is the evidence that my friend
22 read it, and my friend seeks to rely on the evidence of Mr. McCracken to suggest that, in
23 fact, it's not in the ordinary course that TVs are included, and it's not in the ordinary
24 course that washing machines are included. It's the only evidence you have before you
25 now.

26
27 So the only evidence you actually have before you is in my client's favour with respect to
28 the sub (iv) position. They have the onus of proving it. They didn't. They had the
29 opportunity to ask the question. They didn't.

30
31 THE COURT: Does that beg the need to subdivide the
32 category? Using your analogy again, do we have to ask the question of an automobile
33 renting of operation that -- well, but do they rent car seats? If you simply put in "and
34 contents," is that not the answer?

35
36 MR. CHIMUK: With respect, Sir, no. With respect, it -- with
37 the car analogy, yes, cars are included, but in my view, car seats are not.

38
39 Now, would it be -- in hindsight being 20/20 -- right -- if it was -- you know, should my
40 client have probably put "and contents"? Yes, probably, because we wouldn't be here
41 today.

- 1
2 THE COURT: Well, yes.
3
4 MR. CHIMUK: Right? Of course, they should have.
5
6 THE COURT: But --
7
8 MR. CHIMUK: But you're misplacing the onus, Sir, with
9 respect. Right? We're not looking this -- we're not look at this from the context -- and
10 this is what the Monitor wants you to do -- is looking at -- from a context of the Monitor's
11 right and able to sell the property. And I somehow have to do something to get out of
12 that.
13
14 I disagree with that proposition in the context of the fact that we have the ownership
15 position, which is uncontested. And so why is it that my client, then, bears that onus? It's
16 the person who wants to seal my client's goods. You're talking about selling somebody
17 else's property --
18
19 THE COURT: Right.
20
21 MR. CHIMUK: -- to a third party's benefit. That's what they're
22 trying to accomplish.
23
24 And so if you want to take somebody's property away from them and sell it to the benefit
25 of a third party, well, then, you better at least have some scintilla of evidence to suggest
26 that it falls within a statutory regime that allows you to do so because failing --
27
28 THE COURT: Well, statutory regime, sir, contemplates that if
29 property of a debtor is in its possession, then unless there's *PPSA* protection, that is going
30 to get scooped up unless --
31
32 MR. CHIMUK: But there's exceptions within the *PPSA* regime,
33 such as sub (iv), which is what I'm relying upon.
34
35 THE COURT: Yes. I recognize that. But don't I have to -- and
36 that is not an onus issue -- don't I just have to interpret what is the intent of that wording?
37 Not with any previous position in favour of ownership or previous position in favour of
38 statutory notice or anything like that but just -- what does that mean? What does that
39 subsection (iv) mean?
40
41 MR. CHIMUK: Fair. Fair. But what would I suggest is that

1 there's no evidence before the Court, and there was every opportunity for my learned
2 friends to provide evidence if they had any.

3
4 Presumably, they didn't cross-examine him for a reason. Right? And they had that
5 opportunity to ask whether my client was in -- whether it was their course of business,
6 whether they had in the fact -- in the past ever, you know, rented TVs or whether this was
7 an exception.

8
9 And if we go back to the case, which my friends -- which we rely upon, which is the
10 *Planwest* decision, which my friend say is not -- you know, it's not been favourably
11 looked upon by the Courts. I mean, it was upheld by the Court of Appeal. McClung,
12 O'Leary, and Russell held it.

13
14 And so, with respect --

15
16 THE COURT: On very unusual facts. Right?

17
18 MR. CHIMUK: It was absolutely. But that's what I would
19 suggest the proper legal interpretation with respect to this is not that Planwest was wrong
20 or that their case was right. And I don't disagree with their propositions that they cite.
21 What I would suggest is that it's always an issue of facts. It's always a fact-specific
22 situation.

23
24 And I would not suggest that Planwest be expanded above and beyond its specific facts,
25 but what I think it tells us is that you have to look at the specific facts of this specific case
26 in order to make a determination with respect to whether or not this is the ordinary course
27 of business.

28
29 And what I would suggest is that on the evidence before you, you have no information to
30 suggest that it is in within the ordinary course, and, in fact, the only evidence you have
31 suggest that it isn't. And that was the evidence my friend read out during the course of his
32 submissions.

33
34 So I agree. It's a fact-specific situation, but on the facts before you, the only facts that you
35 have favour my submission with respect to sub (iv), and my friend has zero facts. Zero.
36 Zero evidence to support anything to the contrary.

37
38 Subject to any questions.

39
40 THE COURT: No. I am grateful to hear. Thank you very
41 much.

1
2 MR. CHIMUK: Thank you, My Lord.

3
4 **Discussion**

5
6 THE COURT: I am not going to issue a decision on this. I do
7 not think that should come as any surprise. I believe that it is important that I hear the
8 nature of similar arguments as will affect 726's claims for small wares. It does not drive if
9 the fact situation is not parallel, but I do not think it is appropriate to handicap my
10 opportunity to examine the interpretation of the *Act* with the two fact situations that I am
11 -- or two or more fact situations that I am going to be presented with.

12
13 All right? But I will get a decision to you on a timely basis.

14
15 All right? Is there anything else this afternoon?

16
17 MR. BIEGANEK: Today, I think that's it, My Lord, and we'll start
18 a fresh in the morning.

19
20 THE COURT: I hope everybody's fresh.

21
22 Thank you very, very much.

23
24 MR. BIEGANEK: Thank you.

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28 PROCEEDINGS ADJOURNED UNTIL JANUARY 11, 2019

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1 Certificate of Record

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3 I, Devyn Borman, certify that this recording is the record made of the evidence in the
4 proceedings in the Court of Queen's Bench, held in Courtroom 516 at Edmonton, Alberta,
5 on the 10th day of January, 2019, and that I was the court official in charge of the
6 sound-recording machine during the proceeding.
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1 **Certificate of Transcript**

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3 I, J. Aubé, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.

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14 Janice Aubé, Transcriber

15 Order Number: AL-JO-1002-2983

16 Dated: February 15, 2019

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