COURT FILE NO.	1703 12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	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.
DOCUMENT	**BRIEF OF THE MONITOR, ERNST & YOUNG INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DARREN R. BIEGANEK Q.C./ RYAN F.T. QUINLAN Barrister & Solicitor Phone: (780) 441-4336 Fax: (780) 428-9683 File No.: 196164 **DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta, Canada, T5J 3V9

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I. INTRODUCTION

1. On July 5, 2017, Canada North Group Inc., now 667402 Alberta Ltd., Canada North Camps Inc., now 18512398 Alberta Ltd. ("CNC"), Campcorp Structures Ltd. ("Campcorp"), D.J. Catering Ltd. ("DJ"), 816956 Alberta Ltd., and 1371047 Alberta Ltd. (hereinafter collectively referred to as the "Applicants") made an application before this Honourable Court requesting certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and obtained an initial order (the "Initial Order"), a stay of proceedings (the "Stay") against the Applicants for a period of 30 days up to and including August 3, 2017, and the appointment of Ernst & Young Inc. (the "Monitor") as monitor of the Applicants.

2. Since that time, 1919209 Alberta Ltd. ("1919") and Canada North Group LP Holdings Ltd. ("Holdings") have been added as "Applicants" to these proceedings, while Campcorp and DJ have been removed from these proceedings. The Stay has continually been extended.

3. On January 10, January 11, March 14 and March 15, 2019 the Monitor, Canadian Western Bank ("CWB"), Great White Sand Tiger Lodging Ltd. ("Sand Tiger") and 726 Remote Accommodations Ltd., 726 Modular Finance Ltd. and Reliant Asset Management, LLC (jointly "726") made submissions before the Honourable Mr. Justice Hillier in respect of the ownership of and priority to certain assets located on the Bonnyville, Wandering River, Peace River and Kilometer 147 camps that were formerly operated by the Applicants (collectively the "Contested Camp Assets").

4. On May 14, 2019, the Honourable Mr. Justice Hillier released his Reasons for Judgment (the "Reasons") in respect of the ownership of and priority to the Contested Camp Assets. In the Reasons, Justice Hillier found entirely in favour of CWB and the Monitor. A formal Order was later filed in respect of the Reasons (the "Priority Order").

5. The Priority Order was not appealed.

6. The Court that if the parties could not agree on costs within 60 days of the release of the Reasons, then the parties could speak to costs. At the end of the 60-day period, the Monitor wrote to the Court and requested an extension of this period with the consent of the parties. A 45-day extension was granted. No agreement on costs was reached, and a hearing date of November 6, 2019 was set down to argue the issue of costs.

7. Since that time, CWB, the Monitor and Sand Tiger have agreed on the costs payable by Sand Tiger as a result of the pre-trial steps and hearings that resulted in the Reasons and Priority Order (collectively the "Contested Camp Asset Hearings"). As part of a broader agreement between CWB, the Monitor and Sand Tiger, by which Sand Tiger purchased the "Small Wares" that they claimed in their dorm units from the Monitor for a modest sum, Sand Tiger also agreed to pay CWB the sum of $5,500.00 in costs as a result of the Contested Camp Asset Hearings. As part of this agreement, the Monitor agreed to not recover any costs from Sand Tiger for the Contested Camp Asset Hearings.

8. The only cost dispute which remains is what, if anything, 726 ought to pay in costs to the Monitor and CWB as a result of the Contested Camp Asset Hearings. That is the general subject of these written submissions.

9. The Monitor submits that the reasonable and appropriate costs award derived from is a "hybrid" approach that results in a total of $92,390.67 being awarded to the Monitor, as is further set out below.

II. FACTS

10. The Initial Order was granted on July 5, 2017. Throughout the earliest stages of these proceedings, the Applicants indicated to the Court, the Monitor and the stakeholders that a significant number of the Contested Camp Assets were part of the property of the Applicants, through various confidential Affidavits.

11. 726, through counsel, have been equally involved in these CCAA proceedings from a very early stages. Indeed, 726 was successful on October 25, 2017, by way of an Order of the Honourable Associate Chief Justice Nielsen, in having the Stay extended in 726's favour in respect of an action commenced by Kingdom Properties Ltd. ("Kingdom Properties") against it and one of the Applicants.

Affidavit of Georgina McMinn sworn October 12, 2018 at Exhibit "D"

12. By way of a letter dated July 4, 2018 from counsel for Kingdom Properties, the Monitor learned that 726 had obtained an Order from Master Schulz on January 18, 2018 (the "Master's Order) in Court of Queen's Bench Action number 1703 23860, permitting 726 to remove a large number of assets, including a number of Contested Camp Assets, from the Kilometer 147 camp, which had been operated by CNC.

Monitor's 17th Report at paras. 31-33; Monitor's 26th Report at para. 10 and Schedule "A"

13. Prior to that time, the Monitor was unaware of the existence of the Master's Order and was unaware that 726 had been removing assets from the Kilometer 147 camp. The Monitor had not been notified of 726's proceedings in Court of Queen's Bench Action number 1703 23860, but 726 had been aware of the Stay in effect in these CCAA proceedings.

Monitor's 17th Report at paras. 31-33; Monitor's 26th Report at para. 10 and Schedule "A"

14. On July 5, 2018, counsel for the Monitor wrote to counsel for 726 advising that the Monitor had not been aware of the Master's Order, that a number of the assets included in the Master's Order were the property of the Applicants and that 726 was to immediately cease removing any further assets from the Kilometer 147 camp.

Monitor's 17th Report at paras. 31-33; Monitor's 26th Report at para. 11 and Schedule "B"

15. Thereafter, for the first time, 726 advised the Monitor that a number of assets that had been represented by the Applicants as being owned by them in these proceedings were in fact actually owned by 726. Thereafter, 726 promptly began to provide documentation to the Monitor in respect of its asset ownership claims, and corresponded with the Monitor regarding such claims.

Monitor's 17th Report at paras. 19-21 and 26-29; Monitor's 26th Report at para. 12

16. It was later discovered that a number of the assets removed by 726 had different serial numbers on them than were expressly set out in the Master's Order. These are primarily the "Removed Unit" and "Delivered Kitchen Units," previously discussed in these proceedings, which form part of the Contested Camp Assets. The Monitor advised the Court in several prior Reports that there were certain "Missing Assets" from the Kilometer 147 camp that were unable to be located and which were being searched for by the Monitor. The Monitor had initially asked 726 if they had taken these Missing Assets, and 726 denied taking them. Later, when the Monitor attended at 726's Conklin site to take inventory of what was removed from the Kilometer 147 camp, most of the "Missing Assets" were found to be in 726's possession. While the Monitor does not believe that 726 intentionally mislead the Monitor in this respect, additional professional expenses were incurred by

the Monitor looking for these assets because 726 had advised the Monitor that it did not have them in its possession.

Monitor's 17th Report at para. 36; Monitor's 18th Report at paras. 52-56; Monitor's 19th Report at paras. 5-9; Monitor's 26th Report at para. 21

17. On August 17, 2018, the Monitor's counsel wrote to the Commercial Coordinator to confirm a full day September 21, 2018 hearing date. That letter was copied to the service list, and indicated that the municipal tax issues and "certain ownership issues, priority issues and determinations" would be argued on September 21, 2018. At that time, it was anticipated that the issues surrounding the then known Contested Camp Assets would be argued on September 21, 2018. This letter prompted counsel for the MD of Greenview #16 to request a case management conference to discuss the matters that the Monitor anticipated would be heard on September 21, 2018.

Monitor's 26th Report at para. 14 and Schedule "C"

18. On September 6, 2018, a case management conference before the Honourable Mr. Justice Hillier occurred. On that date, his Lordship issued two Orders, without any opposition from any party. The first adjourned all of the property tax related issues until after the *Virginia Hills* decision was released. The second directed that all parties with claims (including all property and secured claims) in the assets held by the Applicants were to file Affidavits setting out their claims by certain specific dates in October 2018. This effectively pushed the determination of the issues regarding the Contested Camp Assets past the September 21, 2018 hearing date.

Order - Advice and Direction of Justice Hillier dated September 6, 2018

19. On September 10, 2018, the Monitor filed an Application returnable September 21, 2018 seeking certain directions in respect of securing of the known Contested Camp Assets and seeking approval for the liquidation of the "Small Wares." At that time, no party had presented a competing claim to the Monitor in respect of ownership of the Small Wares.

Monitor's 17th Report at paras. 60-62; Monitor's 26th Report at para. 16

20. On September 20, 2018, 726 advised the Monitor that it was claiming ownership of the Small Wares located within the dorms and alike units that were claimed by 726.

Monitor's 26th Report at para. 18

21. On September 21, 2018, the Honourable Mr. Justice Hillier granted an Order making certain directions in respect of the preservation of the then known Contested Camp Assets, and adjourning by consent the Monitor's relief in respect of the Small Wares to October 23, 2018.

Order of Justice Hillier dated September 21, 2018; Monitor's 26th Report at para. 19

22. On September 18, 2018, just prior to the September 21, 2018 hearing, the Monitor's counsel wrote to the Commercial Coordinator to confirm a full day October 23, 2018 hearing date. That letter was copied to the service list, and indicated that a number of issues and matters would be before the Court on that date, including without limitation seeking declarations regarding certain property/ownership claims made by 726, and the priority issues as between 726 and CNC.

Monitor's 26th Report at para. 20 and Schedule "D"

23. On October 2, 2018, 726 filed its first Affidavit in support of its claims to the Contested Camp Assets. This initial Affidavit did not include any claim for the "Ancillary Equipment," "Removed Unit" or "Delivered Kitchen Units." Concurrently, counsel for 726 issued a Notice of Appointment for Questioning on Paul McCracken.

Monitor's 18th Report at para. 38

24. Thereafter, counsel for the Monitor indicated that it wished to Question Barry Roman of 726 on his Affidavit.

Monitor's 18th Report at para. 39

25. The dates for the Questionings of Mr. McCracken and Mr. Roman were thereafter set by the parties for November 16, 2018. As a result, the issues regarding the Contested Camp Assets were not heard on October 23, 2018, but were anticipated to be argued on December 4-5, 2018.

26. On November 15, 2018, the Monitor's counsel wrote to the Honourable Mr. Justice Hillier to seek certain case management directions, and indicated, amongst other things that:

a. the issues regarding the Contested Camp Assets would not be argued on December 4-5, 2018;

b. Ms. Nicholson of JSS Barristers in Calgary had recently been appointed counsel for 726 to deal with the priority and ownership issues, and that her retainer was just in the process of being finalized;

c. the parties had scheduled a Questioning of Mr. McCracken and Mr. Roman, 726's affiant, for November 16, 2018, but given the late retention of Ms. Nicholson, that Questioning could not proceed, as Ms. Nicholson was not available to proceed on November 16, 2018 with the Questioning of Mr. McCracken.

d. the Monitor and others were not prepared to proceed with Questioning of Mr. McCracken and Mr. Roman on separate days (despite Mr. Roman's availability on November 16, 2018);

e. while the Monitor, and certainly others, recognized new counsel needed to be accommodated, the Monitor was quite concerned with delaying the application inordinately, as the issue of entitlement to the units claimed by 726 was holding up progress in terms of bringing this matter to some form of conclusion, since it affected everything else in the estate;

f. the Monitor was requesting a case management hearing to obtain guidance on scheduling the hearing for the Contested Camp Asset issues, the timing for Questioning, and the exchange of materials; and

g. 726 would also be making application at the case management meeting for an Order granting it leave to file an additional Affidavit which describes additional Ancillary Equipment claimed by 726.

Monitor's 26th Report at para. 22 and Schedule "E"

27. On November 20, 2018, 726 filed an Application seeking leave to file further evidence in respect of the Contested Camp Assets.

Application of 726 dated November 20, 2018

28. On November 21, 2018, at a case management conference, the Honourable Mr. Justice Hillier granted an Order that permitted 726 to file supplementary evidence, and:

a. directed that Questioning of Mr. McCraken and Mr. Roman would occur on December 4-5, 2018;

b. scheduled the Contested Camp Asset Hearings for January 10-11, 2019; and

c. directed certain timelines for the filing of materials for the Contested Camp Asset Hearings.

Order dated November 21, 2018,of the Honourable Mr. Justice Hillier; Monitor's 26th Report at para. 23

29. On November 27, 2018, Mr. Roman swore his Supplemental Affidavit in respect of the Contested Camp Assets.

30. Ultimately, Questioning on Affidavits occurred on December 4, 5 and 6, 2018. Undertaking responses were thereafter provided by Paul McCracken and Barry Roman.

31. On December 11, 2018, 726 wrote to the Court seeking time to address whether certain matters respecting the Contested Camp Assets were properly before the Court.

Affidavit of Gulnana Machitova sworn December 20, 2018

32. On December 12, 2018, CWB filed an Application in respect of the Contested Camp Assets.

33. On December 17, 2018, the Monitor filed its written submissions in respect of the issues regarding the Contested Camp Assets.

34. On December 20, 2018, CWB and 726 filed their respective written submissions in respect of the issues regarding the Contested Camp Assets. The 726 submissions did not address the Bonnyville Assets and certain other discrete issues.

35. On January 2, 2019, CWB filed its reply written submissions.

36. On January 3, 2019, the Monitor filed its reply written submissions.

37. On January 10, 2019, 726 requested an adjournment of the hearing of the substantive issues regarding the Contested Camp Assets. The submissions on this adjournment took nearly the entire day of this Court sitting.

38. On January 10, 2019, the Honourable Mr. Justice Hillier granted an "adjournment" to 10:00 a.m. on January 11, 2019 to obtain further answers to undertakings of Mr. McCracken, obtain from CWB any letter of no interest in the Bonnyville Assets that may exist and other evidence that the Court may grant permission to be filed.

Order dated January 10, 2019 of the Honourable Mr. Justice Hillier

39. In the evening of January 10, 2019, 726 requested certain written interrogatories from CWB. On January 11, 2019, CWB provided the requested written interrogatories.

40. On January 11, 2019, 726 requested a further adjournment of the issues related to the Contested Camp Assets and leave to file certain further evidence. That Application took half of the January 11, 2019 sitting. The Monitor's counsel fell ill, and the afternoon sitting was adjourned.

41. On January 11, 2019, the Honourable Mr. Justice Hillier granted an Order that:

a. dismissed 726's further adjournment application and 726's application for leave to file or obtain the following:

   i. the Third Affidavit of Barry Roman, marked as Exhibit "D" for Identification on January 11, 2019; and

   ii. 726's request to obtain further evidence from Paul McCracken;

b. granted 726 leave to file, the following:

   i. the undertaking answers marked as Exhibit "A" for Identification on January 11, 2019;

   ii. the CWB written interrogatories, dated January 11, 2019, marked as Exhibit "B" for Identification on January 11, 2019; and

   iii. the Dentons' answers to undertakings marked as Exhibit "C" for Identification on January 11, 2019;

c. directed that the matters that were set to be argued on January 10 and 11, 2019 shall be continued and set for further hearing over two days on March 14 and 15, 2019;

d. permitted 726 to file and serve a supplemental Brief in respect of the following limited subjects on or before 4:00 p.m. on February 19, 2019:

   i. the Bonnyville ownership, security, and priority issues;

   ii. rectification of the general security agreements of CNC as against the limited partnerships; and

   iii. relief from forfeiture;

e. permitted the Monitor, CWB, and any other interested party to file and serve a further supplemental reply Brief on or before 4:00 p.m. on February 28, 2019;

f. confirmed that 726 was not be permitted to file any further evidence in respect of the matters set for further hearing on March 14 and 15, 2019; and

g. preserved the issue of costs in relation to all pre-hearing steps and appearances and the parties' appearances and submissions made on January 10 and 11, 2019 to a future date.

Order dated January 11, 2019 of the Honourable Mr. Justice Hillier

42. On February 19, 2019, 726 filed its supplemental written submissions.

43. On February 28, 2019, CWB and the Monitor each filed their further supplemental submissions.

44. On March 14-15, 2019, the parties argued the substantive issues in respect of the Contested Camp Assets.

45. On April 18, 2019, counsel for the Monitor sent a schedule of certain PPR registrations to the Honourable Mr. Justice Hillier, which had been requested by his Lordship on March 15, 2019.

46. On May 14, 2019, the Reasons were released, and eventually the parties negotiated and submitted a formal Order arising from the Reasons.

III. ISSUES

47. The specific issues to be addressed in this Brief are as follows:

a. What are the general principles related to costs?;

b. Does this Honourable Court have the jurisdiction to award costs in CCAA proceedings?;

c. What costs ought to be awarded against 726?

IV. LAW AND ARGUMENT

A. General Costs Principles

48. It is well established that costs awards are premised on the assumption that a winning party is deserving of some compensation for legal costs incurred in establishing or defending its position.

Milavsky v. Milavsky Estate, 2016 ABQB 347 ("*Milavsky*") at para. 13 **[TAB 1]**

49. Courts in Alberta have wide discretion in respect of crafting an appropriate costs award. The overriding principle is reasonableness.

RVB Managements Ltd. v. Rocky Mountain House (Town), 2015 ABCA 304 at para. 9 **[TAB 2]**

50. In making a costs award, the Court may consider any matter related to the question of reasonable and proper costs that it considers appropriate. In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all the relevant circumstances, including without limitation: the result of the action and the degree of success of each party; the importance of the issues; the amounts claimed and recovered; the complexity of the action; the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action; a party's denial of or refusal to admit anything that should have been admitted; and, whether any application, proceeding or step in an action was unnecessary, improper or a mistake.

Rule 10.33 of the *Rules of Court*

51. Generally, there are three types of costs awards:

a. solicitor and own client or full indemnity costs - the successful party receives complete indemnification for their legal fees;

b. solicitor-client costs - the successful party receives its reasonable legal fees and disbursements, which may not amount to complete indemnification; and

c. party-party costs - which may be "enhanced" to an amount in excess of the amounts set out in Schedule C, by using some multiplier thereof, awarding extra lump sums, awarding some percentage of solicitor and own client costs or using some other reasonable calculation, together with reasonable disbursements.

R&R Consilium Inc v. Talbot, 2019 ABQB 275 ("*R&R Consilium*") at paras. 40-41 **[TAB 3]**

52. As is discussed later in this brief, there are also cases where Courts have adopted a "hybrid" approach, where the successful party receives one level of costs for certain steps, and a different level for other steps.

(i) Solicitor and own Client or Full Indemnity Costs

53. Generally, solicitor and own client full indemnity costs are only to be awarded against a party in cases where that party has engaged in reprehensible, scandalous or outrageous conduct during the course of the litigation.

R&R Consilium at para. 43 **[TAB 3]**

54. In *Strategy Summit Ltd. v. Remington Development Corp.*, the Court summarized the applicable principles and cases as follows:

> 12 Graesser J in *College of Physicians & Surgeons (Alberta) v. H. (J.)* at paras 4-23, (2009), 468 A.R. 101 (Alta. Q.B.) summarized some of the factors which militate in favour of a court exercising its discretion to award solicitor-client costs due to party misconduct:
>
> • the conduct of a party has been reprehensible, scandalous or outrageous
> • the conduct occurred during the course of the litigation
> • solicitor and client costs might suffice to satisfy the objectives of deterrence and punishment that would otherwise be served by a punitive damage award
> • the case is rare and exceptional or unusual
> • allegations of morally reprehensible conduct by such party are held to be groundless by the trier of fact
> • there was no reasonable basis on which to commence, or continue, litigation.
>
> 13 In *Jackson v. Trimac Industries Ltd.*, Hutchinson J set out the rare and exceptional circumstances which might justify solicitor and his own client costs:
>
> • circumstances constituting blameworthiness in the conduct of the litigation by that party;
> • cases in which justice can only be done by a complete indemnification for costs;
> • where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
> • an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion;
> • where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs;
> • defendants found to be acting fraudulently and in breach of trust;
> • the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial;
> • fraudulent conduct;
> • an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges.

Strategy Summit Ltd. v. Remington Development Corp., 2012 ABQB 61 ("*Strategy Summit*") at paras. 12-13 **[TAB 4]**

(b) Enhanced Party-Party Costs

55. Generally speaking, party-party costs are considered with reference to the Schedule C tariff. However, Courts have often noted, and are ever increasingly commenting, that Schedule C is out of date and does not provide for an adequate costs award.

Stewart Estate v. 1088294 Alberta Ltd., 2016 ABCA 144 at para. 26 **[TAB 5]**

56. In *R&R Consilium*, the Court noted:

> Gauged against the actual legal fees incurred here, it is clear that the costs provided for under Column 5 of Schedule C are severely out dated and do not provide a fair current money value for the efforts undertaken by the Applicants to obtain the relief they sought. While no evidence was provided, our Court of Appeal in 2015 noted that the Bank of Canada online Inflation Calculator indicated that the average cost of living in Canada since 1998 has been approximately 39%: *RVB Managements Ltd. v. Rocky Mountain House (Town),* 2015 ABCA 304 (Alta. C.A.) (CanLII) at para 10. The enhanced costs awarded here will be increased by 40% as an adjustment for inflation that will bring the total costs award to $53,200 plus the disbursements of $5397.42 and the applicable GST, which I find are reasonable disbursements in this case.

R&R Consilium at para. 70 **[TAB 3]**

57. As noted in *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, and adopted in many cases since then, cost awards are generally intended to reimburse the successful party for approximately 50% of their actual legal fees, but the level of indemnity will vary with reference to a non-exhaustive list of factors, including the:

a. merits of the case;
b. respective relationship between the parties;
c. risks faced as a consequence of the litigation;
d. length and complexity of the matter;
e. time preparing and organizing documents; and
f. preparation, presentation, and submissions made to the court.

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd., 1999 ABQB 801 ("*Trizec*") at para. 30 **[TAB 6]**; also see *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 at para. 16 **[TAB 7]**; *Strategy Summit* at para. 36 **[TAB 4]**

58. Where appropriate, it is open to a Court to decrease or increase the percentage of recovery.

Trizec at para. 32 **[TAB 6]**

59. In *Mikkelsen v. Truman Development Corp.*, the Court noted:

> 48 When costs awarded pursuant to the Tariff would be inadequate, the Court has numerous options available, as discussed by the Court of Appeal in *Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.*, 1998 ABCA 118 (Alta. C.A.) at para 4, leave to appeal to SCC refused, 25594 (1 May 1997) [1997 CarswellAlta 1286 (S.C.C.)]:

> ...There are different ways to adjust Schedule C when its product seems inadequate: higher column, multiples of a column, a multiplier for inflation or otherwise, extra lump sums, some form of solicitor-client costs, and so forth. Several modes of adjustment may be reasonable; indeed several different modes may amount to much the same thing. The ultimate question is whether the final total is reasonable or not.
>
> 49. Pursuant to Rule 10.31(1)(b)(ii), this Court may award a lump sum instead of or in addition to assessed costs.

Mikkelsen v. Truman Development Corp., 2016 ABQB 255 at paras. 48-49 **[TAB 8]**

60. In *Weatherford Canada Partnership v. Addie*, Justice Shelley provided a comprehensive review of the case law with respect to when partial indemnity of solicitor client fees, a multiplier approach to Schedule C, or hybrid awards are appropriate. She generally indicated that the Courts use the percentage of indemnity method where there is misconduct, significant complexity, or damages claimed in excess of Column 5. Multipliers and hybrid costs are reflected in cases where there is no misconduct and the litigation is not overly complex or protracted. She specifically noted:

> 54 The general rule is that costs should be awarded on a party and party basis and that, absent misconduct, the amount awarded should approximate 40-50% indemnity of a winning party's actual costs (*Marathon* at para 30; *Trizec* at para 21; *LSI Logic* at para 8). Courts may elevate costs to the upper end of that general range and above where the losing party engages in misconduct, when the litigation is particularly long and complex, and when the amount in dispute is significant (*Trizec* at paras 30-32; *LSI Logic* at paras 8, 10, 16; *Marathon* at paras 35-36; *Stewart* at para 25).
>
> 55 Alberta courts have recognized that when Schedule C fees are inadequate, courts may use several different methods for determining appropriate costs, including the application of multipliers to a column, extra lump sums, or some fraction of solicitor-client costs (*Caterpillar Tractor* at para 4; *LSI Logic* at para 7). The ultimate question is "whether the final total [reached] is reasonable or not" (*Caterpillar Tractor* at para 4).
>
> ...
>
> 57 In some cases, courts have avoided using the percentage of indemnity approach on the basis that doing so would undermine policy objectives such as facilitating access to justice (*Blaze* at para 75), or because solicitor-client costs may include items not relevant to party and party costs (*Marathon* at para 31) and not clearly "reasonable and appropriately incurred to advance the issues in the action" (*Kent* (ABQB) at para 62). However, courts may first apply a multiplier to Schedule C fees, and then check the appropriateness of the resulting award by calculating the percentage of indemnity that the award provides to the successful party (*Klemke* at paras 28, 41-42).

Weatherford Canada Partnership v. Addie, 2018 ABQB 571 ("*Weatherford*") at paras. 23-26, 54-55, 57 **[TAB 9]**; also see *McAllister v. Calgary (City)*, 2018 ABQB 999 ("*McAllister*") at para. 16 **[TAB 10]**

61. In *Athabasca Minerals Inc. v. Syncrude Canada Ltd.*, after noting that 40.64% represents the Bank of Canada rate to account for inflation between 1998 and 2017, being the last time Schedule C was revised, the Court used a percentage of actual fees incurred approach. In doing so, the Court

noted that this approach *de facto* accounted for inflation in that approach. Justice Jones further said that "It just strikes me as contortionist to apply both a multiple of Schedule C column amounts and an inflation factor, when the object is to arrive at a figure which provides 40% to 50% indemnification." The Court also noted that it was unnecessary to adjust for:

a. the complexity of the matters in issue;
b. a compressed time frame;
c. the number of deponents to be examined;
d. the volume of material to review: or
e. inflation,

as these matters will undoubtedly have been reflected in the aggregate fees charged by counsel.

Athabasca Minerals Inc. v. Syncrude Canada Ltd., 2018 ABQB 551 ("*Athabasca Minerals*") at paras. 58-59 and 67-68 **[TAB 11]**

62. The case law is inundated with examples of decisions where court ordered some various increase or enhancement above the base Schedule C tariff costs. Just as examples:

a. in *Milavsky*, the Court concluded that while that case was not a rare and exceptional application where costs on an indemnification basis were justified, it also was not a run of the mill special chambers application either. As a result, the Court ordered column 5 costs that were doubled for fees.

Milavsky at paras. 18-20 **[TAB 1]**

b. In *Murphy Oil Canada Ltd. v. Predator Corp.*, a 6 times multiple was employed by the Court partly in response to the conduct of the parties;

Murphy Oil Canada Ltd. v. Predator Corp., 2005 ABQB 134 at para. 28 **[TAB 12]**

c. In *McAllister v. Calgary (City)*, the Court noted that the costs schedule is grossly out of date in terms of value. After considering that and considering the conduct of the parties in relation to the litigation (and there was no misconduct), the Court concluded that Column 3 costs should be grossed-up to reflect a true monetary value. In that regard, the evidence was before the Court at the costs hearing indicated a rate of inflation of 46.60%. Accordingly, a 46.60% gross-up was applied to Column 3 fees;

McAllister at paras. 19-20 **[TAB 10]**

d. in *R&R Consilium*, the Court used a 2 times multiple of column 5 (despite the relief being declaratory in nature), and then further grossed up these enhanced costs awarded by 40% as an adjustment for inflation;

R&R Consilium at para. 70 **[TAB 3]**

e. In *Athabasca Minerals*, Justice Jones awarded 45% of the winning parties' actual legal costs; and

Athabasca Minerals at paras. 58-59 and 67-68 **[TAB 11]**

f. In *Trizec*, 60% of the winning parties' actual legal costs was awarded.

Trizec at para. 32 **[TAB 6]**

(c) Hybrid Approaches

63. In an effort to craft a reasonable and appropriate costs award in the circumstances, Courts have also adopted a "hybrid" approach, where the successful party receives one level of costs for certain steps, and a different level for other steps.

64. In *Polar Ice Express Inc. v. Arctic Glacier Inc.*, the defendant unsuccessfully appealed a judgment in favour of the plaintiff for $50,000 damages for interfering wrongly with economic relations and inducing breach of contract. The Court of Appeal found that the defendant had engaged in misconduct by improperly refusing to produce material records and that the defendant's employee and witness had lied under oath. Therefore, the Court ordered that costs be awarded on a full indemnity basis from the first day of trial onwards, and on a party-party basis for all pre-trial steps.

Polar Ice Express Inc. v. Arctic Glacier Inc., 2009 ABCA 20 **[TAB 13]**

65. In *Weatherford Canada Partnership v. Addie*, Weatherford either erroneously or improperly claimed privilege and strategically delayed commencing the Action against Artemis and Kaechele to maximize its own long-term benefit. It also had in its possession documents which made it clear that it had brought its action out of time. Weatherford's conduct did not involve fraud, a breach of trust, an abuse of process, or the making of baseless allegations of dishonesty and misconduct, but there was an aspect of outrageousness in that Weatherford commenced and continued a complex and expensive lawsuit, when it was in possession of documents that should have alerted it to the fact that its time for doing so had expired. The Court concluded that Weatherford ought to pay costs based on Column 5 using a multiplier of 4 for the period from commencement of the lawsuit to the date that the improperly withheld records were disclosed, and costs based on Column 5 using a multiplier of 2 ½ from the date thereafter.

Weatherford at paras. 68 and 70 **[TAB 9]**

66. Overall, this Honourable Court has a wide discretion to craft an appropriate costs award taking into account all of the circumstances.

B. Costs in CCAA Proceedings

67. Costs to be awarded in proceedings under the CCAA are governed under the inherent jurisdiction of the Court (pursuant section 11 of the CCAA) and the provincial Rules of Court, as there are no applicable provisions within the CCAA dealing with this question of costs.

Jackpine Forest Products Ltd., Re, 2004 BCSC 20 ("*Jackpine Forest Products*") at para. 7 **[TAB 14]**; *9007-7876 Québec inc. (Steinberg Inc.), Re*, 2012 QCCS 4787 at paras. 8-9 **[TAB 15]**

68. Often costs are not awarded in proceedings under the CCAA, and each party is required to bear its own costs. The general rationale for this is that stakeholders in CCAA proceedings are involuntary parties in the process, and the reality is that with an insolvent company funds are limited, and parties ought not expect to recover their litigation costs.

SemCanada Crude Co., Re, 2013 ABQB 102 ("*SemCanada Crude*") at para. 5 **[TAB 16]**; *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465 ("*Return on Innovation Capital*") at para. 3 **[TAB 17]**; *Calpine Canada Energy Ltd., Re*, 2008 ABQB 537 ("*Calpine*") at para. 1 **[TAB 18]**

69. However, a Court under the CCAA is no different than other Canadian Courts. There are many instances where a Court considered it appropriate to award costs within CCAA proceedings. This is particularly so where the parties are sophisticated commercial entities that attempt to better their positions.

SemCanada Crude at paras. 5 and 7 **[TAB 16]**; *Silver Streams Homes Inc., Re*, 2017 ONSC 314 ("*Silver Streams Homes*") at para. 13 **[TAB 19]**; *Return on Innovation Capital* at paras. 4-9 **[TAB 17]**; *Uniforêt inc., Re*, 2004 CarswellQue 9553 at para. 8 **[TAB 20]**

70. This discretion includes the ability to award full indemnity or enhanced costs in CCAA proceedings where appropriate.

71. In *Jackpine Forest Products Ltd., Re*, Justice Burnyeat found that the Court has inherent jurisdiction to award costs on a full indemnity basis in CCAA proceedings, and did so in that case. The applicant had brought a meritless application to replace the Monitor that delayed and complicated the Monitor's function of assisting the debtor to stay in business, while the additional burden of the legal fees would adversely affect the Monitor's efforts.

Jackpine Forest Products Ltd. at paras. 34-37 **[TAB 14]**

72. In *SemCanada Crude*, the Court found that the usual tariff costs ($11,693.00) would have only amounted to one-tenth of the actual legal costs incurred ($112,500.00). The Court held that litigation before it was factually and conceptually complicated, and was vigorously contested on both sides. As a result, the Court awarded partial indemnity costs of approximately one-third of the actual legal costs incurred by the winning party.

SemCanada Crude at para. 7 **[TAB 16]**

73. In *Silver Streams Homes Inc., Re*, the Court awarded costs on a partial indemnity basis due to the importance, novelty and complexity of the matter, both factually and legally, as well as the amount in issue.

Silver Streams Homes at paras. 22-25 **[TAB 19]**

74. In *Calpine*, Justice Romaine was satisfied that given the accelerated and intense process necessitated by the reconsideration motions and the nature of the litigation before her that Schedule C costs were inappropriate as a guide on costs, and granted partial indemnity costs. She concluded that:

> 14 I have considered the estimated solicitor and client costs of each of the claimants, and have concluded that HCP Acquisition Inc. and the Trustees and Directors of the Fund and its general partner should receive the same level of reimbursement of costs, roughly commensurate with the principle that a costs award should aim at providing 40% to 50% indemnity: *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.) at para. 8. I therefore award each of these claimants costs in the amount of $6,300 against each of Khanjee and Catalyst, plus one half of their reasonable disbursements.
>
> 15 The indemnity costs claimed by the Calpine applicants are considerably higher than those claimed by the other two successful parties, and I note that they impliedly include the costs of other parties who have a right to seek indemnification from the Calpine applicants for the costs of appearing on this application. As pointed out by Catalyst, security instruments that may contain such types of indemnity provisions were not in evidence, but I take note that the costs of the Monitor and the Monitor's counsel are costs that must be borne by the creditors of the estates of the Calpine parties. I therefore award the Calpine applicants parties costs in the amount of $15,000 against each of Khanjee and Catalyst plus one half of their reasonable disbursements.

Calpine at paras. 12, 14, 15 **[TAB 18]**

75. It is also clear that costs, including costs on an enhanced or full indemnity basis, may be awarded to the Court's Monitor, especially one with obligations beyond that of a typical monitor. More specifically, the Court may award costs against another party for amounts that comprise the Monitor's professional fees and disbursements, and the Monitor's legal counsel fees and disbursements.

Return on Innovation Capital at paras. 9, 14-15 and 24 **[TAB 17]**; *BuildDirect.com Technologies Inc. (Re)*, 2018 BCSC 210 at paras. 27 and 35 **[TAB 21]**

76. The fact that the Contested Camp Asset Hearings occurred within the ambit of the CCAA does not alter the Court's discretion, nor the applicable principles.

C. Costs Award Against 726

77. The Monitor respectfully submits that a costs award against 726 is warranted in the circumstances for the following reasons:

a. 726 is a sophisticated commercial entity;

b. 726 did not assert their claims to the Contested Camp Assets until approximately 1 year after the Initial Order; thereby, delaying the Monitor from completing the necessary tasks in these proceedings, which in turn increased the municipal taxes incurred and costs of the estate;

c. 726 could have protected itself and avoided the Contested Camp Asset Hearings, but it failed to do so;

d. 726 attempted to better its position by seeking the declarations it sought in respect of the Contested Camp Asset Hearings;

e. the factual and legal issues involved were complex;

f. the Contested Camp Asset Hearings were time and document intensive, which involved without limitation:

   i. numerous Affidavits, Monitor's Reports, transcripts and written briefs that comprised thousands of pages of evidence and argument;

   ii. several prior case management hearings,

   iii. two and a half days of Questioning on Affidavits;

   iv. undertakings responses and written interrogatories;

   v. more than a day's worth of submissions (mostly by 726) in respect of 726's requests for adjournments and permission to file further evidence;

   vi. two days of submissions on the substantive issues; and

   vii. this full day costs hearing;

g. the matters related to the Contested Camp Assets were brought forward and determined in a relatively compressed time period (July 2018 to March 2019) by the Monitor, once the issues were identified by the Monitor ;

h. the matters relating to the Contested Camp Assets were important to the parties, as well as the estate and stakeholders in general;

i. the values attributatble to the Contested Camp Assets significantly eclipse the $1.5 million threshold set out in Column 5 of Schedule C, as:

   i. the combined maximum value of the security interests claimed by CNC and CWB in the Contested Camp Assets was in excess of $18,000,000.00;

   ii. the amount paid by 726 for the Contested Camp Assets significantly eclipsed $20,000,000.00; and

   iii. 726 ended up paying $3,250,000.00 in a settlement for a release of CWB and CNC's security interests in the majority, but not all, of the Contested Camp Assets;

j. the Monitor and CWB were entirely successful in the Contested Camp Asset Hearings;

k. 726's applications for adjournments and permission to file further evidence were unnecessary, avoidable, served no purpose in the result and only served to delay the resolution of the matters related to the Contested Camp Assets,;

l. virtually every aspect of the Contested Camp Asset Hearings, including the adjournments and provision of further evidence, were contested;

m. 726 forced the Monitor to expend unnecessary professional costs in searching for the certain Contested Camp Assets that were originally at the Kilometer 147 camp, which 726 removed under the Master's Order (despite having different serial numbers than were set out in the Master's Order), but then inaccurately advised the Monitor that 726 did not have those assets in its possession;

n. the Monitor's professional fees and the Monitor's legal counsel costs in respect of 726 are at least $179,829.55, inclusive of GST, and it is the stakeholders of the estate that will ultimately bear that professional cost out of their own recoveries; and

o. it is just and appropriate that 726 pay costs to offset at least a portion of the Monitor's professional costs in order to save those stakeholders partially harmless on these issues.

78. For many of the same reasons as expressed above, the Monitor also submits that an award of costs in favour of CWB against 726, in addition to an award of costs in favour of the Monitor, is appropriate. The Monitor will leave the submissions on the quantum of any costs award in favour of CWB to it to advance.

79. In terms of the quantum of the appropriate costs award in favour of the Monitor, it submits that it is clear that an award of costs on a purely Schedule C, Column 5 basis would be completely insufficient and unreasonable. By the Monitor's calculation, the amount payable on a Schedule C, Column 5 basis would be approximately $42,302.12, inclusive of disbursements and GST.

80. However, the actual amount of the Monitor's professional and legal costs is $179,829.55 (inclusive of GST). The amount payable on a Column 5 basis equates to only approximately 23% of the actual fees incurred.

81. As noted above, the Court has indicated that the costs awarded should be approximately 50% of the actual legal costs of the successful party, even absent wrongdoing or other factors that would result in a larger costs award.

82. Thus, it is clear that costs on a pure Schedule C, Column 5 basis is insufficient within the applicable principles of costs and circumstances.

83. The Monitor submits that a hybrid approach here is the most appropriate. Specifically, the Monitor respectfully submits that the appropriate costs award in these circumstances is:

a. on a solicitor and own client full indemnity basis for the Monitor's legal counsel fees, plus GST, for its time spent on:

i. drafting and finalizing the Monitor's reply brief filed January 3, 2019 which primarily contained written submissions on 726's adjournment applications;

ii. attending the Court sitting on January 10 and 11, 2019, which were primarily in respect of the repeated adjournment and fresh evidence applications that 726 advanced on those days; and

iii. negotiating and finalizing the resulting formal Orders arising from the decisions on January 10 and 11, 2019

(collectively the "Adjournment Costs"); and

b. 50%, on a partial indemnity basis, of the remainding Monitor's professional fees and Monitor's legal counsel fees attributed to 726's claims and the Contested Camp Asset Hearings, plus applicable disbursements and GST.

84. This total amount of costs awarded in favour of the Monitor on the basis of this submission is $92,390.67, comprised of:

a. $24,866.10, inclusive of GST, for the Adjournment Costs; and

b. $67,524.57, inclusive of GST for the remainder of the costs on a 50% basis ($179,829.55 - $24,866.10 = $135,049.15 x 50%).

85. In respect of the proceedings on January 10 and 11, 2019, and 726's adjournment and fresh evidence applications on those days, it is the Monitor's submission that:

a. the Contested Camp Asset Hearings were supposed to be heard on December 4-5, 2018, but at the case management conference of November 21, 2018, those dates were pushed back to January 10-11, 2019 in order to accommodate 726 and its new counsel. It then asked for further adjournments on January 10-11, 2019 (transcript at p. 99);

Transcript of Proceedings on January 10, 2019 at p. 99 **[TAB A]**

b. while 726 may have been partially successful in getting an "adjournment" over night, from January 10 to January 11, in order to see if two further additional pieces of evidence could be obtained, the actual reasons for that "adjournment" have to be considered. The Honourable Mr. Justice Hillier made clear that this was granted not because an adjournment of the hearing of the substantive Contested Camp Assets issues was justified, but rather as an exercise of judicial discretion to provide yet another opportunity for 726 to obtain the evidence it wanted before this Honourable Court, despite the fact that it had ample time to obtain such evidence. Generally, the Honourable Mr. Justice Hillier concluded that each of the grounds allegedly justifying an adjournment were without merit. In particular, the Honourable Mr. Justice Hillier stated that:

i. "The parties will be aware that the opportunity that was accorded for 726 to supplement the evidence, was in this Court's assessment, part of a process for completion and not adjourning the issues surrounding the Bonnyville ownership and priority issues separate and apart from the balance of the matters that are before the Court. As I have stated on various occasions, the purpose of this hearing was and is, to identify those claims that were contemplated in the directions given at the September 6th hearing. That hearing contemplated that there would be decisions rendered on ownership and priorities. It did not direct or contemplate any additional need for each respective complainant or claimant rather, to file applications. All submissions, proof of claim, were to be based on assertions in affidavits to be filed at the date prescribed. In the case of 726, extension was granted for further material to be submitted as I will return to in a moment."; and

ii. "Based on the concerns that were raised yesterday, I did accommodate the position of 726 yet again, to allow it to exercise further due diligence."

Transcript of Proceedings on January 11, 2019 at pp. 11-14 **[TAB B]**

c. the reasons advanced by 726 for needing an adjournment and further evidence, which centred around not realizing until late in process the existence and nature of CWB and the Monitor's priority claims to the Bonnyville Assets, were rejected by the Honourable Mr. Justice Hillier, who concluded that 726 ought not have been surprised by the claims and ought not to have needed additional time, especially since this Honourable Court had previously accommodated 726 and provided further time to it at the November 21, 2018 case management conference;

Transcript of Proceedings on January 10, 2019 at pp. 55-62 and 94-99 **[TAB A]**;
Transcript of Proceedings on January 11, 2019 at pp. 11-14 **[TAB B]**

d. 726 could have taken steps to get the additional information it sought from CWB and Mr. McCracken prior to January 10, 2019, but it did not do so;

Transcript of Proceedings on January 10, 2019 at pp. 94-97 **[TAB A]**;
Transcript of Proceedings on January 11, 2019 at p. 14 **[TAB B]**

e. the attempt to obtain and/or introduce further evidence from Mr. Roman and Mr. McCracken was found by the Honourable Mr. Justice Hillier to be an attempt by 726 to litigate by installments, which is a form of litigation misconduct by a party;

Transcript of Proceedings on January 11, 2019 at pp. 11 and 15 **[TAB B]**

f. as a result of the above, these were unnecessary and avoidable adjournment and fresh evidence applications brought by 726;

g. such attempts by 726, even if partially successfully on January 10, 2019, did nothing but delay, hinder and attempt to confuse the Contested Camp Asset Hearings;

h. it must be remembered that 726 did not want to proceed with the substantive hearing of the Contested Camp Asset hearings on January 10-11, 2019, and due to the Monitor's counsel falling ill on the afternoon of January 11, 726 did not have to make any substantive submissions over those two days, and then effectively got another two months before having to make such submissions. In the interim, they were able to file a supplemental brief, after having chosen to not originally make any written submissions in respect of the Bonnyville Assets. As the Honourable Mr. Justice Hillier noted on January 10, 2019, the message from this Honourable Court since September 2018 has been to use the time available to the parties as effectively as possible. 726's applications on these days did not allow the parties to make the best of use of available time possible; and

Transcript of Proceedings on January 10, 2019 at p. 1 **[TAB A]**;

i. 726 unnecessarily prolonged the resolution of the Contested Camp Asset issues, which in turn further delayed the Monitor's ability to complete its tasks within the estate to wind up these proceedings;

Transcript of Proceedings on January 11, 2019 at p. 11 **[TAB B]**

86. For the reasons set out above, the Monitor submits that 726 that is guilty of misconduct, albeit not of a fraudulent or scandalous nature. It attempted to litigate in installments and attempted to (and *de facto* did) unnecessarily delay the completion of the Contested Camp Asset Hearings as a result of baseless arguments and failing to take pre-hearing steps through which it could have obtained the evidence it sought. *Jackpine Forest* Products, *Trimac Industries* and *Weatherford* confirm that such misconduct provides a basis for full indemnity costs, since such conduct ought to be deterred.

87. In respect of the remainder of the costs, the Monitor submits that 50% of the Monitor's professional and legal costs is appropriate in light of the circumstances described in paragraph 77 of this brief.

88. Rather than attempting to determine which column and multiplier to use, or trying to adjust for inflation and other shortcoming within Schedule C, the Monitor is of the view that Justice Jones' approach in *Athabasca Minerals* makes the most intuitive and rational sense in these circumstances.

89. In that case, again, Justice Jones used a percentage of actual fees incurred approach. He said that "[i]t just strikes me as contortionist to apply both a multiple of Schedule C column amounts and an inflation factor, when the object is to arrive at a figure which provides 40% to 50% indemnification." Justice Jones also noted that by using this approach that was unnecessary to adjust for:

a. the complexity of the matters in issue;
b. a compressed time frame;
c. the number of deponents to be examined;
d. the volume of material to review: or
e. inflation,

since these issues are already reflected in the aggregate fees charged by counsel.

90. This is true in respect of the Monitor's costs.

91. Further, there are similarities between this case and *Athabasca Minerals*. That was a case that was of relatively complexity and intensity. That case involved a two-day application with significant preparation during a compressed time-frame, a significant amount of materials including extensive affidavits, transcripts from questioning and responses to undertakings. Five days of reading time had been allocated to the judge to review the material. That made that case one where it was appropriate to award partial indemnity.

Orbis Engineering Field Services v. Taifa Engineering Ltd, 2019 ABQB 592 at para. 12 **[TAB 22]**

92. Many of those circumstances are true in this case as well, plus the additional circumstances set out in paragraph 76. A percentage of actual fees approach is the most reasonable and appropriate in the circumstances.

93. The Monitor submits that there is no reason to be awarded less than 50% of actual fees in the circumstances of this case, especially since the Monitor is not attempting to seek costs for all costs that have been incurred as a result of its dealings with 726, and since it is the stakeholders that will effectively suffer any shortfall in the costs awarded against 726.

94. Overall, the Monitor submits that the hybrid approach set out above is just, appropriate and reasonable in the circumstances.

V. CONCLUSION AND RELIEF SOUGHT

95. The Monitor respectfully requests that this Honourable Court award it the sum of $92,390.67, or such further and other amount that it considers reasonable and appropriate, as against 726.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18 day of October, 2019.

DUNCAN CRAIG LLP

Per: ______________________

DARREN R. BIEGANEK Q.C., Q.C./RYAN F.T. QUINLAN
Counsel for Ernst & Young Inc., in its capacity as Monitor of 667402 Alberta Ltd., 18512398 Alberta Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd.,1919209 Alberta Ltd., and Canada North Group LP Holdings Ltd., and not in its personal or corporate capacity

LIST OF AUTHORITIES

Tab

1. *Milavsky v. Milavsky Estate*, 2016 ABQB 347.
2. *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304.
3. *R&R Consilium Inc v. Talbot*, 2019 ABQB 275.
4. *Strategy Summit Ltd. v. Remington Development Corp.*, 2012 ABQB 61.
5. *Stewart Estate v. 1088294 Alberta Ltd.*, 2016 ABCA 144
6. *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801.
7. *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968.
8. *Athabasca Minerals Inc. v. Syncrude Canada Ltd.*, 2018 ABQB 551
9. *Weatherford Canada Partnership v. Addie*, 2018 ABQB 571.
10. *McAllister v. Calgary (City)*, 2018 ABQB 999.
11. *Athabasca Minerals Inc. v. Syncrude Canada Ltd.*, 2018 ABQB 551.
12. *Murphy Oil Canada Ltd. v. Predator Corp.*, 2005 ABQB 134.
13. *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2009 ABCA 20.
14. *Jackpine Forest Products Ltd., Re*, 2004 BCSC 20.
15. *9007-7876 Québec inc. (Steinberg Inc.), Re*, 2012 QCCS 4787.
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17. *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465.
18. *Calpine Canada Energy Ltd., Re*, 2008 ABQB 537.
19. *Silver Streams Homes Inc., Re*, 2017 ONSC 314.
20. *Uniforêt inc., Re*, 2004 CarswellQue 9553.
21. *BuildDirect.com Technologies Inc. (Re)*, 2018 BCSC 210.
22. *Orbis Engineering Field Services v. Taifa Engineering Ltd*, 2019 ABQB 592.

LIST OF EVIDENCE

A. Transcript of Proceedings on January 10, 2019
B. Transcript of Proceedings on January 11, 2019

TAB A

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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The Honourable Mr. Justice Hillier	Court of Queen's Bench of Alberta
D.R. Bieganek, Q.C.	For the Monitor
R. Quinlan	For the Monitor
C.L. Nicholson	For 726 Group
Z. Han	For 726 Group
D. McAllister	For 726 Group
C.P. Russell, Q.C.	For Canadian Western Bank
B. Smith	For Mr. and Ms. Hadfield
S. Chimuk	For Great White Sand Tiger Lodging
S. Delblanc	For Mr. McCracken
D. Borman	Court Clerk

Discussion

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

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

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

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

Thank you.

MR. BIEGANEK: Thank you, My Lord. Perhaps I'll start with introductions just so the Court knows the cast of characters.

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

THE COURT: Thank you.

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

THE COURT: Thank you.

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

THE COURT: Thank you.

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

THE COURT: Thank you.

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

THE COURT: Thank you.

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

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

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

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

THE COURT: Thank you.

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

THE COURT: Quite so. All right.

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

So are you ready to go?

Submissions by Ms. Nicholson (Adjournment)

MS. NICHOLSON: Good morning, My Lord.

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

Now, when we attended on the --

THE COURT: Can I just --

MS. NICHOLSON: Yes My Lord?

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

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

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

THE COURT: Yes.

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

But the bottom line is Bonnyville is, in effect, an ownership issue. And so that's how we envisioned it. That was the point.

THE COURT: Right.

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

MR. BIEGANEK: It would be tab 20. It's tab 20 of the exhibit binder.

THE COURT: Thank you very much.

MS. NICHOLSON: Thank you.

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

> As amended and as stated on --

And then the blank day: (as read)

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

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

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

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

THE COURT: Okay. I was at page 14.

MS. NICHOLSON: Yes.

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

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

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

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

THE COURT: Yes.

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

THE COURT: M-hm.

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

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

> CNG shall provide the following to the partnership.

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

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

So CNG is, in effect, providing to the partnership its land. And 14.2 explains that 726 -- its contribution as a partner to this partnership is to provide the equipment that's set out in paragraph 14.2(b). And that is, in effect, the Bonnyville equipment. Okay.

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

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

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

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

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

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

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

THE COURT: I have it.

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

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

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

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

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

THE COURT: Not easily.

MR. BIEGANEK I can --

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

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

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

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

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

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

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

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

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

that gets back to Mr. Russell.

THE COURT CLERK: Yes, Sir.

MS. NICHOLSON: Thank you, Mr. Russell.

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

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

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

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

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

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

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

THE COURT: Just give me a minute. I do not have it tabbed, so ...

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

THE COURT: I have Schedule C.

MS. NICHOLSON: Thank you.

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

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

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

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

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

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

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

THE COURT: That is November 28th -- those registrations, as

I understood?

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

THE COURT: Go ahead.

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

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

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

THE COURT: That is correct.

UNIDENTIFIED SPEAKER: Nor do I.

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

THE COURT: I am grateful.

MS. NICHOLSON: Thank you.

THE COURT: Go ahead.

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

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

And they go on at the next -- paragraph 44 there to say that they are providing no opinion. And they're in the process of providing an opinion to Monitor with respect to the validity and enforceability of the claims and any priority issues. And they likely can't complete that until the questioning of the affiant, Paul McCracken, has been completed. And it says these issues, as well, will need to be addressed at that time.

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

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

THE COURT: That I do have.

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

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

THE COURT: So let us use that.

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

THE COURT: Okay.

MS. NICHOLSON: -- in this regard.

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

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

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

They set the issues here in paragraph 88, and they say the 726 group is claiming ownership of or priority to everything at Bonnyville in paragraph 88. And the point here -- they do say "or priority." I just -- the point is we are claiming ownership, but we are not claiming relief in respect of a declaration that we have prior security or in respect of the priority issue. We're not seeking a determination of that. That's the point.

And, My Lord --

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

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

THE COURT: I realize --

MS. NICHOLSON: Yes.

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

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

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

MS. NICHOLSON: No.

THE COURT: I agree. I am with you.

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

THE COURT: Sorry. Yes.

MS. NICHOLSON: Okay. No problem.

THE COURT: Yes.

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

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

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

THE COURT: Just another way of putting it.

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

THE COURT: Right.

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

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

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

THE COURT: I see. Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So --

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

THE COURT: Right.

MR. BIEGANEK: This brief is December 17th.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

MS. NICHOLSON: Yes.

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

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

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

MS. NICHOLSON: Well --

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

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

THE COURT: It is all right.

MS. NICHOLSON: -- and that's really important, too --

THE COURT: Okay.

MS. NICHOLSON: -- because I want to give it its fair due for doing its job. But the thing is, it can't do that job, in our respectful submission, at the expense of the parties' interests.

And so that in the event that it does come to a view that it needs to make assertions on behalf of the estate, then it, then, needs to bring before the Court its applications in the normal way that a litigant in effectively (sic) does. It is -- albeit, it is the Court's officer, but it does not -- because of that -- mean that this Court doesn't ensure that matters -- that it has before it applications that give it the grounding in which to make decisions.

Because now, we say, you have before you the application by 726 about the Bonnyville equipment -- ownership. You now have a claim by CWB about security in respect of that. That's excellent. Now, that matter can be heard. And the Monitor, now, in its brief begins now to take different positions.

So it seems to be suggesting that 726 owns -- pardon me, 726 -- the limited partner -- Bonnyville Limited Partnership owns those assets. So it's now saying that certain of the assets -- the majority of the Bonnyville assets -- are owned by the limited partnership under this Limited Partnership Agreement.

Because you'll recall we can -- my client provided those assets under the Limited Partnership Agreement to the partnership, so we provided those assets to the partnership. And Mr. Bieganek and the Monitor are now saying that that was a security arrangement; that was a conditional sale; and that is, effectively, title transfer to the LP at that time.

And so that, My Lord, is a -- something that is not currently before you. So, like, there is only our request that we be granted a declaration that we own it. We don't have the corollary to that -- their assertion -- but 726 owns it -- or pardon me -- the LP owns it. We don't have anyone asserting that the LP owns it.

And so it's the -- so that is not being advanced, and so that's --

THE COURT: Sorry. Not being advanced when? You say that today?

MS. NICHOLSON: I -- there's no application for a declaration.

THE COURT: Right. But the Court has got a live issue as to, all right, so who owns this property?

MS. NICHOLSON: Well, it has a live issue as to Bonnyville being owned by our client.

THE COURT: Right.

MS. NICHOLSON: Yes.

THE COURT: And so it has got to determine whether that is a valid claim.

MS. NICHOLSON: Exactly.

THE COURT: Okay.

MS. NICHOLSON: So it would presumably, like, I guess, dismiss that application if it's not --

THE COURT: Well, it may not -- that is -- yes.

MS. NICHOLSON: Right. And so --

THE COURT: In order to determine that, it has got to establish, well, is there anybody else that has a better claim or, you know, is the proper owner? That is the only in which you can determine ownership is to assess on all of the evidence what claims there are -- crystallized, competing. I do not think that really matters.

It is what is the position, as well. Is 726 truly the owner?

MS. NICHOLSON: Yes. Yes, My Lord. I agree with that.

THE COURT: Okay.

MS. NICHOLSON: But if we turn to the security claims -- so the ownership issue, as you rightly point out, is does our client own it?

THE COURT: Right.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Do you have that, My Lord?

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

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

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

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

MS. NICHOLSON: Okay.

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

MS. NICHOLSON: Yes.

MR. BIEGANEK They should be, My Lord.

THE COURT: More than 1(B). Perhaps that is the problem.

MR. BIEGANEK Yes. It's -- it'd be under tab 2 is the transcript of Mr. Roman --

THE COURT: Yes.

MR. BIEGANEK -- and then there's subsequent tabs, A, B, C, D.

THE COURT: I have it now.

MS. NICHOLSON: Okay. Thank you.

THE COURT: Go ahead.

MS. NICHOLSON: So, My Lord, if you turn -- there are three financial statements -- 2013, 2014, and 2015.

THE COURT: Right.

MS. NICHOLSON: On the 2013 financial statements at tab 5, there's a reference to short-term borrowings, and that's what my friend is -- he's referencing that as an indication that our client would have had notice of a general security agreement. And our client has something to say about that, and it would like the opportunity to respond to that.

And if we turn to -- and it's also important to bear in mind that -- to look at this financial statements at 2014, the CNC financial statements at 2014. There at note number 9, it talks -- do you have that, My Lord?

THE COURT: Yes.

MS. NICHOLSON: Okay. At the very bottom there, it's referencing the Bonnyville interest there and the sale.

And it talks about the company continuing to retire data of $4.4 million. So that is something that is material to the transaction whether CWB was paid out, whether -- and similarly, the same point can be made with respect to September 30th, 2015 financial statements.

THE COURT: Paid out what? Any money or all of it?

MS. NICHOLSON: And for which it gave release, especially if you look at paragraph --

THE COURT: Do I not have information from CWB as to what it received on that transaction?

MS. NICHOLSON: I'm not sure.

THE COURT Right.

MS. NICHOLSON: I'd have to defer to Mr. --

THE COURT: I believe you would find it indeed -- Mr. Russell's supplementary brief does clarify what was received.

MS. NICHOLSON: I --

MR. BIEGANEK: Tab 4, My Lord.

MS. NICHOLSON: Let me double check that. Thank you.

THE COURT: I mean, I have your point. It is something that does not yet have to be -- further to proceed, but it is a matter --

MS. NICHOLSON: I just want to make sure I have that.

MR. BIEGANEK: It's the first brief I had filed December 20th, tab 4.

THE COURT: Thank you.

MS. NICHOLSON: Oh, on the first brief. Thank you.

Yes. I'm familiar now that I see that with this. But it doesn't address exactly whether a relief -- a no-interest letter was given in respect of this by the bank. So they received these proceeds, and in return, they are permitting the sale to go through, and they are giving a no-interest letter. They are implyably or expressly not asserting their security interest in respect of it.

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

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

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

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

THE COURT: I have it.

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

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

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

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

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

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

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.

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

THE COURT: Okay.

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

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

THE COURT: Thank you.

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

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

MR. BIEGANEK: That's fine.

THE COURT: Okay.

MR. BIEGANEK: Thank you.

PROCEEDINGS ADJOURNED UNTIL 1:30 PM

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.

Certificate of Transcript

I, J. Aubé, certify that

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

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

Janice Aubé, Transcriber
Order Number: AL-JO-1002-2983
Dated: February 15, 2019

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

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January 10, 2019	Afternoon Session
The Honourable Mr. Justice Hillier	Court of Queen's Bench of Alberta
D.R. Bieganek, Q.C.	For the Monitor
R. Quinlan	For the Monitor
C.L. Nicholson	For 726 Group
Z. Han	For 726 Group
D. McAllister	For 726 Group
C.P. Russell, Q.C.	For Canadian Western Bank
B. Smith	For Mr. and Ms. Hadfield
S. Chimuk	For Great White Sand Tiger Lodging
S. Delblanc	For Mr. McCracken
D. Borman	Court Clerk

Discussion

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

MR. BIEGANEK: Okay. Certainly.

THE COURT: Okay.

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

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

THE COURT: Thank you.

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

MR. RUSSELL: Yes, My Lord.

(OTHER MATTERS SPOKEN TO)

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

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

MS. NICHOLSON: That's correct.

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

MS. NICHOLSON: Yes.

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

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

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

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

THE COURT: Okay. All right.

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

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

THE COURT: Yes.

MS. NICHOLSON: As late, as well.

THE COURT: Correct.

MS. NICHOLSON: Yes.

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

MS. NICHOLSON: Yes. Thank you.

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

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

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

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

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

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

And in the course of retrieving my own copy of the Monitor's Seventeenth Report, I also came across and wanted to give you an opportunity for input before I hear from Mr. Bieganek and others, Ms. Nicholson -- and I am reading here from his correspondence to the Court seeking the date that ultimately became the conference on December 4th that we have contemplated might be by telephone, but which I believe most counsel were able to attend in person.

But he says on page 2 in paragraph B --

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

THE COURT: It says --

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

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

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

MS. NICHOLSON: Okay.

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

MS. NICHOLSON: Okay.

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

MS. NICHOLSON: Okay.

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

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

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

> But given the late retention of insolvency counsel, that questioning cannot proceed. Ms. Nicholson is not available to proceed tomorrow with the questioning of Mr. McCracken. The Monitor and others are not prepared to proceed with the questioning of Mr. McCracken and Mr. Roman on separate days, despite Mr. Roman's availability on November 16th, 2018. Pushing the questioning to Ms. Nicholson's available dates will not afford the parties adequate time to put together briefs or transcripts for December 4th or 5th.
>
> While the Monitor and certainly others recognize new counsel need to be accommodated, the Monitor is quite concerned with delaying this application inordinately as the issue of entitlement to the units claimed by 726 is holding up progress in terms of bringing this matter to some form of conclusion. It affects everything. Simply by way of explanation, if the units are declared to be owned by 726 and not subject to any security of, for example, the bank, then that is going to have an effect on additional recovery and, by extension, the cost allocations. If the units are declared to be property of the applicants and subject to CWB security, they will then need to be liquidated and that, too, will, by extension, have an effect on recovery and the cost allocations.

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

Submissions by Ms. Nicholson (Adjournment)

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

THE COURT: Quite so.

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

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

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

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

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

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

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

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

MS. NICHOLSON: So, so --

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

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

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

THE COURT: M-hm.

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

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

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

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

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

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

So to wait and do that means, in my respectful submissions, that the only fair way to deal with that is to ensure that questions get to be put that are material and evidence needs to be proffered -- the opportunity given to the parties to do that, which if Your Lordship does not grant the adjournment, we will never have -- the Court will never know the fulsome picture on the question of express or implied authority. We'll never have that information, nor will it ever have the information, including from Mr. McCracken or others, about ordinary course sales, in respect of which I just even now over the lunch hour learned a whole lot more about. Just now.

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

THE COURT: Thank you.

Mr. Bieganek?

Submissions by Mr. Bieganek (Adjournment)

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

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

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

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

In a normal proving process, as we did with many other creditors -- most of them in the -- when we were in a -- what we thought was a restructuring proceeding -- parties would file their material with the Monitor. The Monitor would give an opinion and reject, vary, or accept everybody's claims. That's not the process that we have in this instance right now. We have something else.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I have it.

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

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

MR. BIEGANEK: Find the different binder.

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

Page 115 did you --

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

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

THE COURT: Yes.

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

A Yes.

Q Okay. And did you sign this Unanimous Shareholders' Agreement on behalf of CNC?
A Yes.

Q And did you do so again in your capacity as a director or that entity?
A Yes.

Q And the parties to the Unanimous Shareholders' Agreement, to the best of your knowledge, are as stated therein?
A Yes.

Q And there are no others?
A Yeah, that's correct.

Q Okay. Thank you. Did you review this -- each of these? If I call these collectively a Unanimous Shareholders' Agreement involving the G -- pardon me -- the Unanimous Shareholders' Agreement involving each of the Bonnyville project, the Kilometre project, and the Peace River project -- if I call all of those the Unanimous Shareholders' Agreement, you'll understand?
A Yes.

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

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

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

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

Q And would you kindly provide the same undertaking with respect to these USAs that we've just looked at?
A We will do that.

And they did provide those answers.

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

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

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

MR. DELBLANC: We have it.

Q MS. NICHOLSON: That is the security agreement, dated March 29th between Kilometre 147 LP and CNC, correct?
A Yes.

Q It is signed by you?
A Yes.

Q And you signed in your capacity as the Kilometre 147 GP?
A Yes.

Q As an officer and director of that entity?
A Yes.

Q And if I call, there is three General Security Agreements granted by three LPs in respect of Canada North Camps, correct?
A Yes.

Q So from my perspective -- and you can correct me if you have different information -- the form of the GSAs is the same in all cases, and the only difference is with respect to the particular LP, which is the party. Is that also your information?
A I believe that's correct.

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

Mr. Delblanc interjects: (as read)

Could you put me back to that exhibit, please.

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

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

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

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

Q When you get a copy of that, I would like to mark that as an exhibit?
A That's fine.

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

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

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

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

THE COURT: I am sorry. What paragraph are you at?

MR. BIEGANEK: 36, My Lord.

THE COURT: Thank you.

MR. BIEGANEK: So it's there.

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

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

So --

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

MR. BIEGANEK: 18.

THE COURT: Thank you.

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

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

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

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

Number one, with respect to the Bonnyville GSA that we never had a copy of it. Well, it's unfortunate it wasn't in evidence, but we did discuss it on more than one occasion. I am uncertain today with my failing memory, My Lord, as to whether or not I provided a copy to Ms. Nicholson. There were a lot of additional documents that were brought forward and provided during the course of that hearing. But at no time between the date of the questioning or even after we filed our brief, which clearly articulated our position and our reliance on that GSA, nor even in their reply brief do we hear about this void until today that the GSA they've never seen.

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

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

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

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

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

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

MR. BIEGANEK: Taha. Right.

THE COURT: Of course. She is here.

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

THE COURT: Yes.

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

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

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

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

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

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

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

And in the absence of having paperwork that was done contemporaneously with the transactions in question, we do not believe the Court's going to be in a position to accept anything that Mr. McCracken might say and to the extent that 726 is relying upon that, that's also a detriment.

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

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

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

MR. RUSSELL: Thank you, My Lord.

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

THE COURT: So that was a request made when?

MR. RUSSELL: Prior to the questioning.

THE COURT: Yes.

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

THE COURT: Right.

MR. RUSSELL: And the interrogatories had preceded them.

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

THE COURT: I see.

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

THE COURT: And it was surrounding clarification of security?

MR. RUSSELL: Of CWB's security position.

THE COURT: In relation to the limited partnerships.

MR. BIEGANEK: Correct.

MR. RUSSELL: Yes.

What I did was I attached to the -- because Ms. Taha's first affidavit and sixth affidavit were dealing with the overall security position of the, the bank, largely with regard to CNC and, you know, the primary borrowers. But there was reference to the LPs having given guarantees.

In affidavit number 7, we put into evidence the guarantees and the assignments of (INDISCERNIBLE) that had accompanied the guarantees at the time. And Ms. Taha deposed that CWB -- it continues to rely on the guarantees and the assignments of (INDISCERNIBLE).

I do have some additional comments, My Lord --

THE COURT: Of course.

MR. RUSSELL: -- once Mr. Bieganek is done.

THE COURT: Thank you very much.

MR. BIEGANEK: So as I've said, I appreciate there's a significant jeopardy here to 726. But in this particular instance, the fact of the matter is that some of these questions did arise during the course of the questioning. Mr. McCracken gave an undertaking to ask Ms. Barnhouse if she received a letter of no interest. We don't have a response to that yet. He could have been asked questions arising out of that during the course of the questioning but wasn't.

And as I've said, the -- I would submit to the Court that the issue, certainly -- and this goes to whether or not the CWB release had happened -- was alive. When we talk about the CNC General Security Agreement, I've taken you through the questioning of Mr. McCracken. It was done -- not by me -- by Ms. Nicholson on the issues and the ability of Bonnyville to give security. And it is unfortunate that that document wasn't entered, but it's there. Everybody was aware of it. And I don't recall being asked to provide a copy, assuming I hadn't provided one, at that time. And I just, as I said, can't remember.

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

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

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

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

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

THE COURT: Sorry.

MR. BIEGANEK: -- whether or not the Canadian Western Bank released its interest. And if not, whether or not those assets remain subject to its security. The rest should not be delayed. But if they insist on delaying Bonnyville, it delays everything.

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

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

THE COURT: Just give me a minute.

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

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

THE COURT: Okay.

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

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

THE COURT: Right.

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

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

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

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

THE COURT: Right.

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

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

THE COURT: Right.

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

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

MR. BIEGANEK: I would, I would -- in the context of the original request for information from the bank, perhaps not, but right after the bank filed its application, we all know the date we were looking for. If they had information or had wanted to know that information, they had opportunities to ask for it. I mean, we asked it of them, and they declined. Right? Now they're saying, well, we should be able to ask the bank if they got to. Trying to be neutral, I said, sure. Go ahead and ask. But they didn't.

MS. NICHOLSON: Begged for an adjournment.

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

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

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

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

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

MR. BIEGANEK: Okay.

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

MR. BIEGANEK: That's correct.

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

We understand that some loans may have been paid and that a -- one of them might have been a small amount at BDC but -- and that was outlined actually in one of the answers in undertaking that was given by Mr. McCracken and his questioning. And Mr. Russell took you through that because it was an appendage to his brief. So it would show where the money went. I didn't see in that, but it went to -- I missed it. Which tab was that, Chuck?

MR. RUSSELL: Tab 4 of the first brief.

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

THE COURT: I do not unfortunately.

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

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

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

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

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

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

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

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

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

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

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

MR. BIEGANEK: M-hm.

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

MR. BIEGANEK: Well, that depends on availability of the Court.

THE COURT: Of course.

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

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

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

MR. BIEGANEK: Like, I'm ready to argue.

THE COURT: -- you are ready to go.

MR. BIEGANEK: I'm ready to argue. I've prepared to argue --

THE COURT: Right.

MR. BIEGANEK: -- based on what we've got.

THE COURT: Okay.

MR. BIEGANEK: Because my assumption is there isn't one.

THE COURT: Right.

MR. BIEGANEK: Right?

THE COURT: Okay.

MR. BIEGANEK: So --

THE COURT: But to at least cover that one off.

MR. BIEGANEK: Yes.

THE COURT: Secondly, the -- well, I am not even sure there is a second one because I am not --

MR. BIEGANEK: Well, the undertaking that was asked of Mr. McCracken was to speak with Ms. Barnhouse and determine if --

THE COURT: Oh, yes. No. That is on the other side of the equation.

MR. BIEGANEK: Yes.

THE COURT: Get that information, so that we were not dealing with adverse inferences.

MR. BIEGANEK: Right.

THE COURT: We would know what the answer is. To get those points, I am not much impressed that $20 million can be in the ordinary course of business. I do not need Mr. McCracken. I don't know that I would rely on his evidence if he said it. But the -- and then this agency, that is a matter of law. There needs to be some outward indicator.

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

THE COURT: Right.

MR. BIEGANEK: Okay. We accept that.

THE COURT: Right.

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

THE COURT: No.

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

THE COURT: Exactly.

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

MR. BIEGANEK: You bet.

THE COURT: Okay.

Mr. Russell?

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

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

Submissions by Mr. Russell (Adjournment)

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

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

THE COURT: M-hm.

MR. RUSSELL: And the -- it's under tab 1. And I have to admit, I may very well have completely misunderstood what the -- this argument was, but --

MR. BIEGANEK: I think, My Lord, if -- the binder you're going to need to look at is the transcript binder, and you would be under tab 2. And it would be tab 2, so that's the transcript of Mr. Roman, and it's -- if it's the 2013 statements or 2014 statements?

MR. RUSSELL: 2014 statements, yes.

MR. BIEGANEK: So it's the second set of financial statements under tab B of that binder.

THE COURT: Sorry. 2014?

MR. BIEGANEK: Yes.

MR. RUSSELL: Yes.

THE COURT: I just happened to have tabbed that. That was not so hard as it sometimes is. Go ahead.

MR. RUSSELL: All right. Well, Sir --

THE COURT: This is -- are we into the notes?

MR. RUSSELL: I'll take you through just a couple of places if I could.

THE COURT: Okay.

MR. RUSSELL: First of all, these are audited financial statements.

THE COURT: Right.

MR. RUSSELL: Secondly, if you look at the consolidated balance sheet, which is probably about four pages in -- or second page in after -- first page after the audit certificate.

THE COURT: I believe I have that.

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

Then, if you turn to note 3 --

THE COURT: Sorry. You took me to 56 million just on the -- I have it.

MR. RUSSELL: Yes. Just on the property, plant, and equipment.

THE COURT: Right. Okay.

MR. RUSSELL: Then, five more pages in is note 3.

THE COURT: I have that.

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

THE COURT: Where am I reading from on paragraph --

MR. RUSSELL: Okay. Note number 3.

THE COURT: -- 3?

MR. RUSSELL: Take the bottom line of numbers. So there's columns -- four columns --

THE COURT: It is a note 3 that --

MR. RUSSELL: Yes. Note number 3?

THE COURT: Yes?

MR. RUSSELL: "Property, plant, and equipment"?

THE COURT: Right?

MR. RUSSELL: Okay. It's the -- the first item is "land." The cost is 9 million.

THE COURT: Of course. Yes.

MR. RUSSELL: Okay. Yes.

So if you just go down to the very bottom --

THE COURT: Yes.

MR. RUSSELL: -- the total of the plant, property, and equipment --

THE COURT: Okay.

MR. RUSSELL: -- $75 million was the cost, accumulated depreciation is the 18 million, and that leaves the 56 million.

THE COURT: I see. Yes. That is how we get to that number. Yes.

MR. RUSSELL: Right.

THE COURT: Yes.

MR. RUSSELL: And then the next line down says, "included in the above are camp trailers, equipment, et cetera, under capital lease."

So there's no doubt that CNC was a lessee.

THE COURT: Yes. Okay.

MR. RUSSELL: And, in fact, in number 6, the long-term debt -- it gives for the particulars of that -- and then, note number 9 is the subsequent event, and this is where the auditor is certifying that the company sold 9.5 million of assets in the Bonnyville camps for cash consideration of $20 million.

THE COURT: Okay.

MR. RUSSELL: So I don't see how 726 is going to be able to demonstrate that the evidence that they have on the agency is -- trumps the -- this audited report.

THE COURT: What you are saying is that -- what is the acronym -- the GAA -- the generally accepting accounting principles, is it?

MR. RUSSELL: Yes.

THE COURT: -- would say that in the event that there was some other agency component to this, the audited report would require that you report that.

MR. RUSSELL: Absolutely.

THE COURT: Okay.

MR. RUSSELL: Unless the auditors were negligent, and I don't think anybody's been suggesting that.

THE COURT: Right. Yes. All right. I have that point.

MR. RUSSELL: The next point, My Lord -- if I could have you look at the affidavit of Christina Kiss (phonetic) from our office.

THE COURT: I have no idea where that is. I have read it.

MR. RUSSELL: Perhaps, then, I'll just -- at tab B, Sir, page 7.

THE COURT: Yes.

MR. RUSSELL: So this is where I had been making the pitch for having everybody lay their cards on their table under oath, so that we knew the matrix that we were dealing with going forward.

THE COURT: Yes.

MR. RUSSELL: And at page 7, line 7, Your Lordship says after making -- after having a discussion with Mr. Quinlan with regard to, with regard to whether the Monitor supports this or not -- line 7, Your Lordship asks me: (as read)

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

My answer is: (as read)

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

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

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

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

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

THE COURT: That was paragraph 14 or 15?

MR. RUSSELL: Paragraph 15, My Lord.

THE COURT: 15.

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

THE COURT: Okay.

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

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

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

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

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

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

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

THE COURT: Right.

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

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

THE COURT: Do not have an answer.

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

THE COURT: Okay.

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

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

THE COURT: Okay.

MR. RUSSELL: So we then knew --

THE COURT: And I have that in evidence.

MR. RUSSELL: Yes. At tab 4.

THE COURT: Right.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

THE COURT: Yes.

MR. RUSSELL: -- I also, at that point, advised that CWB had no record of having given a letter of no interest.

THE COURT: So sorry?

MR. RUSSELL: CWB had -- I advised counsel --

THE COURT: Right.

MR. RUSSELL: -- that CWB had no record of having given a letter of no interest.

THE COURT: I see.

MR. RUSSELL: And that's why it's important --

THE COURT: You have already told them that.

MR. RUSSELL: Yes. And that's why it was important to find out from them if they had one, and we had simply lost it.

THE COURT: I see.

MR. BIEGANEK: And to be clear, Sir, it's our understanding that Mr. McAllister has what he believes to be the Stikeman's file.

THE COURT: Yes. I recognized he said that in the course of questioning, yet not all of the Stikeman's file.

MR. BIEGANEK: He may not have all of it.

THE COURT: No. But he did say --

MR. BIEGANEK: But he's got some.

THE COURT: -- he had portions that he was going to review.

Thank you very much, Mr. Russell.

MR. RUSSELL Thank you.

THE COURT: Ms. Nicholson.

MS. NICHOLSON: Thank you, My Lord.

Submissions by Ms. Nicholson (Adjournment)

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

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

THE COURT: So we can go on that aspect.

MS. NICHOLSON: You're right.

THE COURT: Yes.

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

THE COURT: Okay.

MS. NICHOLSON: -- on that.

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

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

The important thing to note here, My Lord, is these are consolidated financial statements. That is exactly the point -- CNC Group Inc.'s consolidated financial statements. So if you turn to -- if you look at September 30th, 2014, tab 2(B), on page -- under note 1. It says, "Basis of Presentation." All of the consolidated financial statement -- the entities that are the subject of these financial statements are listed, which is exactly what I'm speaking about when I -- I'm talking about this other entities, Canada North Structures Inc., Cam Corp. Structures Inc., including its wholly (INDISCERNIBLE) Cam Corp. USA Inc.

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

So when Mr. --

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

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

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

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

THE COURT: All right.

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

THE COURT: No. But, but --

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

THE COURT: Okay.

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

THE COURT: But you did, you did have questioning of him twice yourself, apart from Mr. McAllister.

MS. NICHOLSON: Twice, sorry.

THE COURT: Seems -- I could be wrong, but after --

IDENTIFIED SPEAKER: It, it was over a day.

MS. NICHOLSON: Over a -- it was over a couple --

THE COURT: -- Mr. Bieganek had completed --

MS. NICHOLSON: Yes.

THE COURT: -- it seemed, to me, that you had some re-examination.

MS. NICHOLSON: I did consider that part of the same questioning, but --

THE COURT: Well, no. But you see, it's after Mr. Bieganek and, I believe, Mr. Russell, as well, have asked their questions that you say are surprising. But in light of what I've already gone through from at least November 15th, the Court's having difficulty that it should be a big surprise to experienced securities counsel that, indeed, ownership and priorities are live issues.

MS. NICHOLSON: I was not retained to deal with --

THE COURT: No. But --

MS. NICHOLSON: -- on the Bonnyville issue at that time of the cross-examinations.

THE COURT: No. But you're there for your client.

MS. NICHOLSON: Yes. I -- but, I mean, like, I can only --

THE COURT: So you're not going to shut off your skills and ability.

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

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

THE COURT: M-hm.

MS. NICHOLSON: So we heard that.

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

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

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

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

> Peter Young was very aware of our partnerships and what was in them, and what wasn't in them, and what was going on, and what wasn't going on.

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

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

Now, in --

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

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

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

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

THE COURT: So --

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

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

MS. NICHOLSON: Okay.

THE COURT: -- having lost a daughter.

MS. NICHOLSON: Oh, dear heavens.

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

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

THE COURT: Of course. I understand.

MS. NICHOLSON: -- that you've referred to of our colleague, of which I was not aware.

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

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

THE COURT: No, it is not.

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

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

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

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

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

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

So if my friends are willing to volunteer their witness, then that would have gone potentially at a distance to addressing this issue because now we're saying we need to know if you implyably released your security. That's one of the things that we need to know.

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

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

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

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

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

So how is it --

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

MS. NICHOLSON: Well, in --

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

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

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

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

MS. NICHOLSON: I understand.

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

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

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

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

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

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

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

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

UNIDENTIFIED SPEAKER: Yes.

MR. DELBLANC: Sorry. Could you say that again?

THE COURT: Mr. Delblanc, the question is being put indirectly through the Court to you as to steps that may allow for Dentons to provide an answer to the Court by tomorrow morning.

MR. DELBLANC: I don't think that'll be an issue, Sir. We have actually incidentally been taking some additional steps throughout this week trying to readdress those issues with Ms. Barnhouse again.

We had some answers which we thought were not overly responsive, and we've asked for some extra clarification on that. I don't think a tomorrow morning timeline would be unreasonable.

THE COURT: All right.

MR. DELBLANC: Thank you.

THE COURT: There we are.

MS. NICHOLSON: Thank you, My Lord.

THE COURT: Thank you very much, Mr. Delblanc.

MS. NICHOLSON: And so then, that would leave Mr. -- my client against Mr. McCracken to -- or pardon me -- Mr. Roman who says in 2013 financial statements that he didn't know over whose -- what security agreement was contemplated by that. The reference to it -- they're having general security.

THE COURT: Well, I recognize that --

MS. NICHOLSON: Yes.

THE COURT: -- that depending on the degree of experience or sophistication, an individual may not know with particularity what the GSA is that's been referred to there. It is only --

MS. NICHOLSON: Or which entity, which entity because it's consolidated, right? Whether or not --

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

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

THE COURT: All right.

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

Ruling (Adjournment)

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Okay. Okay.

Mr. Russell.

Discussion

MR. RUSSELL: My Lord, just out of the interest, Mr. Roman's background is undergraduate in economics, Masters in Finance from Northeastern University in Boston, worked at Bank of Boston as a commercial loan officer for a few years, then started his business.

This -- he had also in an email that's in evidence had been complaining to Mr. McCracken that the Romans had borrowed $50 million to finance these things. This is not an unsophisticated individual, and this is a big loan.

THE COURT: Yes, it is indeed.

MR. RUSSELL: M-hm.

THE COURT: All right. How can we make best use of the time here. And I am particularly aware that we have not even touched obviously to either -- there are interrelated issues, but I wonder this, Mr. Bieganek, are there any issues as affect that particular claim that can be isolated?

MR. BIEGANEK: Well, we had this email exchange yesterday, and I've been concerned whether they could or not, but I appreciate they've got a very narrow piece.

And it made be a best use of our time now to give the clerk a brief break --

THE COURT: Break, yes.

MR. BIEGANEK: -- to allow my friend to make his pitch. Mr. Quinlan will respond to that piece, and then he can decide whether he wants to come tomorrow for the balance of the show.

But I would just to alleviate him to putting the option of whether he wants to stay but give him the opportunity to put his case forward now because I know he's come from Calgary.

THE COURT: Quite.

MR. BIEGANEK: So ...

THE COURT: Is that satisfactory?

MR. QUINLAN: Yes. If we could get it done now, My Lord --

THE COURT: Of course. All right.

We're going to take ten minutes.

(ADJOURNMENT)

THE COURT: Thank you, everyone. Please be seated.

Submissions by Mr. Chimuk (Ownership)

MR. CHIMUK: Good afternoon, My Lord.

THE COURT: Mr. Chimuk.

MR. CHIMUK: Scott Chimuk for Sand Tiger.

First, I'd like to thank My Lord for the indulgence allowing me to go first and my colleagues for agreeing to same. Given the hour, I'll endeavour to be both witty and brief, although I'll probably only accomplish being brief.

So the first issue, which I'm sure my friends have prepared substantive submissions on and no doubt have loads of case law, is with respect to the issue of vetting. I can advise the Court that we can put the issue of vetting to rest. It's a non-issue.

So --

THE COURT: All right. So we have already accomplished your first objective.

MR. CHIMUK: So the first submission is that -- with respect and unless my colleagues say otherwise -- there's absolutely no issue with respect to ownership. This is purely the applicability of the *PPSA* regime, how it applies, if it applies; that's it. It's the only issue.

So we say, with respect, that the first exception with respect to the *PPSA* regime is Section 1(1)(z)(iv), which essentially states that if we're not in a regular business of releasing, then the *PPSA* does not apply.

Specifically, what we would submit is that we are not in the regular business of leasing televisions and washers and dryers. Right? And so either, we are, or we aren't.

Now, with respect, we say that we're not, but if we are, the Court would have to infer that when we lease trailers, it's implicit in that, that it's going to include TVs, washers, and dryers.

THE COURT: But isn't it fair to say that that may be the case, and in other instances, it would not be the case? In fact, are there not operations that you do where you do not supply?

MR. CHIMUK: A hundred percent. So this is why it doesn't matter because what I'm going to suggest is that either it's a yes or a no, but either way, this bears no impact with respect to my client.

THE COURT: I see.

MR. CHIMUK: And that's because the second exception with respect to the *PPSA* is Section 1(1)(z)(v), the very next section -- right -- which says that if our chattels are incidental to the use and operation of those lodgings, then it'd be covered by the *PPSA* registration of the lodging itself. So we say either they're incidental, or they're not. But irrespective, we win.

So you can apply 1(1)(z)(iv) or you can apply 1(1)(z)(v). But either way, it results in the same result, which is that the *PPSA* regime does not apply with respect to those chattels. Because either, we're not in the business of leasing TVs and washing machines, or the TVs and washing machines are incidental to the use of the lodging itself, in which case the other exception applies.

So it's a catch 22 in a good way for my client and a bad way for CWC. But irrespective of how you apply it, our point is we don't care what your finding is with respect to that -- the fact because if you find that the chattels are incidental, then we're caught by one exception, and if find that they're not incidental, then we're caught by the other exception, both of which remove us from the *PPSA* regime, such that we're the clear owner and such that the receiver can't sell our goods in order to satisfy another creditors claim.

And then, finally, the last point, My Lord -- I promised I'd be brief -- is Section 66(1) of the *PPSA*, which, of course, is the commercial (INDISCERNIBLE). I mean, it's the same. And frankly, this is, given the context of *CCAA*, it's within the context of *PPSA* that we have to be commercially practical and reasonable here.

And to be frank, the idea where the suggestion that CWC issued a loan on the strength of a potential security interest in TVs and washing machines doesn't make any sense. And that's clearly not what was intended. That's clearly not within the scope.

And to suggest that because my client failed to specifically mention TVs and washing machines somehow means that the *PPSA* registration with respect to the lodging -- the dorms themselves -- doesn't apply, in our submission, is ludicrous.

What is it that you have to list when you're talking about registering a trailer? Do you have list the washing machines? Do you have to list the toilets? Do you have to list the doorknobs? To just -- to go through and list everything, which is part and parcel of an incidental to the use of the trailer itself? To do so would result in an absolutely commercially absurd result. That's not practical; that's not common sense; and it's not commercially applicable.

And with respect, subject to any questions that you have and a right to reply, those are our submissions.

THE COURT: So if I understand what you are saying, when you register the interest in respect of the dorm -- the trailer -- you say that built into that is "and contents."

.MR. CHIMUK: The contents that are affixed to the unit, of course. The washing machine? The --

THE COURT: Well, sorry. I am not talking about fixtures in a non-removal sense. I am talking about the appliances, the electronics --

MR. CHIMUK: Yes.

THE COURT: -- what you have listed -- the televisions, the laundry, washers, dryers, the laundry equipment. I think there was one other category if --

MR. CHIMUK: Mattress type of thing.

THE COURT: -- the mattresses.

MR. CHIMUK: The mattresses, yes.

THE COURT: Yes.

MR. CHIMUK: Sheets, no. Now --

THE COURT: Right.

MR. CHIMUK: -- it would be very interesting if, what if the sheets were within the washer and dryer? But I guess we'll leave that in issue to another day for another Court to decide.

But --

THE COURT: You did say you were going to funny, and I think that everyone would agree that you have managed that twice now.

MR. CHIMUK: So yes. That -- with respect, My Lord, what we're suggesting is that when you register the trailer itself, items that are incidental to the use of that trailer, such as a washer and a dryer or a TV, would be covered by that *PPSA* registration.

Or alternatively, if they're not -- if there's something special, if there's something inherently unique or not incidental to the use of the trailer with respect to the TVs and washers, then we got to go back to Section 1(1)(z)(iv), in which case we're not in the ordinary business of leasing TVs. That's not what we do. We lease trailers.

So either we're caught by the *PPSA* registration, insofar as those items are material to and incidental to the use of the trailer itself. Or if there's something separate and apart, then the exception that's carved out in 1(1)(z)(iv) means that we're caught by that exception because we're not in the ordinary business of leasing TVs. Because we're not, and that's what the evidence is, and that's undisputed.

So either way, my client's successful. I think that probably it's 1(1)(z)(v), but I can see that it also could be 1(1)(z)(iv).

THE COURT: And you're saying that if it's 1(1)(z)(v), then -- please repeat.

MR. CHIMUK: Then, if it's 1(1)(z)(v), then the chattels, i.e. the TVs and the washer, the laundry machines -- are incidental to the use of the trailer itself. They're part and parcel with the trailer.

And therefore, because they're part and parcel with the use of the trailer itself, they're caught by the *PPSA* registration of the trailer. That's what we're saying. So they're included as part of that registration.

THE COURT: If you are renting a vehicle --

MR. CHIMUK: Yes.

THE COURT: -- then the seats in the vehicle, even if they are not level put down --

MR. CHIMUK: Yes.

THE COURT: -- are incidental to it.

MR. CHIMUK: Correct.

THE COURT: It is quite clear. Trailers can be rented with or without that equipment.

MR. CHIMUK: Correct. Perhaps a better analogy, Sir, would be a car seat perhaps. Right? And so what I'm saying is if you rent a car with a car seat --

THE COURT: As in a child's car seat. Is that what you're saying?

MR. CHIMUK: Yes, Sir. Yes, Sir.

THE COURT: Yes, okay. Sorry.

MR. CHIMUK: If you rent a car with a car seat --

THE COURT: Yes.

MR. CHIMUK: -- okay -- is that incidental to the use of the car? I would submit that it is.

But if I'm wrong, are you in the business of renting cars, or are you in the business of renting car seats? I would suggest you're in the business of renting cars. And therefore, that car seat is exempted out from the *PPSA* regime, pursuant to (iv). That's what I'm saying.

THE COURT: Okay. I understand your point.

MR. CHIMUK: Okay.

THE COURT: Thank you.

MR. CHIMUK: Thank you, Sir.

THE COURT: Mr. Quinlan.

MR. QUINLAN: If I may, My Lord, Mr. Russell and I spoke during the break. And given that this is more of a CWB issue, Mr. Russell is going to speak first, and I will clean up after, if that's all right.

THE COURT: Okay. Thank you.

Go ahead, Mr. Russell.

Submissions by Mr. Russell (Ownership)

MR. RUSSELL: Thank you, My Lord.

I'd like to suggest a third option that matters if my friend loses. I would like to refer to two parts of Mr. McCracken's transcript, Sir, if I could. Hopefully you haven't put it away yet.

THE COURT: No, I am not.

Go ahead.

MR. RUSSELL: So, Sir, this goes to the issue that my friend raised of TVs and beds, et cetera -- I'll just call them chattels -- are an incidence of the rental of dorms.

And, My Lord, keep in mind that the dorms are modular homes under the *PPSA* and have to be registered by serial number, which there's no doubt Sand Tiger did.

The chattels, I would suggest, are a different thing altogether. Normally, you would see a general registration -- so you'll see the serial number registrations at the top of the PPR registration form, and then you get to the general collateral. And the general collateral would say all of the chattels that are part of the use of the dorms that are mentioned of as serial numbered goods.

If they had done that and if they'd registered within 15 days -- because this is -- their lease of term (INDISCERNIBLE) in a year is a PMSI. If they registered within 15 days of delivery of the units to CNC, then CWB's prior all pack registration would come in second. It would be behind their registration of the chattels as general collateral. But that's not what happened.

THE COURT: So you're saying it would have to have listed those to be properly included.

MR. RUSSELL: It doesn't have to -- they don't have to say vents, doors --

THE COURT: Just say all chattels.

MR. RUSSELL: Just all chattels utilized in connection with the above dorms. Because, then, it would have been notice to the world at large that the -- that these dorms came with chattels, which were not necessarily an integral part of the dorms themselves. If they were not fixtures, they were not accessions.

THE COURT: Right.

MR. RUSSELL: And clearly, beds, TVs, et cetera, are neither fixtures nor accessions, I would suggest, Sir.

Now, I --

THE COURT: I do not think your friend is arguing that.

MR. RUSSELL: -- two things in Mr. McCracken's testimony.

At the bottom of page 25, line 20 -- and actually, I'll just put this in context, Sir. Mr. McAllister was asking -- and this goes to this issue of whether the chattels are incidental to the dorms.

So Mr. McAllister was questioning Mr. --

THE COURT: McCracken.

MR. RUSSELL: -- McCracken on what -- on his view of the small wares. And at line 20, Mr. McAllister's talking about Peace River. So clearly, this is not specific to the Sand Tiger issue. These are two general statements I wish to bring to Your Lordship's attention.

So Mr. McAllister says: (as read)

Q Peace River -- and what about, like, recreational units? They would come equipped with exercise equipment or pool tables or foosball tables?
A Yeah. We were only open for a very short time at Peace River. But whatever was in there was Barry's.

And the next sentence is the important one. He says: (as read)

> Canada North -- we didn't have the money to put all that stuff in. Barry put up the money to not only build the camp and put it in but also to equip it.

The next page is 232, line 11.

THE COURT: Just give me a minute.

MR. RUSSELL: So the question is, all right. In terms -- we talked a lot about small wares over the last couple of days and Coney Fickordell (phonetic) -- I won't tell you whose asking this question --

MR. McCALLISTER: It was me.

MR. RUSSELL: (as read)

Q I just want to have a better appreciation of what your understanding is a person who works in this industry of what small wares are. Can you tell me that in your own language?
A Well, in camp vernacular, it's bed and dishes, pots and pans, not always televisions because a lot of times now, TVs are part of what's provided by whoever's providing the equipment. But shovels, catering supplies in order to do the catering job, in our vernacular -- is our vernacular for small wares.

Q Okay. But it wouldn't include -- it would not include furniture that would normally be included as part of what you have called the "unit"; is that fair?
A Normally part of the unit.

He doesn't say always -- "normally." Next question: (as read)

Q And light towers wouldn't be considered small wares?
A It's not -- they're expensive. It's not a small item, you know, but sometimes it's included in that vernacular, yes. Depends on what the client wants to be able to bring into the rental program or to the lease program for the equipment.

And then he just continues on and talks about light towers and the sort.

The reason I bring those two quotes to your attention is clearly, Mr. McCracken was of the understanding that the small wares were not incidental to the dorms necessarily. They could be, or they might not be.

Now, my friend --

THE COURT: So are you just saying what out of that uncertainty, that equivocation?

MR. RUSSELL: If the industry norm was that always the small wares are included in the rental of the dorms and everybody in the industry knows that, then my friend's argument would have some legs. And that was his point about the chattels being incidental or an incidence of the rental of the units.

But when they aren't universally known as being incidents of the rentals of dorms, that's when you need the general registration that I described at the outset.

Now, my friend refers to Section 1(1)(z)(iv) and (v) of the *PPSA*. Let me just deal with sub (v) first. The exception -- and I'm sorry, Sir. Have you got it?

THE COURT: Yes.

MR. RUSSELL: The exception is:

> A lease of household furnishings or appliances as a part of a lease of land --

Not of dorms, not of moveables, not of personal property of the land:

> -- where the goods are incidental to the use and enjoyment of the land.

This section simply doesn't apply.

Sub (iv):

> A lease involving a lessor who is not regularly engaged in the business of leasing goods.

I'll start with Section 67(5) of the *PPSA*, Sir. And these are -- these comments are in our -- both our briefs.

So 67(5) says:

> Except as otherwise provided in this *Act*, a provision in the security agreement or any other agreement that purports to exclude a duty or onus imposed by this *Act* or that purports to limit the liability of or the amount of damages recoverable from a person who has failed to discharge a duty or obligation imposed on the person by this *Act* is void.

And the reason I raise that, Sir, is that Sand Tiger has relied on the fact that their lease contemplates TVs, other things that don't -- aren't coming to mind right now. Their lease actually listed some of these things.

THE COURT: And you are just saying that that does not help the --

MR. RUSSELL: That -- right.

THE COURT: -- notice to --

MR. RUSSELL: That's right.

THE COURT: -- a financier or --

MR. RUSSELL: That's right. That's right.

THE COURT: -- others to the public.

MR. RUSSELL: And I'm referring to the -- I refer to the *Fast Labour Solutions* case, Sir, and I'll just quote -- and I inadvertently put it into the both the first brief and the second brief; I guess it was doubly important -- but the -- paragraph 12 of that case, the Court says:

> The *Personal Property Security Act* was designed to sweep away these technicalities and to provide one universal regime and one universal registry, in which all security interests had to be registered. Its ultimate purpose is to define all of those arrangements where registration is required in the public interest because possession has been separated from title. At the highest level of generality, the *Act* should be interpreted having regard to that objective.

And what that *Act* -- and what the *Act* says is if you've got a PMSI, you have to register within 15 days or you lose out to a prior registered all path.

My friend relies on or suggest that these things are accessions to the dorms, and the definition of accessions under the *Act* is:

> Goods that are installed in or affixed to other goods.

And these are not.

THE COURT: I am so sorry. I was just finishing notes --

MR. RUSSELL: Oh, I apologize, Sir.

THE COURT: -- so give me that again. No. That is fine.

MR. RUSSELL: No.

THE COURT: Say it again.

MR. RUSSELL: My friend suggests that the chattels are fixtures or pertinences of the dorms -- of the dorm units and -- but *PPSA* defines accessions as:

> Goods that are installed in or affixed to other goods.

And these aren't. So that doesn't help my friend.

My friend does rely on the case of *Planwest*. But in our brief of January 2nd, which was our rebuttal brief after we had seen my friend's brief, we point out that the *Planwest* case is not well received by -- has not been well received by the Court. And, in fact, the Court of Appeal -- and this is at paragraph 10 of the second brief --

THE COURT: That was Justice Lester's decision?

MR. RUSSELL: *Fast Labour*? No. That's Court of Appeal. Justices Slatter, McDonald, and Greckol.

THE COURT: Okay.

MR. RUSSELL: Paragraph 10 of the brief where I'm going to quote again from the *Fast Labour* case -- and this -- there's just two things that I want to quote here. The first is the Court says:

> As long as leasing is a regular part of the business, it will be caught by the statute, even if leasing is not the predominant or a significant part of the business.

And the second quote, My Lord:

> Having regard to the overall purposes of the *Act*, one indicia of a business is that the lease is for a commercial purpose and is part of an overall business strategy.

So what we have here, Sir, I suggest, is just that. Sand Tiger does regularly get involved with the leasing of dorms. As my friend had suggested, it is an incidence of leasing of the dorms that you also lease the TVs and everything else -- all of the chattels. And I would suggest that the case law simply doesn't support that.

THE COURT: Sorry? The case law does not support --

MR. RUSSELL: Does not support my friend's position on that.

THE COURT: Oh, your friend is saying.

MR. RUSSELL: Section 66(1), what it says is:

> All rights, duties, or obligations arising under a security agreement under this *Act* or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

But this is talking about discharging rights and obligations. This isn't talking about the terms of a lease.

And my friend is equating that provision to say that it's only commercially reasonable that the chattels would be included as indices of the dorms. And, My Lord, with respect -- I suggest that section simply doesn't apply.

I also suggest, Sir -- Section 66(3):

> The principles of common law, equity, and the law merchant, except insofar as they are inconsistent with the express provisions of this *Act*, supplement this *Act* and continue to apply.

THE COURT: That's 66(3)?

MR. RUSSELL: Yes.

THE COURT: Yes.

MR. RUSSELL: And, Sir, what I'm suggesting is that the registration requirements for a PMSI is the specific provision in the *Act*, which is inconsistent with suggesting that you can just ignore the moveable nature of the chattels and avoid registration.

And, Sir, lastly, my friend suggested that the test is whether CWB -- or suggested that nobody could say that CWB had loaned money, based on the existence of these chattels at the Sand Tiger dorm. And of course not. Nobody would suggest that. The fact is that's not the test for whether one security interest trumps another.

I like to think our brief was a bit more eloquent than I was, Sir, but subject to any questions, those are my comments.

THE COURT: Thank you very much.

MR. RUSSELL: Thank you.

THE COURT: Mr. Quinlan.

Submissions by Mr. Quinlan (Ownership)

MR. QUINLAN: My Lord, I have little to add, as this is primarily an issue between CWB and Sand Tiger. I guess I will simply advise that the Monitor agrees with these submissions of CWB for the reasons Mr. Russell did eloquently set out.

The two exceptions in the *PPSA* do not apply here. I think there is little doubt that Sand Tiger is normally engaged in business of leasing goods. That seems to be conceded on all fronts. I don't know that the law says that its dismissal type of good, and in other words, they have to lease chattels, as opposed to some other goods. They are regularly engaged in business of leasing, as my friend pointed out.

With respect to the other exception, I agree with Mr. Russell that the *PPSA* provision specifically says with respect to a lease of land. This is not a lease of land, and that exception has no applicability.

Finally on this issue of -- I guess for a lack of a high-level term -- commercial reasonability. I agree with my friend, Mr. Russell -- and I think I'll give away Mr. Bieganek's thunder because it's something you will hear a lot of tomorrow likely -- but Sand Tiger could have protected themselves and did not.

As Mr. Russell pointed out, had they registered or given any notice in the general section of their registration of these items -- which Mr. Slice's (phonetic) affidavit terms himself as chattels and not as accessions, which they are clearly not -- then Sand Tiger would have not risked their ownership interest in these items.

In fact, this case is very similar to the *Fast Labour Solutions* case where, I think it was, Justice Yamauchi indicates had they -- where parties failed to register, they put their ownership interest at risk. And that is the exact point of the *PPSA*.

Had they registered, they would have enjoyed the PMSI priority, and their interest would not have been at risk. They simply failed to do that, and the *PPSA* case law is riddled with examples of where parties didn't think they had to register, but did, and were on the losing end of it.

Frankly, Sir, the result is not commercially unreasonable. It's exactly what's supposed to happen in the *PPSA* regime.

Subject to any questions you have, My Lord, those would be the Monitor's submissions.

THE COURT: Thank you very much.

MR. QUINLAN: Thank you.

MR. CHIMUK: I just have a brief reply.

THE COURT: Of course.

Submissions by Mr. Chimuk (Ownership)

MR. CHIMUK: So the three words that my case hinges on are evidence, onus, and ownership.

With respect, there's no dispute that my client owns the chattels. Therefore, what we would suggest is that the onus with respect to proving and putting forward evidence that the Monitor should be able to sell what is owned by my client, pursuant to the *PPSA* regime, that the onus is on them to show that we fall -- that the goods that they want to sell fall within that regime. It's not on the owner. It's on the person who's seeking to sell another owner's property. And to do so, they require evidence.

My client's sworn an affidavit with respect to this. He was not cross-examined on it. Both of my learned friends had the opportunity to cross-examine. They had the opportunity to ask Mr. Sloots (phonetic), are you in the business of leasing TVs? Do you include TVs in all your trailers? Do you include washing machines in your trailers? Do you do that?

And if the answer to that question was yes, then heck, we'd probably be caught by Section 1(1)(z)(iv) because the word "goods" -- are you in the ordinary business of leasing goods? If you do it as a one-off, then you're not. You're exempted by that section. They had the opportunity to ask my client that question, and they didn't ask the question. And what they're seeking to do is take away my client's ownership rights to their property.

The onus is on them to show that they have an ability to do so, that the goods that they're seeking to sell fall within that *PPSA* regime, but they didn't ask the question. And there's no evidence with respect to that.

In fact, the only evidence that's properly before the Court is the evidence that my friend read it, and my friend seeks to rely on the evidence of Mr. McCracken to suggest that, in fact, it's not in the ordinary course that TVs are included, and it's not in the ordinary course that washing machines are included. It's the only evidence you have before you now.

So the only evidence you actually have before you is in my client's favour with respect to the sub (iv) position. They have the onus of proving it. They didn't. They had the opportunity to ask the question. They didn't.

THE COURT: Does that beg the need to subdivide the category? Using your analogy again, do we have to ask the question of an automobile renting of operation that -- well, but do they rent car seats? If you simply put in "and contents," is that not the answer?

MR. CHIMUK: With respect, Sir, no. With respect, it -- with the car analogy, yes, cars are included, but in my view, car seats are not.

Now, would it be -- in hindsight being 20/20 -- right -- if it was -- you know, should my client have probably put "and contents"? Yes, probably, because we wouldn't be here today.

THE COURT: Well, yes.

MR. CHIMUK: Right? Of course, they should have.

THE COURT: But --

MR. CHIMUK: But you're misplacing the onus, Sir, with respect. Right? We're not looking this -- we're not look at this from the context -- and this is what the Monitor wants you to do -- is looking at -- from a context of the Monitor's right and able to sell the property. And I somehow have to do something to get out of that.

I disagree with that proposition in the context of the fact that we have the ownership position, which is uncontested. And so why is it that my client, then, bears that onus? It's the person who wants to seal my client's goods. You're talking about selling somebody else's property --

THE COURT: Right.

MR. CHIMUK: -- to a third party's benefit. That's what they're trying to accomplish.

And so if you want to take somebody's property away from them and sell it to the benefit of a third party, well, then, you better at least have some scintilla of evidence to suggest that it falls within a statutory regime that allows you to do so because failing --

THE COURT: Well, statutory regime, sir, contemplates that if property of a debtor is in its possession, then unless there's *PPSA* protection, that is going to get scooped up unless --

MR. CHIMUK: But there's exceptions within the *PPSA* regime, such as sub (iv), which is what I'm relying upon.

THE COURT: Yes. I recognize that. But don't I have to -- and that is not an onus issue -- don't I just have to interpret what is the intent of that wording? Not with any previous position in favour of ownership or previous position in favour of statutory notice or anything like that but just -- what does that mean? What does that subsection (iv) mean?

MR. CHIMUK: Fair. Fair. But what would I suggest is that there's no evidence before the Court, and there was every opportunity for my learned friends to provide evidence if they had any.

Presumably, they didn't cross-examine him for a reason. Right? And they had that opportunity to ask whether my client was in -- whether it was their course of business, whether they had in the fact -- in the past ever, you know, rented TVs or whether this was an exception.

And if we go back to the case, which my friends -- which we rely upon, which is the *Planwest* decision, which my friend say is not -- you know, it's not been favourably looked upon by the Courts. I mean, it was upheld by the Court of Appeal. McClung, O'Leary, and Russell held it.

And so, with respect --

THE COURT: On very unusual facts. Right?

MR. CHIMUK: It was absolutely. But that's what I would suggest the proper legal interpretation with respect to this is not that Planwest was wrong or that their case was right. And I don't disagree with their propositions that they cite. What I would suggest is that it's always an issue of facts. It's always a fact-specific situation.

And I would not suggest that Planwest be expanded above and beyond its specific facts, but what I think it tells us is that you have to look at the specific facts of this specific case in order to make a determination with respect to whether or not this is the ordinary course of business.

And what I would suggest is that on the evidence before you, you have no information to suggest that it is in within the ordinary course, and, in fact, the only evidence you have suggest that it isn't. And that was the evidence my friend read out during the course of his submissions.

So I agree. It's a fact-specific situation, but on the facts before you, the only facts that you have favour my submission with respect to sub (iv), and my friend has zero facts. Zero. Zero evidence to support anything to the contrary.

Subject to any questions.

THE COURT: No. I am grateful to hear. Thank you very much.

MR. CHIMUK: Thank you, My Lord.

Discussion

THE COURT: I am not going to issue a decision on this. I do not think that should come as any surprise. I believe that it is important that I hear the nature of similar arguments as will affect 726's claims for small wares. It does not drive if the fact situation is not parallel, but I do not think it is appropriate to handicap my opportunity to examine the interpretation of the *Act* with the two fact situations that I am -- or two or more fact situations that I am going to be presented with.

All right? But I will get a decision to you on a timely basis.

All right? Is there anything else this afternoon?

MR. BIEGANEK: Today, I think that's it, My Lord, and we'll start a fresh in the morning.

THE COURT: I hope everybody's fresh.

Thank you very, very much.

MR. BIEGANEK: Thank you.

PROCEEDINGS ADJOURNED UNTIL JANUARY 11, 2019

TAB B

Action No.: 1703-12327
E-File No.: EVQ19COMPANIES
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 ARRANGMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. and CANADA NORTH GROUP LP HOLDINGS LTD.

P R O C E E D I N G S

Edmonton, Alberta
January 11, 2019

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D. Bieganek	For the Monitor
R. Quinlan	For the Monitor
C. Russell	For Canadian Western Bank
Z. Han	For 726 Alberta Ltd.
C. Nicholson	For 726 Alberta Group
D. McAllister	For 726 Alberta Group
B. Smith	For Mr. and Ms. Hadfield
S. Delblanc	For Mr. McCracken
S. Delblanc	For Mr. McCracken
D. Borman	Court Clerk

Discussion

MR. BIEGANEK: A couple of housekeeping matters arising out of yesterday.

THE COURT: Thank you.

MR. BIEGANEK: And I think everybody will speak to it. I'm just waiting for Mr. Quinlan to attend from downstairs, he's filing answers to undertakings that we did receive from Ms. Nicholson this morning. With -- which deal with the two outstanding requests regarding the review of the stipend of the file. The answers simply are no search was made and no written request was made of CWB to waiver or provide a letter of no interest in respect of the matter, and we'll will hand these up in a moment. Ms. Nicholson provided a list of written interrogatories to Mr. Russell, I'll let him speak to that. Ms. Nicholson has handed to us this morning, a short affidavit of Barry Roman (phonetic) which I'll address during the course of argument, I'm not going to ask for any time to address it. I think the matter is addressable based on the -- what the actual test -- legal tests are. And we do have some answers from Ms. Barnhouse (phonetic), we're just getting those printed and we'll provide those to the Court shortly. So, that's it from a housekeeping perspective. The Monitor is not looking to have the matter further adjourned vis-à-vis Bonnyville, but we're prepared to address it today.

THE COURT: All right, thank you.

MS. NICHOLSON: My Lord, with respect -- just one further matter to add. We inquired of Mr. McCracken's counsel who's in court today, as to whether they -- it -- he -- Mr. McCracken, would be prepared to provide some answers to what the ordinary course of business of CNC is, because that's material to the late filed application of CWB. And the response that we received was that -- that Mr. McCracken is willing to cooperate and I -- and my friends are in the courtroom so I don't want to misstate what they've said, but I believe they said that he would be willing to provide evidence, but we're looking for the Court to, you know, direct that if the Court wishes to receive it.

MR. DELBLANC: Maybe, My Lord, if it is appropriate, I wouldn't mind just addressing that. I was -- we got an e-mail last night from Ms. Nicholson, while I was on the squash court, but Mr. McCracken has been questioned or cross-examined, and we don't mind -- I just don't -- I didn't want to provide a bunch of answers, perhaps contrary to the spirit of what's going on here. We will certainly cooperate, but I -- I felt it proper to have a direction from the Bench on that point. So if she provides interrogatories -- I didn't want my friends to be blindsided or anything like this, not that they would be, but he's been questioned or cross-examined, and that was by this order of this Court. And I presume -- I've heard the submissions and your queries from the Bench about, we've had the opportunity to do this, to do this and so I did not want to run afoul of anything. So if you so direct, My Lord, we absolutely will comply with everything, but I want to stay within the four corners of what's being done here and I don't want to be outside of that, that's all.

THE COURT: If the Court was mindful of getting a response, what's the most expeditious way? I intend to proceed today.

MR. DELBLANC: I haven't seen the interrogatories. I would make the comment of whether something's in the normal course, is going to be something for this Bench to decide.

THE COURT: Exactly.

MR. DELBLANC: And for Mr. McCracken to say this is our normal course of -- it might not be. So that's just a legal argument. If she has some questions, we'll deal with them right away, but as we sit here, if that's what you want. I mean we'll -- we'll go out and --

THE COURT: Right, I understand.

MR. DELBLANC: We -- we spoke with Mr. McCracken this morning on the Barnhouse materials, we had been working on those, but we needed his permission to waive the privilege as -- of course, and we got that this morning. And so that my friends have and Mr. Delblanc has -- we've e-mailed those and my friends did not have time to copy them because I think they came to them while they were in transit, fine, we have them now. But with regard to the interrogatories, if my friend -- if you do so direct, My Lord, and if she has them prepared, we'll -- we'll deal with them as quickly as we can.

MR. BIEGANEK: I'd like to comment on that piece, My Lord. If I may.

THE COURT: Just give me a minute. Go ahead, Mr. Bieganek.

MR. BIEGANEK: Okay. As we mentioned yesterday, we don't tend to litigate by installment. This proceeding in its present form, has been ongoing since June of 2017. And the -- when the initial order was first granted. Throughout the proceedings, it's been abundantly clear that one entity of the applicants that's no longer an applicant, that would have been CAMPCORP entity, manufactured and sold camp trailers. It's biggest customer at one point was Canada North. But, there has been no evidence throughout the proceedings to suggest that Canada North Camps or the Canada North Group, were in the business regularly, of selling camps, either individually or in bulk, as part of their ongoing business. Certainly they swapped out units or sold them as they became obsolete, whereas they started to wind down their operations as part of their restructuring.

So, my concern of course is that we're now, again, ex post facto backfilling the evidence based on positions that have been put forward and articulated for close to a month, and with -- on the auspices of -- or under the auspices of a "late filed" application of the bank, which I think was filed primarily to placate counsel for 726, so they understood exactly what the bank's position was even though it was, in my view, obvious throughout.

So, I'm a little concerned with now -- like I can deal with the Roman (phonetic) affidavit because he's provided subjective evidence on an objective test, and that's going to be for you to decide, I'm not so fussed by that. I am, as I expressed yesterday, somewhat concerned with Mr. McCracken being asked yet again, to come in and provide further testimony this time in the form of written interrogatories, that -- that in circumstances where his credibility is clearly in issue. And that would be my concern. So I -- I voiced that, and voiced the concern that this litigating by installment is -- is, well, frustrating certainly for counsel, I'm sure it is for the Court. And ought not to be acceded to.

THE COURT: Mr. Russell.

MR. RUSSELL: Thank you, My Lord. If I might also -- I support the position of the Monitor, but also I remind Your Lordship, yesterday I took you through the December 31, 2014 financial statements, and pointed out the level of assets that this company had. Just as a reminder, the netbook value at that year-end of the land and all of the equipment, was 56 million. I can't conceive that a sale of $20 million of 56 million could ever be considered to be in the ordinary course of business, and Sir, I would suggest that you have the ability to take judicial notice of that. Thank you, Sir.

THE COURT: Ms. Nicholson.

MS. NICHOLSON: Thank you, My Lord. We obviously think that what Mr. McCracken has to say in terms of the regularity with which these kinds of transactions took place, is material. And we would like, and ask the Court to direct, that Mr. McCracken answer, and if -- I would also open it up to my friends to the extent that they have any questions that they wish to ask Mr. McCracken by way of interrogatory, that they be permitted to do that as well. And so that you would get the benefit of his information. And so -- and -- and I don't have -- I don't have those prepared, presently, but even if they came in after these submissions, you would then have the benefit of knowing, at least having his evidence on that point. On -- on -- on matters that we think are material. That is assuming you're not going to --

THE COURT: You know, this has been clearly indicated by other counsel, that the question of whether something is in the ordinary course of business, is a determination by the Court.

MS. NICHOLSON: Understood --

THE COURT: And --

MS. NICHOLSON: -- and so that wouldn't be the question that would be asked.

THE COURT: Oh.

MS. NICHOLSON: Of course. That would be asking the -- the question the Court needs to decide.

THE COURT: Quite. But the question of a transaction of -- in the order of 20 million or even 10 million off of a 56 thousand -- sorry, $56 million in assets, being conducted in the course of dealings since Canadian Western Bank first began to finance this corporation, what -- what does that do to assist me?

MS. NICHOLSON: I -- I would have thought it would be a piece of evidence, but if Your Lordship is not interested --

THE COURT: It's a piece of evidence, but you've already heard the Court's perspective on installments; if it was something that was being relied upon, then it ought to have been presented to the Court.

MS. NICHOLSON: Just to go back to installments, again, like from our perspective, the letter that you received from Mr. Bieganek, I mean, that is not -- and as you know from our submissions, proper notice about an application. So that's -- you know, we feel that we are being prejudiced and I know that the Court feels otherwise, and feels that our -- the letter that was sent by Mr. Bieganek, put us on notice, of the positions and the relief that was being sought in the Court, and we continue to have a different view of that. So --

THE COURT: Okay, let me back up. I would say that the September application which Mr. McAllister was present, put everyone on notice that the questions of ownership, claims, priorities, were all matters that had to be crystallized and determined. They were to make their claims, not later than October the 4th. That was all clearly set out. Mr. Bieganek's letter was simply confirmation that the questions of priorities and ownership, were very live. And it's not for this Court to inquire whether your clients were more concerned about the leases on the three other camps, than they were about the Bonnyville ownership and where the security of Canadian Western Bank -- that's not for the Court to decide what the parameters were of your client's concerns. The issues were in front of the Court as of September. So the clarification in November was simply a reinforcement that I read into the record so that everyone recognized that the Court's perspective on this, has not changed.

MS. NICHOLSON: No, and I -- and I appreciate that, and My Lord, with the greatest of respect, I'm -- your position is that the matters are before the Court because there's evidence in -- in the record. My position is of course, that matters are before the Court properly when applications have been filed seeking relief. And my position has been that just because this is a CCAA proceeding, doesn't need people who seek relief, or the Court needs to have before it, applications proper so that the parties can know what they have -- the case they have to meet. But I understand that your -- your assessment is that because the affidavits were to be filed and were filed, that the matters were in your perspective, properly before the Court, and I've said that our client respectfully has a different view on the requirement about what is properly before the Court, but --

THE COURT: Do you have any case law that helps you with this, Ms. Nicholson? Because I recognize that my history on the Bench does not extend

15 years' worth of commercial litigation, but it is absolutely the first time in which the idea of priorities and ownership has to be subdivided when indeed, that's the whole purpose of the Monitor trying to address what -- with or without an opinion, what ought to be the disposition, particularly once we get to -- to liquidation.

MS. NICHOLSON: Quite so, My Lord, that is what the Court is called to do. It is called to receive all applications and all claims that need to be properly brought in accordance with the *Rules*. Just because it's the CCAA proceedings, doesn't mean we throw out the ordinary *Rules* which is if the Court -- if somebody is asking the Court to make declarations that affect other people's rights, those matters need to be advanced properly in accordance with the *Rules*, in our submission. Otherwise, it's -- it's not a fair process. And just -- and the CCAA and the Monitor being here and the fact that you've got a court officer, he's acting now, as a litigant. And that's been my concern. And so --

THE COURT: Is that your concern actually?

MS. NICHOLSON: No, that a litigant needs -- that the litigant needs to comply with the ordinary course rules, in order for the process to be fair to the participants, that's all. And the CCAA doesn't take the *Rules of Court* and rip them up. It says, this Court is hearing all these matters on a summary basis, please bring them forward, and that's what CWB has done by filing its application. And that -- that's our -- our perspective on what is properly before the Court, and that's, in our view, what we are trying to avoid, is litigation by installment. And that's -- was the -- the basis of the -- of the desire for the opportunity to put in -- to put in the evidence now that much of which is before you, with the exception of information that Mr. McCracken may have that may bear on this topic. Which is the reason we would ask that the -- everyone be given the opportunity (INDISCERNIBLE).

THE COURT: Mr. Bieganek.

MR. BIEGANEK: Sir, Ms. Nicholson put in at tab 1 of the Book of Authorities, Rule 6.3 -- 6.3(2) reads -- and this is dealing with applications generally, it begins with:

> Unless the Court otherwise permits, an application to the Court must

In my respectful submission, by your order of September 6th, the Court otherwise permitted. And that is not an unusual or exemplary practice in insolvency proceedings.

What -- what Ms. Nicholson is essentially asking for, Sir, is a -- an adjournment. She's continuing her application for an adjournment. And that's -- if -- I mean -- we don't accede to that. The only way that -- that Mr. McCracken's evidence could be properly assessed from a credibility perspective, would be to put him in a box and have that done live. But, I'm not asking for that opportunity.

THE COURT: Okay.

MR. DELBLANC: My Lord, it's highly inappropriate for me to stand up because I don't have standing, but I do take the credibility assertions against Mr. McCracken seriously. There's always two sides to a story. There may or may not be explanations and whatever this Honourable Court rules, is what it's going to rule. But it should not be based on Mr. McCracken's credibility or lack of it, because what is likely sought is just a factual exercise, give me a history of your sales, presumably he would be asked these questions, how many times have you sold something of this magnitude, was all -- were all the assets on the Bonnyville camp actually yours or did you have to pay somebody out for them, did they belong to someone else? So, 21 million might be larger than it is. My point is, I -- I feel compelled to stand up, and Mr. McCracken's credibility (a) might have an explanation and (b), I don't think is relevant for the search that's going to take place if you so order.

THE COURT: I'm not going to deal with that issue for the immediate, I want to know what the balance of the materials, because that's not what I contemplated yesterday in my adjournment, I didn't need evidence, I'm not sure I still do, but I need to determine that. But I do want to know that evidence which I did give opportunity to be assembled, what it has to say.

MR. BIEGANEK: Okay, so here is -- I've -- I only printed a few copies, but here's the answers to undertakings of Mr. Roman. If -- I think everybody's got copies, I simply appended Ms. Nicholson's -- she e-mailed to the group, to that. We do have a copy of the Bonnyville GSA that I can provide you, but I will provide that to you in the course of argument. The -- Mr. Russell has the written interrogatories from the bank.

MR. DELBLANC: I guess, My Lord -- and I also have brought with me, should you wish to see it, the interrogatories that Ms. Nicholson sent me on December 2, and my response to those which then went to the affidavit number 7, which was filed December 4. Would you like to see those or not? I --

THE COURT: I'll ask you as an officer of the court, do those really get subsumed by the affidavit?

MR. RUSSELL: Yes, they do.

THE COURT: Then I will need to see that they assist this Court.

MS. NICHOLSON: I concur with that.

THE COURT: Okay.

MR. BIEGANEK: And Ms. Nicholson will have to provide you with the affidavit.

THE COURT: Before I receive that one, is it agreed by counsel that -- so that this record is clear, the items being provided to me, I'm going to mark just for identification. The undertakings probably don't need to because they are now filed.

MR. BIEGANEK: M-hm.

THE COURT: But, so that it's clear what is being provided to me out of yesterday's adjournment, is well recognized. I will ask the clerk to mark as an exhibit for me, the answers to undertakings as item number 1.

MR. DELBLANC: Is that of Mr. McCracken, Sir, or --

MR. BIEGANEK: Those are Barry Roman's.

MR. DELBLANC: Barry --

THE COURT: No, this is Mr. Roman so far. Secondly, that the letter January 11, 2019, two page with three page attachments, written interrogatories, be marked as Exhibit 2.

THE COURT CLERK: (INDISCERNIBLE) 'A', 'B', 'C' (INDISCERNIBLE).

THE COURT: I don't -- is there a reason for that?

THE COURT CLERK: (INDISCERNIBLE)

THE COURT: Okay, well then that's fine, I don't care, I just simply want it identifiable. So it's Exhibit 'A' for identification, Exhibit 'B' --

THE COURT CLERK: 'B'.

THE COURT: -- for identification?

EXHIBIT A FOR IDENTIFICATION - Answers to Undertakings of Mr. Roman

EXHIBIT B FOR IDENTIFICATION - Letter Dated January 11, 2019

MR. BIEGANEK: Okay.

THE COURT: And then you were about to pass me up --

MR. BIEGANEK: This is the further answers to the undertakings of Mr. McCracken. These are the responses from Ms. Barnhouse. A letter dated January 11th, 2019 from Bryan & Company.

THE COURT CLERK: And that (INDISCERNIBLE) 'C', Sir?

THE COURT: That would be 'C', thank you.

EXHIBIT C FOR IDENTIFICATION - Undertakings of Mr. McCracken, Responses from Ms. Barnhouse and Letter Dated January 11th, 2019 from Bryan & Company

THE COURT: I'm going to take ten minutes to review these materials.

MR. BIEGANEK: Thank you, Sir.

THE COURT CLERK: Order in the court.

MS. NICHOLSON: Oh -- My Lord? I'm -- I'm sorry. In --

THE COURT CLERK: Oh, sorry.

MS. NICHOLSON: If -- if -- I think -- we -- we just wanted to bring to your attention as well the sworn affidavit of Mr. Roman. That --

MR. BIEGANEK: You'll have to determine whether it's admissible or not, Sir, but --

THE COURT: I guess I've got to read it to determine that.

MR. BIEGANEK: Yeah.

MS. NICHOLSON: That's what I --

THE COURT: So Ms. Nicholson is quite correct, I should take a look at it as well.

MR. BIEGANEK: Yeah.

MS. NICHOLSON: Does --

THE COURT: But it's not being marked.

THE COURT CLERK: Oh okay.

THE COURT: Okay?

THE COURT CLERK: Thank you, Sir.

MS. NICHOLSON: Thank you.

THE COURT: Thanks.

(ADJOURNMENT)

THE COURT: Thanks everyone, please be seated. Madam clerk, just to further clarify the record, I'd ask that the unfiled affidavit of Mr. Roman, January 11th, today's date, be marked as Exhibit for Identification 'D'.

THE COURT CLERK: Thank you, Sir.

EXHIBIT D FOR IDENTIFICATION - Unfiled Affidavit of Barry Roman Dated January 11, 2019

Ruling

THE COURT: From my review, I consider each of 'A', 'B' and 'C' for Identification, be properly responses to the opportunity given in yesterday's request for adjournment, by 726. I granted that to further clarify the -- the positions of the parties and there was no objection to the Monitor, to those matters being provided to the Court, and in particular, the Monitor as an officer of the court, has indicated that with that information, the Monitor would be able to proceed in achieving the purpose of the hearing.

I deny the request to submit the affidavit of Mr. Roman. And further, the request to make inquiries of Mr. McCready (phonetic), as to the scope of business or the ordinary course of business of CNC. I find that to be a legal determination, that was identified yesterday, it is my determination, reconfirmed yet this morning, that it is important to not be receiving further evidence by installment on matters that are not directly tied to the way in which the issues have been identified in your briefs, as to which the Court has the evidence that was gathered by the parties and not by installment.

The parties will be aware that the opportunity that was accorded for 726 to supplement the evidence, was in this Court's assessment, part of a process for completion and not adjourning the issues surrounding the Bonnyville ownership and priority issues separate and apart from the balance of the matters that are before the Court. As I have stated on various occasions, the purpose of this hearing was and is, to identify those claims that were contemplated in the directions given at the September 6th hearing. That hearing contemplated that there would be decisions rendered on ownership and priorities. It did not direct or contemplate any additional need for each respective complainant or claimant rather, to file applications. All submissions, proof of claim, were to be based on assertions in affidavits to be filed at the date prescribed. In the case of 726, extension was granted for further material to be submitted as I will return to in a moment.

It was the intent in September 6th direction, that the matters of ownership and priorities would be determined as to enable this Court with advice from the Monitor, to deal on a timely and orderly basis, with the disposition of this estate. Although it wasn't easy to point to -- sorry, although it really was easy to point to the sequential importance of resolving the ownership and priority issues, because those would later inform the risks of parties as to municipal tax contributions, these are equally important to the matters effecting continued liquidation, including the management of contingencies and the reduction of the number of parties, presenting issues in this complex matter.

The argument of 726 has been largely predicated on alleged unfairness of the late filing as 726 describes it, by Canadian Western Bank in its December 12 application. As to which I have already granted leave in the same fashion as I have granted leave to 726 for its late application.

Circumstances from the perspective of 726 are set out fully in its written brief. 726 alleges that the dispute of ownership of the Bonnyville equipment arose only laterally in the course of questioning with a number of consequential issues. Firstly that no party had filed any supporting application until the recent submission by CWB on December the 12th.

Secondly that the issue is not within the purview of CCAA proceedings. Thirdly that further evidence was required, and fourthly the retainer for counsel to argue the issue requires formal instructions. I acknowledge that two of those grounds as to jurisdiction and the retainer have not been pursued, but they do inform the Court's assessment of the adjournment request and I will address them briefly.

Counsel filed an administrative affidavit, and the stream of communications between counsel regarding the appropriateness of the adjournment, and the need for directions from the Court. Nothing indicates that any consultation was made with Ms. Hins (phonetic), she is the officer responsible for the commercial list and the scheduling. As earlier expressed, it's regrettable that the parties didn't receive the Court's response once the request was brought to my attention, for a pre-hearing conference. Confirmed it was at the busiest time of the Court's calendar. However, I do acknowledge that there was no follow up to the request that was made either with Ms. Hins or anyone assisting this Court during the month of December.

More importantly however, there was no request made for Ms. Taha (phonetic) of CWB, to clarify any points as to CWB's position on the Bonnyville transaction. I refer to that in the context of earlier written interrogatories which led to Mr. Russell's agreement to simply file a further affidavit, to address concerns raised by Ms. Nicholson, and acknowledged here this morning that the affidavit subsumed the written interrogatories and Ms. Nicholson takes no objection that there's no need for this Court to see either the written interrogatories or any correspondence associated with it.

As contemplated, I have received fulsome, written and oral submissions on the request for the adjournment, and I'm going to deal with each of the points that were raised.

As to any delay, to clarify the scope of retainer, I acknowledge as I said, that this was not pursued, but I find there to be no merit whatever, from the outset in this particular concern. I note that the Monitor's reply brief accurately captures the chronology of the involvement of 726 dating back to July of 2017. And the confirmation of the CCAA proceedings.

Secondly, counsel for 726 has appeared in these proceedings at various times, including December 12th, 2017 to obtain a stay of proceedings on the claim by Kingdom Properties that was alleged to be related to the CCAA proceedings.

Secondly in April of 2018 when it became apparent that no proposal from CNC would be possible in the circumstances, and liquidation proceedings commenced.

Third, September 6th, 2018 where the Court directed all secured creditors. This ownership of priority claims, other than the municipal tax claims, file affidavits of claim by October the 4th, 2018. 726 did that with amendment.

September 18, 2018 when counsel for the Monitor wrote to the Court and to the service list, to identify a number of issues, seeking direction. Including property and ownership claims that were made by 726 and perhaps others in respect of certain assets, as well as the priority issues in respect of certain assets between 726 and CNC.

September 21, Mr. McAllister attended in court on a number of matters that affected the question of payout and the reserve on contingencies. The issue of holdback was addressed at some length. Claims of 726 were included as part of the risks in the contingency discussions. I will come back to that application.

October 23rd, 2018, the stay of proceedings between Kingdom Properties and 726 was specifically placed in front of Justice Nielsen. He lifted the stay that he had earlier imposed, noting that Mr. McCracken's time was no longer required on a plan of arrangement. The parties were directed to prepare a litigation plan including the prospects of the summary judgment application. Ownership issues between the parties were also specifically raised as matters to be addressed at the December hearings, that was all part of the October 23rd hearing.

Chronologically I repeat that the November 15 Monitor's counsel's letter is germane to clarifying scope contemplated in resolution of the claims directed by this Court, in the September order. I won't repeat the language of that which I have read to counsel, but the Monitor identified, with reluctance, the need to identify the December hearing dates, in order to accommodate Ms. Nicholson's retainer as an experienced securities counsel, for 726, on issues affecting priorities and ownership, collectively with co-counsel, Mr. McAllister. I've been further advised by Mr. Bieganek as an officer of the court, that both Ms. Nicholson and Mr. McAllister edited that letter.

November 21, 2018, dealt with the deferral of the municipal tax matters, and it focused on the 726 ownership issues. Mr. McAllister with Ms. Nicholson on the telephone, explained their dual roles in dealing with ownership and priority issues. Counsel sought and obtained leave to amend and supplement the application and evidence in support of the claim of 726, noting various errors that have been made in preparation of the earlier affidavit material. Court granted the adjournment, it accommodated the application of 726, to provide supplemental materials, subject always to costs in respect of the delay. Court further set deadlines for questioning and the filing of briefs.

November 28, 2018, 726 did file its application for declaration of ownership of the Bonnyville assets. I note the obvious, that if there was no dispute regarding those assets, as would have been well within the purview of the Monitor to confirm the issues of ownership, that have been resolved, the parties would not have needed these proceedings. The parties were clearly aware that ownership and priorities in relation to each of the four camps, including Bonnyville, was at issue.

On December 3rd of course, 2018, Ms. Taha provided a further affidavit as I've described, which subsumed written interrogatories sought by 726.

December 4, already knew that the Court was dealing with other CNC issues, in court, nothing related to 726 was raised, in respect of pending questioning of Mr. Roman and Mr. McCracken. I note that 726 considered that the September 6th directions to file claims, should have inspired CWB to seek a formal remedy. That is not within the contemplation nor the practice of the Court, in respect of Rule 6, and in particular, the language contemplated by Rule 6.3 as to the Court otherwise permitting. Nonetheless, it could equally have been said of 726, arising out of the September hearings, and it wasn't until late November that request was made and authorized for the filing of the specific application.

In reviewing the October 3 affidavit of Ms. Taha, the concerns of CWB, it's quite obviously dependent upon review of supporting materials from parties as may assert an interest in priority to CWB. From a review of the file, the Monitor was similarly unclear as to the position, certainly of 726, up until the application November 28, 2018 was filed.

The jurisdictional argument, as I've alluded to, in respect of ownership, has properly been abandoned. The issues here are for disposition in these commercial proceedings, not for another day and other proceedings so that CWB may wish to advance, as was attested in the written brief.

I reject the argument that an adjournment is justified because counsel for 726 did not appreciate the import of questions that were put to Mr. McCracken and to Mr. Roman, as affecting a claim to priority by CWB as a secured creditor. As experienced counsel, it was more than just a hint that the issues related to the general security agreements were very live, very much in need of determination by the Court. Counsel for 726 was certainly entitled to re-examine those deponents, after having already put questions to them. In the face of all of that, 726 sought further adjournment instead.

Based on the concerns that were raised yesterday, I did accommodate the position of 726 yet again, to allow it to exercise further due diligence. In considering the element of delay that's inherent in a further request to adjourn, I reflected on other disputes on this file, which risked the fair and orderly handling of property, as well as concerns to keep this file moving in the best interests of all parties.

Counsel will recall that in September, I dealt in an oral decision, with CWB's request for deferral of directions, to obtain a clearer picture of the assets and ownerships, including the claim on the Bonnyville equipment. In denying that adjournment, I noted at least three factors.

Firstly, the changes in the landscape affecting the assets, need to be recognized as very real by the Court, and that included, as I referenced, the Bonnyville assets. I acknowledged that a number of contingent risks may not be fully quantified. Nonetheless, to keep matters moving for all parties, I declined deferral and I authorized dispositions as being appropriately prepared and presented by the Monitor for approval. That didn't please all participants, but it did close out an aspect of the file that was impeding progress. The parties simply needed an answer to move forward.

I cited a number of factors as supporting the exercise of the Court's discretion. Not to simply defer, because more information could potentially be gathered, but that a decision needed to be made. In addition to timing and structure for the sales, I expressed concern about firstly, the effect on secured creditors; secondly, the impact on the CCAA proceedings moving forward; thirdly, the magnitude of the risks as had been quantified, and that those were difficult to further parse or break down in quantification; and fourth and finally, perhaps the most significant, considerations of additional terms that could be provide further flexibility for the Court, when it comes to costs allocation.

I see this most recent request to adjourn, albeit by a different party, in a more confrontational circumstance, being contrary to the responsibility of the Court to avoid unnecessary delay, and my responsibility to provide you with timely answers.

Out of yesterday's adjournment, I have those matters which have been marked as Exhibits 'A', 'B' and 'C' for Identification. Counsel for 726, urges that this Court receive further information from Mr. McCracken and Mr. Roman as to the ordinary course of business of CNC. I regard this as entirely litigation by further installment. I acknowledge I may not have a totally detailed picture, that is not uncommon as parties make decisions about the best way to present their case, I'm satisfied that I have a full appreciation of the context of the disputes on ownership and priorities. All counsel have prepared their evidence, they have questioned witnesses, and they have put together very extensive briefs. I'm satisfied that their oral arguments will assist this Court in reaching decisions on ownership and priorities.

I recognize that the dollar amounts in issue are significant, that has been the case since these CCAA proceedings commenced in July of 2017. I also recognize that Bonnyville is different than the other three camps. And that counsel have worked diligently to profile those differences.

The positions taken by the Monitor and by CWB, remain consistent with the earlier expressions by them as to uncertainty as to what the nature of the claim, as supported by documents would be, by 726. Each counsel expressly reserved the right, based on further clarification of evidence, as to the import and effect of the GSA's on ownership and priorities.

The questions that were put to witnesses as to the steps taken by legal counsel, were always relevant to the admittedly broad application of the Monitor, to deal with ownership, priorities and risks including in relation to municipal tax claims. I find nothing to be gained in asking Mr. McCracken about the ordinary course of business of CNC, regardless of which corporate entity might be used. As reported to CWB, Canada North Camps owned the equipment. The sale was for $20 million. The Court is satisfied that it has sufficient evidence to allow it to deal with the criteria set out in the legislation.

As to onus, it has always been for 726 to establish it's claim in these proceedings, on ownership and priority, and that's not changed since 2017. I'm in a position to hear your respective submissions on the remaining issues that have been presented to the Court for determination. Have you discussed how you're going to proceed?

MR. BIEGANEK: I think the -- consistent with how we've done it in the past, I haven't heard any objection, I would -- I would start and (INDISCERNIBLE) Monitor's position on everything, then you would likely hear from Canadian Western Bank, then 726, and hopefully we can get through that today.

THE COURT: Thank you, I'd be grateful for your submissions.

Submissions by Mr. Bieganek

MR. BIEGANEK: Right. Sir, I should have outlined this yesterday, but in terms of the material that the Court has, we've provided -- the Monitor has provided and I've actually put it on a buff-coloured material just for discrepancy purposes, a brief and a book of authorities. We also provided the Court with three binders, a book of documents which is largely, My Lord -- I've pulled exhibits from the various affidavits or -- or documents to try and make it a little easier to deal with, because as you can appreciate, there is a large volume. I don't think I captured all of them, but we've got most of them; a binder of exhibits including -- well not including two confidential exhibits which were provided in an envelope, I -- I trust Your Lordship has those, and then the binder of transcripts which appended to them, the answers to undertakings, in each; and then there's the further, obviously, the Monitor's reply brief.

For 726, we received their amended application, their latest affidavit which was gone through yesterday, their brief and book of authorities. We've already dealt with the Santager (phonetic) material.

On behalf of Canadian Western, we have their -- their brief and their reply brief. And obviously there's the affidavit of Ms. Kiss (phonetic) which included the transcript of the September 6th proceedings. So that was the bulk of the material.

I don't intend to go ad nauseum through the facts, but I do believe, and I appreciate that Your Lordship has had an opportunity to review the material, and -- and knowing Your Lordship, I -- I do know that you've done that.

One of the things though that I -- not one -- key -- key elements in this are the document matrix. I -- and I think if you -- as you can glean from the material, while we have what I'll call four separate transactions with respect to the four camps, Bonnyville, Wandering River, Peace River, and kilometer 147 or Manaus (phonetic), they all took place at or around the same time. So December 14 -- December 2014 and January of 2015.

And so it's -- it appears, looking at it from 30,000 feet, that there was one sort of understanding that we've -- that the parties were to enter into arrangements and that they would be four separate arrangements, and that is how they would be set up. And the setup would include a limited partnership, and that's set forth in limited partnership agreements. Each limited partnership obviously had a -- a general partner, and there was unanimous shareholders agreement for each of those. In addition, each partnership had entered into two agreements with Canada North Camps, it was a service agreement and an operating agreement. The essence of the combination of those four documents, is that each party would provide certain things, to the partnership, but it was clear that the full operation of each camp was delegated in its entirety by the general partner, to Canada North. Canada North was to receive and control all revenue and pay all expenses. They were entitled to receive money for the services they were providing, but they were essentially funding the shortfall to the extent that the revenue generated from each of those camps, was insufficient to cover the expenses.

Now, aside from the -- those four agreements, in respect of the Wandering River, Peace River and Manaus camps, there were lease agreements. Those lease agreements are -- are going to be important, I'll need to take you through those. The importance in those is largely to address issues raised by 726 that they're entitled to ownership of smallwares (phonetic), and additional ancillary equipment. As we can see from the supplementary affidavit that Mr. Roman swore on November 27th, they're claiming in essence, entitlement to, certainly in the case of Bonnyville and Peace River, to receive all of the equipment that is on those sites. And they rely upon their leases to support that contention.

What you will see as I take you through those, is that the leases themselves are very specific. They're not in the nature of general security, they do not include proceeds or what I would call (INDISCERNIBLE) or sundry language. So (INDISCERNIBLE) to that, we'll need to look at it. And I think -- well again, I hesitate to take a lot of time to go through the documents, I think it's imperative because the document matrix here is key. And the Monitor can't stress the importance of that enough.

Because as I read the material, and certainly the arguments of my friend, and I'm sure I -- we -- you may hear otherwise, they're supported, but 726 relies on the documents, and largely for the assertion that the GSAs that were signed by Mr. McCracken in favour of Canada North were not authorized, and are therefore unenforceable. And we'll address that in the course of argument today. But they otherwise ask the Court largely to infer implied terms, some of which are inconsistent with these documents, or critically rectify them to reflect what they say is the actual agreement. So I think it's -- it's key in this instance, that we look at the documents which were done contemporaneously with that transaction or those series of transactions, to gain an appreciation of what the parties actually agreed to and we're used to writing. And as Your Lordship is well aware, both parties had two very large law firms acting on their behalf, to help pay for these transactions.

Now, the partnership agreements, are found at, I'll say the first one is the Bonnyville Lodge one -- the Bonnyville Lodge one that was appended to Mr. Roman's affidavit, was actually not the one that was used, it -- there was an amended and restated one entered later, it's at Exhibit D-16 which is tab 20 of the exhibit book, and I apologize for that, as I was looking through this, I see that we did mark one exhibit, just to clarify, My Lord, why the tab numbers are different than the exhibit numbers. We -- we marked one exhibit as Exhibit 11 has I think 'A', 'B', 'C', 'D' associated with it, so it's otherwise made numbering of the tabs a little difficult. Where's the exhibit binder? Oh there it is, good, okay.

So -- and the -- the -- each -- each limited partnership agreement has slight nuances to it in terms of the commitments of each partner, but they are otherwise generally consistent with and the same throughout. And I want to -- perhaps if we could just use the D-16 at tab 20, just to give the Court some feel for what needs to be looked at. The key articles from -- in my submission, would be first of all, article 11, which outlines the powers of the general partner. Article 14 in each agreement, speaks to the relative contributions of each limited partner. And keep in mind that the limited partner here was Canada North Group Holdings. Not Canada North Camps. That -- that party was lately added to the proceedings after the Monitor powers were expanded. Article --

THE COURT: So when you ask me to keep that in mind, I -- I respect that there's a corporate distinction and --

MR. BIEGANEK: Right.

THE COURT: -- for various reasons, but I have in general, in examining the matters, still used as an acronym at least, the CNC.

MR. BIEGANEK: Okay.

THE COURT: Now, am I going to have to subdivide in my analysis of this?

MR. BIEGANEK: I think you'll -- you'll simply have to acknowledge that they're two separate entities. But Group Holdings -- well let me get -- Exhibit D-5, My Lord, is -- in the book, is the corporate structure, it's a big -- and we've copied it large and it's in colour, and that gives you the -- the corporate structure, the (INDISCERNIBLE) chart, so when you're considering this, excuse me, you'll have that in front of you and we can -- we can differentiate.

THE COURT: Well it's not that I'm --

MR. BIEGANEK: Yeah.

THE COURT: -- incapable, I -- that might be a --

MR. BIEGANEK: Oh, no, no, no, no, no.

THE COURT: That might be a separate matter.

MR. BIEGANEK: Does it make a difference? Does --

THE COURT: That's what I want to know.

MR. BIEGANEK: Ultimately, I -- I'm going -- you're going to hear me say I don't believe it does, okay? And -- and for reasons which I hope can become apparent. But, it does go to knowledge of Mr. McCracken on the validity piece. But I'll -- I'll speak to that when -- when the time comes, but I think ultimately, as you can see from your chart, those two entities are controlled by Canada North Group Inc., and the directors are the same.

The other additional articles that the Court will need to be mindful of or keep in mind as we go through this argument today, is article 17, which deals with borrowing, and particular article 17.2, and I'm sure you'll hear from Ms. Nicholson about that. What that speaks to is that where the partnership requires funds from time-to-time, they can borrow funds -- borrow, keep that word in mind, because the restriction is only on borrowing, where there's approval by extraordinary resolution which is defined as a unanimous among the limited partners. And that extends to the granting of security in respect of assets, to secure the borrowing.

THE COURT: Sorry, I was just shuffling papers when you said that's in what section?

MR. BIEGANEK: That is 17.2.

THE COURT: Of.

MR. BIEGANEK: The limited partnership agreement.

THE COURT: Right, okay. Which is found?

MR. BIEGANEK: That's the same -- on these points, the LPAs are all the same.

THE COURT: Okay.

MR. BIEGANEK: Except at paragraph -- article 14 is the primary differentiator and --

THE COURT: Yes.

MR. BIEGANEK: -- to the extent there are differences, I'll point them out to you as we roll through today. The other two articles that the Court should keep in mind when looking at these matters is article 20 which speaks to dissolution, And also article 22 which speaks to dissolution and liquidation. Article 20 -- and I'm making a general statement here, indicates that assets that are provided by each of the limited partners first go to them, if there are those assets. And then article 22 deals with the normal types of, what I'll call dissolution and liquidation provisions you'd see in a limited partnership agreement, outlines the circumstances and then deals with the -- the waterfall of payments that must be made on liquidation, so creditors get paid first, and then we move down the chain to what I'll call the equity holders or the limited partnership. The -- the normal law that followed events.

Now, the USAs, the unanimous shareholders agreements, again are similar, not necessarily identical, in each case, and in that, I would have the Court refer to the book of documents, tab 5, and this is the amended and restated one for kilometer 1-4-7, but a key piece of this - excuse me - that you'll -- you'll hear about -- excuse me. It's article 4. Pardon me, I'm referring to the limited partnership agreement. Yes. Tab 7, My Lord, pardon me. This is the Wandering River one, the -- this is article 4 and in particular, 4.1(i) and (j). it's the same paragraphs in each unanimous shareholders' agreement. It would be page 12 of the agreement.

THE COURT: Thanks, I've got it now (INDISCERNIBLE). Okay.

MR. BIEGANEK: So it's subparagraphs, for this one, I guess from -- from the bank's perspective, it would (h) and then we've got (i) and (j) as well. From CNC's perspective, it's (i) and (j). Those provisions indicate -- and as I said, there will be nuances between them and I'll point those out to Your Lordship as we go. But in respect of entering into agreements, witnessing capital expenditures are in -- in continuing indebtedness in excess of $100,000, and incumbering the assets of the general partner or applicable partnership, except as may be necessary to secure loans or advances authorized by subparagraph -- and if you look at this, it's hard to differentiate about whether that says (j) or (i), I think (INDISCERNIBLE) (i), and that's what the parties have proceeded on the basis of, but in either event, any event, there is a unanimous resolution of the -- the board of directions that's required for that -- those to take place.

Now, we do know from our questionings, and from some review of documents, that with respect to the partners and their general partners, there does not appear to have been any meetings of the partners or these enterprises once they were established. So we don't have any resolutions authorizing the -- well, we do not have resolutions that authorize, first of all, the entering into of the operating agreements or service agreements, I know they're clearly contemplated, and were put into effect. We don't have resolutions authorizing the entering into of the CNC GSAs that were granted by each of the partnerships, and we don't -- we have certified --

THE COURT: Sorry, what else -- before you got to the GSA, you say there was no authorization to enter into the -- the operation agreements?

MR. BIEGANEK: Right.

THE COURT: Yes.

MR. BIEGANEK: They're -- but I mean they're contemplated -- my -- my position on that is quite clearly the partner -- partnerships clearly contemplated it, but --

THE COURT: Right.

MR. BIEGANEK: -- if we're looking at it from a pure procedural standpoint, the procedure wasn't followed for those either.

THE COURT: Right.

MR. BIEGANEK: Right? If -- it also wasn't followed in the case of Wandering River for the entering into of the master lease agreement with 726 which is a fairly onerous document, the rent on that is about 193,000 a month plus tax, so I mean there was money paid on that, so -- so the point being, factually as we go through this, Your Lordship will see that the niceties of corporate or partnership procedure, were generally not followed (INDISCERNIBLE). What flows from that is something you're going to be asked to consider, but I think it's fair from the evidence, that -- that clearly the -- the corporate procedures were not followed, period.

All right, turning then to more specific transactions, as we went through yesterday, starting with Bonnyville, that partnership was established in December of 2014. At the time of that transaction according to the evidence, the Bonnyville camp was already set up and operating. With the exception of the Jack-and-Jill dorms which are -- I'll address later, that were to be installed and included amongst the consideration to be paid -- or that was paid, the $20 million plus GST, included a $3 million sum that was to -- was advanced to enable CNC to move those units to the -- to the camp to set up.

The -- as we've noted in our brief, at the time of that purchase, Canada North Camps' assets were the subject of CWB security interests, that was obtained by the bank pursuant to a GSA that was granted in favour of CWB, we do have in evidence, Sir, in Ms. Taha's first affidavit, a GSA from 2011, and in the latest set of material from the answers of Ms. Barnhouse, another one from 2013. It's our understanding as Monitor, that the bank did not have a serial number registration at PPR in respect of those units, but did have a perfected interest in the assets of Canada North Camps, on a general basis.

THE COURT: Sorry, say that last part again, it had a?

MR. BIEGANEK: It -- it had registered its all present and after acquired personal property registration, but did not specifically list serial number items. Now, the -- if you have the book of documents in front of you, I'll just draw the Court's attention to material dealing with the - excuse me - the Bonnyville transaction, that's at tab 10. This was exhibit 'B' to Mr. Roman's affidavit sworn October 2nd. The last document in that bundle is the bill of sale made effective as of December 30th, 2014.

THE COURT: I'm sorry, the last?

MR. BIEGANEK: The last document in that bundle.

THE COURT: Yes.

MR. BIEGANEK: Is the bill of sale.

THE COURT: In this tab?

MR. BIEGANEK: In tab 10.

THE COURT: The last folio that I have on it shows -- oh, maybe I'm just coming to the last page of that, it's the bill of sale?

MR. BIEGANEK: That's the last page. Yeah.

THE COURT: Yes, all right, I have it.

MR. BIEGANEK: So if you go 1, 2 --

THE COURT: Yes.

MR. BIEGANEK: Six pages.

THE COURT: Yes, no I found it.

MR. BIEGANEK: And actually for -- if you want -- a discreet copy is at tab 1-B of the transcript book as well. That was provided in answer to Mr. McCracken's undertakings.

So, you'll note from this document, that the purchaser is acquiring the equipment installation setup and startup costs, more particularly described on schedule 'A', that's the equipment. And sub (1)(b), the equipment's free from any charge, lien claim mortgage, security interest or encumbrance of any kind. That's what's noted there. And I think it's certainly important, My Lord, that you look at this schedule, and you will see that it only lists specific equipment, all of which is -- we'll call them well sites generally, but they're -- they're trailer units or dorms. All of which have serial numbers. And -- and on the last page of the document, you'll see installation setup and startup costs, but there's no listing of smallwares, there is no listing of ancillary equipment. And I think that's important because as we see from the items that they're claiming, they include all of the walkways, the electrical plug-ins, the sewage treatment -- well I think in Bonnyville, it's attached to municipal services, but all of the other sundry ancillary equipment, and this is outlined in Mr. -- Mr. Roman's supplementary affidavit, they claim all of the supplementary equipment as needed to effectively operate the camp.

But if you -- I don't know that I need to take you to it now, you just to make a note, that if you look at the amended and restated Bonnyville Lodge limited partnership agreement, that is exhibit D-16 at tab 20 of the exhibit book, and in particular, article 14, there is no mention there, of ancillary equipment being supplied by 726, it's actually very specific equipment and it refers to the numbers generally that are mentioned in schedule 'A' to the bill of sale. Notwithstanding that, Mr. Roman's evidence is that all the sundry equipment formed part and parcel of the quote, installation setup and startup costs, so that's his evidence.

Now, we've eliminated the need to look at an adverse inference. The evidence that we do have before the Court, is that in the case of the asset acquisition, both Ms. Barnhouse and the (INDISCERNIBLE) have -- or review of the (INDISCERNIBLE) file and the (INDISCERNIBLE) themselves, have confirmed that first, that there was no release of interest received, from CWB, and there does not appear to have been a PPR search conducted of the -- of CNC in respect of the transaction.

As we note in this material, there was no additional or ancillary documents provided, there is no lease between 726 and the partnership, the position of 726 is that they acquired it and provided these assets to the partnership for the purpose of fulfilling their obligations under the limited partnership agreement. I'll get to --

THE COURT: Sorry, you -- but you said that there was no lease between 726 and the limited partnership?

MR. BIEGANEK: Correct.

THE COURT: Okay. As distinct from --

MR. BIEGANEK: The other three camps --

THE COURT: Oh, for Bonnyville when you --

MR. BIEGANEK: -- where there were leases provided.

THE COURT: Yes, yes, of course.

MR. BIEGANEK: Right. Okay. Now, I'm just going to grab this glass of water, Sir, I started fighting a cold this -- the last couple of days. Thank you, madam clerk.

Now, I'm going to move on to deal with, again, this is furtherance of the document review, the Wandering River partnership. This is a sub-partnership of the Heart Lake limited partnership and you'll recall that there was some litigation or some arguments made by the bank regarding receivables in respect of -- arising out of that earlier in the proceedings. The -- the partnership did include some other parties, in this case, the Canada North Group provided a 50 percent interest in some of its land, but there was also here, as with the others, an operating agreement and a services agreement.

The -- in this particular case, there were payments made by 726 Remote -- or pardon me, 726 Group and 726 Modular, for equipment which was acquired by them, and then placed on lease with the partnership. The master lease is between 726 Remote and the partnership, however invoicing for the equipment acquired by the 726 generally was provided to RAM (phonetic), which was the -- the parent company, but all payments for the equipment appear to have been made by the other entity, 726 Modular, not 726 Remote. I'm not sure ultimately, if much turns on that, Mr. Roman's evidence was that a lot of these things were handled internally and on ledger sheets, but the -- the point is that there's no real documentary connection between the two, other than perhaps on 726's internal accounting records.

Now, the master lease of 726 and -- and I think I'll -- I'll take Your -- Your Lordship to these leases, because this is -- the master leases and the schedules are key to understanding how the documents -- the lease documents work. In the case of this particular lease -- yes, that is -- if you have the exhibit binder, it's exhibit D-9 at tab 9. And that's the schedule. Here, let me start with this, Sir, a little bit better, this is -- this is the exhibit schedule. But if you turn to the next exhibit, and this -- I'm just taking you to the form, this is the master equipment lease agreement for Peace River. So, I'll go back to the Wandering River in a sec, this general statement is as follows.

In each particular instance, how this worked from the paper perspective, is there's a master equipment lease agreement that outlines the terms, and then there's general terms and conditions which are attached to it. The master equipment lease agreement is the envelope, we'll call it the RELA (phonetic) document, and it provides that from time-to-time in the -- the second main paragraph, the lessee, in this case the limited -- or in each limited partner case, would propose to lease and the lesser would elect to lease to the lessee from time-to-time, work force housing modules, trailers and/or relocated modular and/or prefabricated structures, including various appurtenances such as stairs, railings, furniture, kitchen equipments, security systems and the like. And that's defined as equipment, pursuant to these covenants. And then you'll see under -- as you go down the -- the page to item number 1, is the equipment schedule.

So in each case, they would take an equipment schedule or a series of equipment schedules, which would outline two things. Number 1 -- well more than two, probably three. Number 1, the equipment that is to be leased or put on the lease, and that is normally would be looked at as schedule 'A' to each schedule. And then schedule 'B' to each schedule is the value attributed to that equipment, and the schedule would also outline the total value and the rental payments to be paid.

THE COURT: Sorry that would be in 'B' as well?

MR. BIEGANEK: No, it's in the -- the face of the document.

THE COURT: Oh.

MR. BIEGANEK: I'll -- if you -- so if you scroll -- or -- or flip to 1, 2, 3, 4, 5, 6, page 7 of that bundle, you'll see equipment schedule number 1.

THE COURT: Yes.

MR. BIEGANEK: Right? And there's an equipment value middle of the page.

THE COURT: Yes.

MR. BIEGANEK: And then a rate per month and the term about two thirds of the way down. And then if you look to schedule 'A' to that document, again this is Peace River, you'll see the equipment listed. And then the schedule 'B' to that particular document, shows the equipment value. And that's how they were generally set up for each LP.

THE COURT: Okay.

MR. BIEGANEK: In the master equipment lease agreement, if you still have that at B-10, and they're all the same, the general terms and conditions at least, are all the same. If you look at paragraph 16 of those general terms and conditions, you'll see that in (b) there's an entire agreement clause in those general terms. Okay.

THE COURT: Have it.

MR. BIEGANEK: Now, if we turn back to exhibit D-9 and I go back to the Wandering River piece, this is the equipment schedule number 1, which to my recollection, is the only equipment schedule for the Wandering River partnership.

THE COURT: Sorry, just give me a second, the entire agreement is in what portion?

MR. BIEGANEK: It's in the general --

THE COURT: It's in the generals, but I -- did you have the number?

MR. BIEGANEK: Oh yeah, it's paragraph 16.

THE COURT: In miscellaneous then, I just haven't found it yet.

MR. BIEGANEK: Yeah.

THE COURT: Okay.

MR. BIEGANEK: And (b).

THE COURT: Thank you, got it now.

MR. BIEGANEK: Okay.

THE COURT: Go ahead, now you're --

MR. BIEGANEK: Okay. Now, Wandering River is the -- pardon me, exhibit D-9 was the equipment schedule number 1 to the Wandering River master lease. If you look at that document, Sir, you will see that it includes certainly rights, and then equipment which is listed in this instance, as schedule 'B', it's probably incorrect from that -- from a documentary perspective, but the importance of this is, you'll see that the assets listed, are only the trailer units, the -- the modular units. Well we'll have a discussion about whether smallwares are included, there's no indication in that document, that any ancillary equipment was subject to that lease.

THE COURT: Sorry, you're saying something about smallwares?

MR. BIEGANEK: Well there's -- there's three components to the 726 claim in all respects.

THE COURT: Yes, no I understand the --

MR. BIEGANEK: There's -- right.

THE COURT: -- three in their claims, there's the smallwares, there's the ancillary and then there's the --

MR. BIEGANEK: The main.

THE COURT: Yes, the main --

MR. BIEGANEK: Yeah.

THE COURT: -- equipment.

MR. BIEGANEK: Yeah.

THE COURT: But, what are you saying here? That's there's nil in reference --

MR. BIEGANEK: There's no -- there's no --

THE COURT: -- to ancillary or --

MR. BIEGANEK: Smallwares.

THE COURT: -- in respect to smallwares, both?

MR. BIEGANEK: Right.

THE COURT: Okay. I have it.

MR. BIEGANEK: Okay. Now, we do know from the evidence, that 726 -- this is -- this is a lease for 42 months, so it's a lease for a term of more than one year, is they are in business of leasing, that is their only business, and they did not effect the registration of a financing statement of PPR until November 27th of this past year, 2018. And as I've pointed out to you in our general -- my general overview, there's no evidence here that there was an extraordinary resolution entered into by the partners, although this lease is contemplated by paragraph -- article 14 of this particular limited partnership agreement, and there's no evidence of a unanimous director's resolution of the general partner under the terms of their USA. And in this particular case, the minimum rental per month was $193,800 plus tax. So, we have that.

Now, with respect to Peace River, this agreement was entered into at the end of January of 2015.

THE COURT: Sorry, where am I seeing the rate of 198 (sic) a month?

MR. BIEGANEK: Oh, if you --

THE COURT: Oh, is that 2-97? It's just -- it's (INDISCERNIBLE)

MR. BIEGANEK: Yeah, no if you -- it's hard to read. So schedule 'A' attached, so it's 297-600 per month --

THE COURT: Oh, and 193 is at the bottom part?

MR. BIEGANEK: Right.

THE COURT: Okay.

MR. BIEGANEK: Right, but no -- no less than 193,800.

THE COURT: I have it, thank you.

MR. BIEGANEK: And I think how it worked out is, they were paying 193,800. And there were payments made. In Peace River, the LP agreement was entered into in January of 2015. In each case there, again, the Peace -- I'll just refer Your Lordship to it, it's exhibit D-15, that's the amended and restated -- or pardon me, that's the signed document, it's at tab 19 of the exhibit book. In this particular instance, Canada North Group was providing obviously its proportionate share of initial working capital. Startup -- startup losses, installation and setup costs and equipment, linens and disks, we're not sure what that means, etcetera, plus equipment referenced on schedule 'A' to their master lease agreement, between CNC and the partnership dated effective January 23, 2015, 726 was to provide its proportionate share of the working capital, the equipment on its master lease, all costs associated with transportation, site work, installation, pilings, utilities, etcetera. And upon expiry of the lease, was to sell the equipment to the partnership for a dollar.

A couple of points here. Unlike the other USAs, if this -- this particular unanimous shareholders' agreement was entered at exhibit 26, which is tab 30 of the exhibit book. Oh, pardon me, that's the master -- pardon me, the -- the USA contemplates in this that there are qualified leases, which exclude it from -- which exclude the -- eliminate the need for a unanimous resolution of directors, okay? And the USA for the Peace River Lodge limited partnership is found at tab 8 of the book of documents. Okay.

THE COURT: Exhibit 30's not relevant, I've got to go to the other binders.

MR. BIEGANEK: Right, I'll go to Exhibit 3 in a moment --

THE COURT: Right.

MR. BIEGANEK: -- that the -- it's got to be in the binder.

THE COURT: Okay.

MR. BIEGANEK: And it's again at page 12. And you'll see there in (f), there is borrow money on the credit of the corporation or the limited partnerships. Other than pursuant to the equipment lease between limited partnership and 726 dated the blank day of January, 2015, or any equipment lease or land lease including any renewals or extensions thereof, approved by the board of directors of the corporation and entered into between a limited partner and the limited partnership, on or following the date hereof, and that's referred to as a qualified lease. Okay? And you'll see that in (i) a qualified lease is excluded from the requirement, if you read (i) and (j) together.

THE COURT: So you're saying the net effect of that is what? That this is unique obviously, to Peace River, but --

MR. BIEGANEK: Yeah. I'm going to take you to --

THE COURT: Okay.

MR. BIEGANEK: If -- the next document you need to flip to is at tab 4 of the book, which you have in front of you. Which is the Peace River Lodge limited partnership agreement. And if you look at article 14 of that document, there's a reference there to an equipment lease between CNC and the partnership.

THE COURT: In article 12?

MR. BIEGANEK: 14.1(c).

THE COURT: Fourteen, yes.

MR. BIEGANEK: Do you have that, My Lord?

THE COURT: I've got article 14, tell me what specific reference.

MR. BIEGANEK: Point 1, (c).

THE COURT: So the equipment referenced on (a) and dated --

MR. BIEGANEK: Schedule 'A' to equipment lease between CNC -- that one's blank, we did get a -- there is a signed document with the blank filled in, entered as an exhibit.

THE COURT: Okay.

MR. BIEGANEK: The date on it's January 23rd, 2015, I'll give you the exhibit number in a moment. But there's a master lease in that instance with CNC, and the limited partnership. Okay. That master equipment lease is at tab 30 of the exhibit book, that's D-26. And it isn't for any equipment, it -- but it is for a number, approximately 1.7 million US, and it's in respect of foregone profit on the construction of the camp. And the acknowledged understanding was that Canada North would be entitled to receive payment under that lease, from the partnership, as matters progressed.

As with the other partnerships, there was also a service agreement and an operating agreement entered into with CNC. And in terms of the lease agreement that was entered into between the partnership and 726 Remote, that's found at tab 10, exhibit 10 of the exhibit book.

THE COURT: Okay.

MR. BIEGANEK: You have that? Okay. This -- I want to take you through this a little bit more because this -- this camp was constructed over a period of time. So it looks to me like how I would describe it in a -- in a vernacular sense, is that on this particular piece, 726 was essentially providing funding to get the camp set up. Okay?

So they were using a lease to secure themselves for the funding, but they were providing cash to build and -- and establish the camp. And we have -- the master lease agreement is the first document in that bundle, and then if we go to 1, 2 -- 7 pages in, we have equipment schedule number 1. Do you have that in front of you?

THE COURT: Well I have schedule 'A' equipment.

MR. BIEGANEK: Yeah, no, a few pages back. And there's a document in -- that's attached to exhibit schedule number 1.

THE COURT: I have it now.

MR. BIEGANEK: Excellent, okay. So that outlines the equipment value, attaches schedule 'A' and notes that it's a minimum lease term of 45 months. And you'll see in schedule 'A' which you did have before you, the equipment that's listed.

THE COURT: I have that.

MR. BIEGANEK: Okay. And then schedule 'B' shows the value that's attributed -- or that will be -- what I'll call, put on lease. And that includes not just the units purchased from Camp Corp, but also site setup that you see there, right? All included in the value, for a net total equipment value as they call it, of 10 million 677 and change. Now there were further equipment schedules, and this gets us into the -- or if you flip the next page after that value, you'll see equipment schedule number 2.

THE COURT: All right.

MR. BIEGANEK: All right. This shows equipment value here of 2.3 million. With additional monthly payments. And a minimum lease term again of 45 months. But the critical piece here is to flip the page, My Lord. Now, you'll see it says at the top, schedule 'A' to equipment schedule number 1, by and between 726 Remote Accommodations as lessor and Peace River Lodge as lessee. None.

But you look at (b) or schedule 'B' and it says to equipment schedule number 2, by and between 726 Remote as lessor and Peace River Lodge as lessee, various site and setup work at Peace River Lodge in Peace River as detailed in invoice number 11, dated January 12, 2015, attached hereto. And attached to that, is support for what's noted as draw number 6.

There is a listing of items here including some service invoices, but also some equipment and so forth, for additional, what I'll call value of 2.422 million. 726, notwithstanding the wording of schedule 'A', claims entitlement to these assets as forming part of its lease. Our position, which we'll get to, is that this invoice was used to attribute additional value to the original equipment, but by its very terms, it's clear, the equipment's not included, it's just there for value. So if those assets are anybody's assets, they remain the partnership's assets.

Again --

THE COURT: You're saying schedule 'B' is again, consistent with the pattern that they used in attribution of value?

MR. BIEGANEK: Correct.

THE COURT: But that the import of the language of the agreement itself is that there's no claim attached to them, it's just a valuation.

MR. BIEGANEK: Right.

THE COURT: I understand.

MR. BIEGANEK: That's not the position they're taking now, but --

THE COURT: No, I realize.

MR. BIEGANEK: -- that's what the documents -- yeah.

THE COURT: But as to what the document says.

MR. BIEGANEK: Yeah.

THE COURT: Okay.

MR. BIEGANEK: This lease is for a term of 45 months as I've said. There's a dollar option to purchase at the end of it. Again, there's no evidence -- well, the evidence is, 726 Remote did not register its interest by way of financing statement of PPR at the time, they have done so now, just a couple of months ago.

THE COURT: I'm just noticing the time, how are you managing this in your own mind?

MR. BIEGANEK: Well, if I can -- why don't I finish with the -- the last partnership now and then we can break --

THE COURT: Okay.

MR. BIEGANEK: -- for a while, and then come back and -- My Lord, I can't -- well, I don't guarantee that we'll get done today.

THE COURT: I understand that.

MR. BIEGANEK: So -- okay, but we'll do -- I'll do my level best. The next partnership is kilometer 1-4-7, again this one similar to all the others, the master lease agreement here is at -- starts at 11, D-11 in the exhibit book. And this one we entered a series of documents, so it'll be tabs 11, 12, 13 and 14 are relevant to this discussion. And this is the - excuse me - the one camp where we have the equipment swap. So the -- the primary lease -- or the master lease is D-11-A, that's at tab 11. The 11-B at tab 12, is the equipment schedule number 1 which lists the equipment. And that includes the F-X dorms that were referred to yesterday. And schedule 'B' is the -- the value attribution and the title of that is schedule 'B' Manaus Lodge summary of 726 investment.

The additional -- there was never any amendment made to this master lease agreement. So there is in Mr. Roman's affidavit, an e-mail from the -- his supplementary affidavit, an e-mail from Canada North saying, we shipped yours -- your rec units to Wandering River, did you want to make changes to the invoices and the lease? There's no response to that. And there's been no change to the invoice or the lease. And Mr. Roman confirmed that I his questioning at page 62, lines 4 to 24 of the --

THE COURT: Sorry that was what? Can you say it again?

MR. BIEGANEK: Page 62.

THE COURT: Yes.

MR. BIEGANEK: And it's lines 4 to 24 of his transcript. Now, as we outline in the brief, in this case -- well, before I take you to that, My Lord, if you look at the remainder of the equipment schedules, you'll see is equipment schedule number 3, there is no additional equipment that's added to the lease, it's all just notations of attribution of value. And again, it goes to the question of whether or not the ancillary equipment that they removed from the camp under the (INDISCERNIBLE) order, is properly theirs under their lease agreement and we say it's not.

If you --

THE COURT: Just a moment.

MR. BIEGANEK: Yeah.

THE COURT: Okay. Are you able to help me? I -- I still haven't digested how the exclusion of any equipment, but the attribution of values, what is the purpose of that structure, using O-3 for example or --

MR. BIEGANEK: What's the purpose of that -- well, I can only surmise, My Lord, but from -- it appears to me as I've said, that 726 utilized lease documentation for the purpose of evidencing the obligations that the various partnerships had to get.

THE COURT: Right.

MR. BIEGANEK: It didn't utilize any other type of lending documentation to -- like a -- a master loan agreement or --

THE COURT: Right.

MR. BIEGANEK: -- anything like that. So my -- my conclusion, and it's only mine, but I think --

THE COURT: Yes.

MR. BIEGANEK: -- it's reasonable from the paperwork, is that their -- their method of putting on paper, was to, if we're going to give -- say -- let's just use an example, okay we're going to put $10 million worth of equipment on this site, or we're going to advance $10 million to set up this camp, a certain portion of that is related specifically to equipment that's being purchased and put on site, a certain portion of that is paying Canada North to set up the camp, but all of that value or all of that dollar amount, is going to have as security for it, only the assets listed on schedule 'A'. So it's -- it would be like - we don't use them much anymore - but taking a promissory note for an advance under a general security agreement if we're -- we're doing a specific equipment loan, we're taking one security agreement, but we've got three loans underlying it, here's a -- here's a promissory note (INDISCERNIBLE) for loan 1, here's a promissory note for loan 2, here's a promissory note for loan 3, all covered by the security. 726 uses the same as it's means of -- of doing it, it's -- it's imperfect, but that's how it's structured.

THE COURT: But I'm still not sure that that allows me to grasp why -- okay, so your first schedule lists the equipment in 'A'.

MR. BIEGANEK: Right.

THE COURT: Why is it your -- we are seeing a breakout in 'B' of different valuations? What is -- what's being accomplished by that? If it's tax then I don't really care, you know, but --

MR. BIEGANEK: Yeah, I -- I don't have the answer --

THE COURT: I see.

MR. BIEGANEK: -- for you, Sir. I don't have an answer for you. But it could be tax related, it could be -- I think it's just primarily to provide an accounting to the parties that are to the agreement of this is the value we're providing for which purposes, this is to equipment, this is to pay your invoices for site setup, this is for other sundries, this is for the tax, we put it all under this piece and we charge you monthly rent for it in repayment.

THE COURT: Okay.

MR. BIEGANEK: If we -- to finish up on this piece, if you turn to tab 40 of the exhibit book, and exhibit D-34. The highlighted units on that e-mail, this is an e-mail exchange between Mr. Roman and the Monitor, asking for the whereabouts about certain missing equipment, as it turns out, 726 has possession of it, they removed it from the Manaus camp, but the highlighted items are -- do not appear anywhere on the lease agreement between 726 and kilometer 1-4-7. Yet they claim they're entitled to those units.

Sir, that -- I'll finish on this piece, and on this review of the facts by doing the following, again, this lease was for a term of more than one year, there was no financing statement registered PPR until November of last year. And that's it for the kilometer 1-4-7 piece.

In terms of amounts owing to CNC by the partnerships, the -- what we've entered as exhibits, it's tabs 31 to 34 of the exhibit book, some general ledger statements shows that Wandering River Lodge owes CNC $159,123.46; Peace River owes 1.1 million. Bonnyville owes 842,000; and kilometer 1-4-7 owes 1.2 million; those are outlined at paragraph 72 of the brief.

THE COURT: Is there any controversy in respect of those figures as such?

MR. BIEGANEK: Well, Mr. McCracken confirmed those were the figures.

THE COURT: Right, okay.

MR. BIEGANEK: The Monitor's not had -- is -- understands there's backup for all of it.

THE COURT: Okay.

MR. BIEGANEK: But the backup has not been produced.

THE COURT: The paragraph number from your brief was?

MR. BIEGANEK: Seventy-two.

THE COURT: Two? Thank you.

MR. BIEGANEK: All right. I think now is an appropriate time to break.

THE COURT: Okay. I want you to discuss the implications of our time and where we go from here.

MR. BIEGANEK: Okay.

THE COURT: Because the inability to finish impacts the reasoning that the Court provided.

MR. BIEGANEK: Yes.

THE COURT: And I leave it for counsel to have the first opportunity to -- to examine what this does for the continuation.

MR. BIEGANEK: Okay.

THE COURT: All right?

MR. BIEGANEK: Yeah, thank you, My Lord.

THE COURT: Thank you very much.

THE COURT CLERK: Sorry, My Lord, are we starting at 1:30 or 2?

THE COURT: I don't know that an extra half an hour in --

MR. BIEGANEK: No.

THE COURT: I'll take your guidance --

MR. BIEGANEK: 2:00.

THE COURT: 2:00 is fine?

MR. BIEGANEK: Yeah.

THE COURT: -- from your standpoint?

MR. BIEGANEK: Yeah.

THE COURT: All right, let's do that.

MR. BIEGANEK: Thank you.

PROCEEDINGS ADJOURNED UNTIL 2 PM

Certificate of Transcript

I, Shari Lynch, certify that

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

(b) the Certificate of Record for these proceedings was not included orally on the record and is not transcribed in this transcript.

Shari Lynch, Transcriber
Order No.: AL-JO-1002-2984
Date: January 27, 2019

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

January 11, 2019	Afternoon Session
The Honourable Mr. Justice Hillier	Court of Queen's Bench of Alberta
(No Counsel)	For the Monitor
R. Quinlan	For the Monitor
C. Russell	For Canadian Western Bank
Z. Han	For 726 Alberta Ltd.
C. Nicholson	For 726 Alberta Group
D. McAllister	For 726 Alberta Group
B. Smith	For Mr. and Ms. Hadfield
S. Delblanc	For Mr. McCracken
S. Delblanc	For Mr. McCracken
D. Borman	Court Clerk

THE COURT: Afternoon, everyone, please be seated.

MR. QUINLAN: Good afternoon, My Lord.

THE COURT: Mr. Quinlan.

Discussion

MR. QUINLAN: Over the lunch break, unfortunately Mr. Bieganek's illness took a fairly swift turn, and has had to, go home for lack of a better term. So over the break and in consultation with my friends here, today, we propose to break for the rest of the day and continue on with some rescheduled dates. We have spoken, you are next sitting on the commercial list near the end of March. It looks and appears as if you have March 20th and 22nd completely free, you are not -- there is no availability on the 21st. So we have proposed to continue the hearing on those two days. I have sent an e-mail to the commercial coordinator's office to -- just to confirm that we can still pre-book those two days. I haven't received a response yet but we're hoping they're still free.

And we have discussed as between ourselves and set out some other preliminary steps and deadlines, which should assist the parties in knowing the arguments going forward, as well as yourself, because in their original brief, 726 did not address any substantive arguments in respect of Bonnyville, the parties have agreed - of course this is all subject to Your

Lordship's confirmation - that 726 shall file a written argument by February 19th, 2018, limited to --

UNIDENTIFIED SPEAKER: 2019.

MR. QUINLAN: Sorry 2019, thank you. The -- the Bonnyville issues and any arguments they have on rectification for relief from forfeiture, as none of those items were -- none of those arguments were particularly set out in their brief. The Monitor and CWB and any other party who wishes to, can file a reply brief on or before February 28th, 2019. The parties have agreed that no new evidence will be filed, there's not going to be new evidence as part of this process. And if Your Lordship is agreeable to all this, I would reduce this to a form of written order, circulate it to my friends here and then send it to Your Lordship for execution.

MR. RUSSELL: My Lord, might I just make an additional comment? Excuse me. I realize this is an unfortunate turn of events, and quite frankly, it flies in the face of Your Lordship's desire to keep this moving on a prompt basis. The problem is, I know that Mr. Bieganek has spent literally days preparing for the -- for the oral argument, and it -- from what I understand of the argument, is at a point would be very difficult, if not impossible for Mr. Quinlan to pick up and run with himself.

THE COURT: Oh, I'm not second-guessing that we can't go ahead this afternoon, thanks very much on that aspect, Mr. Russell.

MR. RUSSELL: Thank you, Sir.

THE COURT: There are two components to this. One relates - - I mean obviously we couldn't have anticipated that Mr. Bieganek would have a turn in his health, and maybe that stands alone, but the question of costs occasioned by not getting to the merits of this thing earlier, is something which I would invite input on, and I want clarification, so I think I really want Ms. Nicholson to -- to help the Court with respect to the framework that Mr. Quinlan has just laid out. I know you've obviously been involved, you've had input on it, but I just want your input, thank you.

MS. NICHOLSON: My Lord, I support this. Obviously. I -- are you asking me to speak to costs, Sir?

THE COURT: That's the second point -- point of it, but I've got four points that have been raised, the -- the most germane of which is the agreement that there'll be no new evidence that's provided.

MS. NICHOLSON: Yes, My Lord, I -- I understand why you'd like to know my perspective on that. I -- I -- I don't have instructions, but I would -- I -- I -- you have not permitted the two pieces of evidence as -- as we've spoken about today that we tried to bring forward, the Roman material, and we just -- by the way, this was just raised about no new evidence just now, but --

THE COURT: Sorry, do you want to consult amongst counsel? I thought it had been, that's what I wrote down.

MS. NICHOLSON: Sorry, it was -- I don't mean to say it was sprung on is, we -- we had a very short two-second comment about it, in -- fair?

UNIDENTIFIED SPEAKER: (INDISCERNIBLE)

MS. NICHOLSON: Yeah.

UNIDENTIFIED SPEAKER: Sure.

THE COURT: Do you want some time to talk? What do you mean sure?

UNIDENTIFIED SPEAKER: Is that what you're asking?

MS. NICHOLSON: No, no I -- I don't -- I don't need time to talk, I -- I just probably on that point, I don't have instructions, but I could get them quickly, and I -- I think I could get them quickly. And -- but it would be -- that would be the only issue that I would like to get instructions on, apart --

THE COURT: As in if I adjourn now for five minutes, you can get your client on the phone, get instructions and then that would firm up these four points?

MS. NICHOLSON: I think maybe if I could have ten minutes maybe?

THE COURT: Okay, sorry, I didn't mean (INDISCERNIBLE). This watch is an old watch and it's just fine, that's not my point.

MS. NICHOLSON: Yes, that would -- that would assist for sure.

THE COURT: All right. And then it seems to me, consistent with really what happened on the 21st, I can recollect that the -- the impact of the further delay would be simply something that would be assessed ultimately in the attribution of costs.

MR. RUSSELL: I would think that would be appropriate, My Lord. The -- the reality is that the -- you know, obviously the Monitor has in mind, something with regard to the costs that would otherwise have not been incurred, but I don't think until we kind of see the global picture, that we can say anything more than that.

THE COURT: You see but that's a separate point. If -- if there had not been this application, that's one matter is to what -- what would not have been incurred. But if there is some aspects of this that were down to the benefit of 726, then the application is absolutely necessary, but was it necessary in two stages or not, or what are the implications? I believe that simply remains open for determination another day, and that's all that's been done on costs in relation to this in September, is that we have heard representations that 726 ought to be accorded an opportunity to amend its affidavits, to file its applications, to not appear for the December hearings, but that there are costs associated with that.

MR. RUSSELL: And, My Lord, I suggest that what you've just expressed be put into the order as well if we could.

THE COURT: All right, okay, I have that.

MR. QUINLAN: I'm agreeable to that, Sir, I'll put that in the order as well, thank you.

THE COURT: Okay, that's probably the best case scenario for your clients on costs, but you probably should take instructions that if this is by agreement, that that fifth item, that costs are adjourned to -- to --

MS. NICHOLSON: To --

THE COURT: -- another determination, okay?

MS. NICHOLSON: Thank you, My Lord, I'll --

THE COURT: All right.

MS. NICHOLSON: -- I'll --

THE COURT: So we'll adjourn for ten minutes. Is there anything else I need --

MR. QUINLAN: Maybe while Ms. Nicholson steps out, I can just deal --

MS. NICHOLSON: Sure.

MR. QUINLAN: -- with you on these two orders that you granted yesterday, and then we can adjourn?

THE COURT: No difficulty leaving this to the rest of your company?

MS. NICHOLSON: That's -- I -- yes, thank you, My Lord.

THE COURT: All right, thanks very much.

MR. QUINLAN: So, pursuant to our conversation yesterday, My Lord, about me redoing the two orders you granted yesterday, one with respect to the approval and vesting of the WRC assets and second, with respect to the expanded Monitor's power for sale, I have done that. I'm passing up the form of order. This first one is the vesting and approval order. Sir, I can advise that I've made no changes to that form of order except removing the Monitor's power section, so this was -- this is otherwise the form of order that was circulated to all my friends and Your Lordship.

And is otherwise in the standard court template, the exception of paragraph 6 and 7 are added. Paragraph 6 just says, the purchase price allocated to each of the assets, is what we'll apply to it. And seven of course, permits the Monitor to discharge any PPR registration -- serial number PPR registrations if the parties themselves don't. Otherwise, this is in the standard template with the exception of the sealing provision in paragraphs 15 and 16, and the approval provision at paragraph 17.

THE COURT: Right. I signed that order, Mr. Quinlan.

MR. QUINLAN: Thank you very much. And I'll pass up the second form of order. Relating to the expanded powers of the Monitor, Sir. What I do want to draw to your attention, and to my friends' attention, is that these are the same provisions, substantive provisions, one deals with capitalized terms and two deals with service. Paragraphs 3, 4 and 5 were what was in the existing -- or the draft that was circulated for those -- for this section. What I have added is the last paragraph in here overnight, and that's just confirming that if the Monitor completes any sales, basically the sale proceeds stand in place of the property and in the same priority, just confirming that so that it's clear for all parties.

THE COURT: I think the law imposes that but it's good for the parties to know that the Court's confirmed that's the way it will stand.

MR. QUINLAN: I just thought in light of Mr. Smith's comments yesterday --

THE COURT: Yes.

MR. QUINLAN: -- that might be helpful to include, My Lord.

THE COURT: No, I think that's likely so.

MR. QUINLAN: So subject to that, I have nothing further to add if you want to now take an adjournment to let Ms. Nicholson complete her call.

THE COURT: Let's do that. Okay. Thanks very much.

MR. QUINLAN: Thank you.

(ADJOURNMENT)

THE COURT: Thanks everyone, please be seated. Ms. Nicholson.

MS. NICHOLSON: Yes, My Lord. I was able to obtain instructions on the terms that we've discussed, with respect to an order.

Decision

THE COURT: All right, Mr. Quinlan will prepare that order then for circulation. Just so that I'm clear, it's a five -- five point order in terms of rescheduling for March 20th and 22nd. I think presumptively, that's what it's going to be, but I would ask you to speak directly to confirm with Ms. Hins, I just tried to get her myself, without success, so you ought not to feel too slighted by the fact that you couldn't, if a judge can't and he's sitting in commercial court, you know she's unavailable. But, I would do whatever I can with my schedule, I had looked at some other dates that didn't necessarily engage that commercial week, and I don't know if there are impacts, I think there is certainly on Ms. Nicholson, of a stagger where there's a -- a day break as opposed to two days that are contiguous. So we're going to look to dates, and I'm wondering in that respect, whether you're already feeling an impact or whether you might be able to advance by a week for example, the -- the filing deadlines that you've set for yourselves.

MS. NICHOLSON: My Lord --

THE COURT: And I say that on the basis that I'm looking that I might be able to make available, either -- well no it's really only -- no, I have two possibilities. What was --- yes. No, I have one, sorry, March 14 and 15. So if that's not workable with counsel, then fine, but I will canvas with Ms. Hins because it doesn't conflict with anybody else's schedule, it is just my free -- my unassigned time.

MR. MCALLISTER: I can tell you those dates do work for me.

THE COURT: Do work for you? Thank you, Mr. McAllister.

MS. NICHOLSON: And they do for me, My Lord as well.

MR. RUSSELL: I'll make it work.

MR. QUINLAN: We'll make it work as well, My Lord, if necessary. Or if -- if available.

MR. DELBLANC: Should be fine. We'll make it work as well.

THE COURT: Okay. All right. Because that then doesn't impact the commercial week, I think that's maybe the safer route to go, is for me to set that and all we require then is a courtroom and I will just confirm with Ms. Hins. So let's have your order changed from 20th and 22nd, because they are not contiguous and I prefer that everybody have the advantages of two days back-to-back, and watch, we'll just find that that doesn't work, I -- best laid -- laid plans, but -- so February 12th, let's just be sure, I have a feeling that's a Family Day.

MS. NICHOLSON: My Lord, the Family Day is --

THE COURT: Oh, it's the following one, it was --

MS. NICHOLSON: The following week, yes. But is it -- is it --

THE COURT: I don't know if the Court --

MS. NICHOLSON: Do you need -- do you need the brief on -- a week before then -- before the 19th?

THE COURT: That's what I'm going to suggest is that --

MS. NICHOLSON: I was -- I was praying for it with my friends that they would give me to the 19th and they've acceded that, but --

THE COURT: Okay. Okay, well then -- and I respect that.

MS. NICHOLSON: But I -- but I -- but I don't --

THE COURT: Let me see --

MS. NICHOLSON: I understand your schedule as well, My Lord, so --

THE COURT: Right, so --

MS. NICHOLSON: -- I don't want to --

THE COURT: Yes, thank you.

MS. NICHOLSON: -- hamstring you.

MR. RUSSELL: Sir, I suspect that we can easily do our rebuttal briefs in the nine days between the 19th and the 28th and then that would give Your Lordship two full weeks with the -- with all the materials.

THE COURT: Okay.

MR. RUSSELL: Does that work?

THE COURT: All right, let's leave the dates then as they've been said -- stated, February the 19th and February the 28th. It'll be for the Court then to address March 14 and 15, okay? No new evidence, costs deferred. I'm not sure if you had standard language in an earlier order that dealt with that costs matter, but everybody understands what I'm saying, it -- it remains live and extent.

MR. QUINLAN: I believe everyone understands that, My Lord.

THE COURT: Okay. All right, is there anything else that needs clarification this afternoon?

MR. QUINLAN: I don't believe so, My Lord, no.

THE COURT: All right, thanks very, very much.

MR. QUINLAN: Thank you.

MS. NICHOLSON: And thank you, My Lord, again, for accommodating us.

THE COURT: This is not the easiest file that we've got on the books, thank you.

PROCEEDINGS ADJOURNED
