

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF **BOREAL CAPITAL PARTNERS LTD.**,  
JRB-331 SHEDDON HOLDINGS LTD., 2123068 ONTARIO  
LIMITED, JRB-109 REYNOLDS HOLDINGS LTD., JRB-339  
CHURCH HOLDINGS LTD., JRB-147 CHURCH HOLDINGS  
LTD. (each an “**Applicant**” and collectively, the “**Applicants**”)

**COUNSEL SLIP AND ENDORSEMENT**

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Motion for Plan Sanction  
Heard on August 9, 2022 at 10:00 a.m. before Hon. Justice Michael A. Penny  
via judicial videoconference

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<b>Name</b>	<b>Party</b>	<b>Contact Details</b>
Rebecca Kennedy Rachel Nicholson Puya Fesharaki	Counsel for the Applicants	<b>Thornton Grout Finnigan LLP</b> Tel: 416-304-1616 Email: <a href="mailto:rkennedy@tgf.ca">rkennedy@tgf.ca</a> / <a href="mailto:rnicholson@tgf.ca">rnicholson@tgf.ca</a> / <a href="mailto:pfesharaki@tgf.ca">pfesharaki@tgf.ca</a>
Alex Morrison Greg Adams	Court-appointed Monitor	<b>Ernst &amp; Young Inc.</b> Tel: 416-941-7743 / 613-598-4350 Email: <a href="mailto:alex.f.morrison@ca.ey.com">alex.f.morrison@ca.ey.com</a> <a href="mailto:Greg.J.Adams@parthenon.ey.com">Greg.J.Adams@parthenon.ey.com</a>
Matthew B. Lerner	Counsel for the Court-appointed Monitor	<b>Lenczner Slaght LLP</b> Tel: 416-865-2940 Email: <a href="mailto:mlerner@litigate.com">mlerner@litigate.com</a>

**COUNSEL EMAIL LIST**

[rkennedy@tgf.ca](mailto:rkennedy@tgf.ca); [rnicholson@tgf.ca](mailto:rnicholson@tgf.ca); [pfesharaki@tgf.ca](mailto:pfesharaki@tgf.ca); [alex.f.morrison@ca.ey.com](mailto:alex.f.morrison@ca.ey.com);  
[Greg.J.Adams@parthenon.ey.com](mailto:Greg.J.Adams@parthenon.ey.com); [mlerner@litigate.com](mailto:mlerner@litigate.com);

## **ENDORSEMENT OF PENNY J.**

### **Overview**

The applicant Boreal Entities have brought a motion for a Sanction Order seeking the Court's sanction of the Amended and Restated Plan of Compromise and Arrangement dated June 10, 2022 under to the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.

Following the conclusion of oral argument, I granted the motion and issued the Sanction Order with reasons to follow. These are the reasons.

### **Background**

The Boreal Entities are in the business of developing residential condominium projects in and around Oakville, Ontario. One of these projects, Sheddon, is near completion.

The Initial Order in these proceedings granted a stay and appointed Ernst & Young Inc. and Kesmark Estates Ltd. as the Monitor and Chief Restructuring Officer of the Boreal Entities respectively. The stay has been extended several times, most recently to August 31, 2022.

In accordance with the Initial Order, the Monitor has been conducting an Investigation of Jonathan Bowman, a former director and officer of the Boreal Entities, and related entities, regarding potential transfers at undervalue, fraudulent preferences, fraudulent transfers of property, or any other reviewable transaction with respect to Boreal Entities property prior the filing date. The Investigation is ongoing.

On June 22, 2022, the Court granted the Meeting Order which authorized the Boreal Entities to file the Plan and to call and conduct a meeting of the affected creditors to vote on the Plan.

The Meeting Order permitted any party to submit a bid in competition with the Plan. Mr. Bowman submitted a proposal to the Boreal Entities in respect of a proposed refinancing. His proposal required the participation of Halmont, the DIP lender, as a subordinated secured lender which was not acceptable to Halmont. Also, Mr. Bowman's proposal did not provide greater value than the Plan. As a result, the Boreal Entities, with the concurrence of the Monitor, determined that

Mr. Bowman's bid was not superior to the Plan. No further alternative bids were submitted.

On July 21, 2022, the meeting of affected creditors was conducted in accordance with the Meeting Order. The affected creditors unanimously voted in favour of the Plan.

A summary of stakeholder treatment under the Plan is as follows:

DIP Lender's Claim: Repaid in full in cash on Plan Implementation Date

Affected Claims – Funded Debt Claims: Granted guarantees from each of the Boreal Entities and charges on the Real Properties until repaid in full in cash by no later than June 30, 2025

Affected Claims – Affected General Unsecured Creditor Claims with Proven Claims: 70% of Proven Claims repaid in full in cash on Plan Implementation Date, with remaining 30% payable on the earlier of:

(i) the closing of the sale of all remaining residential units at the Sheddon Project, and,

(ii) eight (8) months from the Plan Implementation Date, provided that distributions will not be made to any Holdback Claim that is a Proven Claim until substantial completion of the Sheddon Project has been obtained.

Insured Claims: Recoveries provided for under applicable Insurance Policies.

### **The Issues**

The principal issues on this Motion are whether:

- (a) the statutory test for sanction of the Plan has been met;
- (b) the substantive consolidation of claims under the Plan is appropriate;
- (c) the releases contemplated by the Plan are appropriate; and
- (d) the Monitor should be permitted to continue the Investigation following the Plan implementation date.

## **Analysis**

### Statutory Requirements

Section 6(1) of the CCAA provides that the Court has discretion to sanction a plan if it has achieved the requisite “double majority” vote at any meeting of creditors held under s. 4 of the CCAA. There is no dispute in this case that the required creditor approval was achieved at a properly constituted meeting of creditors, as confirmed by the Monitor in its Seventh Report. In addition:

- (a) there must be strict compliance with all statutory requirements;
- (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.

The granting of the Initial Order required and therefore demonstrated that criteria (a) was proven before this Court at the outset. There is no evidence of any subsequent non-compliance with any requirement of the Initial Order (or any subsequent orders) or the CCAA. The Meeting Order determined that the creditors were properly classified and the Monitor’s Seventh Report confirmed that notice of the Meeting was sent in accordance with the Meeting Order, the Meeting was properly constituted, the voting was properly carried out and the Plan was approved by the requisite majority. The Monitor concluded that the Applicants have strictly complied with all statutory requirements.

No parties or stakeholders have taken the position that there have been any unauthorized steps in these proceedings. The reports of the Monitor, as confirmed by the Seventh Report, further confirm there have been no unauthorized steps taken or alleged to have been taken in these proceedings. I also note that the Court has been kept apprised of all key issues facing the Boreal Entities throughout the CCAA proceedings.

When considering whether a plan is fair and reasonable, the court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available. The meaning of “fairness” and “reasonableness” are necessarily shaped by the unique circumstances of each case within the context of the CCAA.

Where creditors have signalled their support of a plan by means of the vote, the court will be reluctant to second-guess their decisions. In assessing whether a proposed plan is fair and reasonable, the court will consider: (i) whether the claims were properly classified and whether the requisite majority of creditors approved the plan; (ii) what creditors would receive on bankruptcy or liquidation as compared to the plan; (iii) alternatives available to the plan and bankruptcy; (iv) oppression of the rights of creditors; (v) unfairness to shareholders; and (vi) the public interest.

In this case, affected creditors voted as a single class on the basis of commonality of interest vis-à-vis the Boreal Entities, as they are all unsecured creditors. The classification of creditors was supported by the Monitor and approved by the Meeting Order. As detailed above, the voting results demonstrate that all affected creditors voted in favour of the Plan; this included one significant creditor whose claim has been initially disallowed in the claims process.<sup>1</sup> Overwhelming creditor support received in a properly conducted vote creates an inference that the Plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the Plan. The affected creditors' approval of the Plan reflects the fact that it is a product of negotiation and communication among stakeholders. The Plan is the best available path forward for the Boreal Entities' unsecured creditors. The evidence supports the conclusion that all stakeholders will benefit more from the implementation of the Plan than any other potential alternative, including a forced liquidation. The Monitor confirms that in a forced liquidation, there would be nil recovery for unsecured creditors and a shortfall in secured creditor recovery.

Implementing the Plan will allow the Boreal Entities to make distributions to unsecured creditors that would not otherwise be available. Further, if the Plan is implemented, it will allow the Boreal Entities to continue as a going concern for the benefit of various suppliers and other contracting stakeholders. As a result, the Plan represents the best path forward for the most stakeholders. The test to sanction the Plan has been satisfied in the circumstances.

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<sup>1</sup> Mr. Bowman and his entities also made a claim, which was also initially disallowed. They are pursuing their rights to challenge that determination in the established claims process. Mr. Bowman did not attend or vote by proxy at the Meeting.

### Substantial Consolidation

The Plan substantially consolidates the claims of creditors against the Boreal Entities collectively. As detailed in the Fifth Report of the Monitor dated July 7, 2022, this approach was the result of the Investigation, during which the Monitor learned that: (a) there has been a material co-mingling of funds between the various project entities, and as between the project entities and other projects related to Bowman; (b) there is an absence of formal documentation documenting advances amongst the project entities and as between the project entities and the lenders; and (c) the books and records of the Boreal Entities do not reconcile with company balances in order to confirm intercompany advances.

Substantive consolidation is an equitable remedy with the primary purpose of ensuring the equitable treatment of all creditors. Considerations around any substantive consolidation analysis include: (a) whether there are facts that point to an intertwining of corporate functions and other commonalities across the group, such as difficulty in segregating assets or the transfer of assets without corporate formalities (b) do the benefits of consolidation outweigh the prejudice to particular creditors? and, (c) is consolidation fair and reasonable in the circumstances?

Here, the evidence supports the conclusion that there has been a significant comingling of assets and functions between the Boreal Entities. The Monitor has stated there are cost and expediency grounds to proceed on a consolidated basis. The Monitor's analysis shows that there is no prejudice from the use of substantive consolidation. There is no challenge to these findings and the Monitor's recommendations. For these reasons I conclude that substantive consolidation is fair and reasonable in this case.

### Releases

It is well established that superior courts have jurisdiction under the CCAA to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" and where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.

In considering whether to approve releases in favour of third parties, I must consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the considerations include:

(a) whether the parties to be released from claims were necessary and essential to the restructuring of the debtor. Here, the Releases were critical components of obtaining the support of the supporting stakeholders and therefore are necessary and essential to the restructuring embodied in the Plan;

(b) whether the claims to be released were rationally connected to the purpose of the plan and necessary for it. Here, the Boreal Entities would not have brought forward the Plan and the supporting stakeholders would not have supported the Plan absent the inclusion of the Releases;

(c) whether the plan could succeed without the releases. Here, the support of the supporting stakeholders in providing the financing under the Plan (including the offerings from the Plan sponsor and the secured exit facility from Halmont) is essential to the Plan's viability. Without this support, which is conditional on the Releases, the Plan would not succeed and the benefits under the Plan would not have been available to the Boreal Entities' stakeholders;

(d) whether the parties being released are contributing to the plan. Here, the Released Parties all made significant contributions to the Boreal Entities' restructuring, both prior to and throughout the CCAA proceedings. Their extensive efforts resulted in the negotiation of the Plan, all of which form the foundation for the completion of these CCAA proceedings; and

(e) whether the release benefitted the debtors as well as the creditors generally. Here, the negotiation of the Plan by the released parties, namely the directors, CRO and supporting stakeholders are critical to providing recoveries to unsecured creditors.<sup>2</sup> The Releases are an integral part of the Plan. As set out above, in the event that the Plan is not sanctioned and implemented, there would be no distributions to the unsecured creditors.

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<sup>2</sup> There is a carve out with respect to Mr. Bowman and his companies because of the Investigation. Apart from this exception, Mr. Bowman enjoys the benefit of the general release of Boreal Entity directors. While the Release includes a release of all claims against the Boreal Entities and their directors, this also excludes the claims made in the claims process within the CCAA proceedings by Mr. Bowman and his entities. Thus, the interaction of the releases and the claims is balanced in the preservation of rights and fair to both parties.

On the basis of this evidence and analysis, I conclude that the Releases are an integral part of the Plan and necessary to the support of key stakeholders. The Monitor supports their inclusion. The Releases set out in the Plan and Sanction Order are appropriate in the circumstances.

### The Monitor's Continuing Investigation

Paragraph 28 of the Initial Order granted the Monitor the authority to carry out the Investigation of Mr. Bowman and his entities with respect to certain property transfers and other transactions that warranted further investigation. Under s. 36.1 of the CCAA, ss. 95 to 101 of the BIA apply with necessary modifications to CCAA proceedings. Sections 95 and 96 of the BIA provide a trustee (and, under s. 36.1 of the CCAA, a monitor) with the ability to review prior preferential transfers for up to a year and transfers at under value for up to five years. These are specific statutory remedies enacted to maximize the ability of a trustee or monitor to realize value for all stakeholders in proceedings under the BIA or the CCAA.

Sanction orders of the Court in CCAA proceedings which carve out an ongoing role for the monitor post-plan sanction are not unusual and may be granted where there are valid reasons to do so, including where necessary to resolve and administer outstanding claims: see the Sanction Order dated July 10, 2020 granted in the CCAA Proceedings of *Canwest Global Communications Corp. et al.* at para. 99; Sanction Order dated June 9, 2017 granted in the CCAA proceedings of *U.S. Steel Canada Inc.* at para. 57. Here, the Monitor has expended significant time and resources in furthering the Investigation, which remains ongoing. If allowed to reach its completion, the Investigation may result in additional recoveries for the restructured Boreal Entities. Further supervision of the Court may be necessary in order both to further the Investigation and to deal with the distribution of any proceeds which could result from the Investigation.

The secured exit facility being provided by Halmont will provide the continued funding for the Investigation, with the result that there is no prejudice to the recoveries of any existing creditors of the Boreal Entities.

The requested relief is a discretionary Order. In my view, the relief sought advances the policy objectives of the CCAA and will help to achieve the CCAA's remedial objectives: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379 at para. 70. The Investigation may result in the return of assets that were removed from the Boreal Entities' estate, putting the restructured Boreal Entities that emerge from these CCAA proceedings on a



stronger financial footing. This, in turn, would contribute to their ongoing viability for the benefit of their many continuing stakeholders. This is a remedial purpose that is consistent with the policy objectives of the legislation. Mr. Bowman will suffer no prejudice by virtue of this order, as he will retain all due process rights otherwise afforded to a person or entity against whom preference or under value-type claims are made.

Accordingly, an order shall issue terminating the stay upon implementation of the Plan, other than with respect to the Monitor and CRO in relation to the ongoing Investigation. For this purpose, the Monitor and CRO shall continue to benefit from the authorizations and protections granted in the Initial Order and subsequent orders of the Court in these proceedings, until the Investigation has been concluded or further order of the Court.

A handwritten signature in blue ink, appearing to read "Penny J.", with a stylized initial "P" and a period at the end.

Penny J.