COURT FILE NUMBER	2303-06543	Clerk's Stamp
COURT	COURT OF KING'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 AN PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.	
APPLICANTS	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.	
DOCUMENT	**BENCH BRIEF**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins / Erinn Wilson Tel: 403-260-3531 / 3682 Fax: 403-260-3501 Email: scollins@mccarthy.ca / erinnwilson@mccarthy.ca	

**BENCH BRIEF OF ERNST & YOUNG INC.,
IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF
J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.**

IN RESPECT OF THE MONITOR'S APPLICATION SEEKING INTERIM FEE APPROVAL

TO BE HEARD BY THE HONOURABLE JUSTICE WHITLING

July 26, 2023 at 10:00 am

TABLE OF CONTENTS

I. INTRODUCTION

1. This bench brief of Ernst & Young Inc., in its capacity as the court-appointed monitor (the "**Monitor**") of J.W. Carr Holdings Ltd., Spruce Grove Industrial Park Inc., 272649 Alberta Ltd., 279896 Alberta Ltd., Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd. (collectively, the "**Applicants**"), is submitted in support of the Monitor's application, returnable July 26, 2023 (the "**Application**"), seeking approval of the interim fees and activities of the Monitor and the interim fees of counsel to the Monitor, as set out in the Fourth Report of the Monitor, dated July 18, 2023 (the "**Fourth Monitor's Report**"). Capitalized terms used herein and not otherwise defined shall have the same meaning as ascribed to such term(s) in the Fourth Monitor's Report.

II. FACTS

2. The Monitor was appointed as the monitor of the Applicants pursuant to the Initial Order, issued by the Honourable Justice J.J. Gill on April 19, 2023 (the "**Initial Order**") granted under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA Proceedings**"). The Initial Order was subsequently amended and restated on April 26, 2023 (as so amended and restated, the "**ARIO**").

3. The Monitor retained McCarthy Tétrault LLP ("**McCarthy**") as counsel to the Monitor in these CCAA Proceedings.

4. Pursuant to the ARIO, the Monitor and counsel to the Monitor, among others, are to be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of the CCAA Proceedings. The ARIO authorizes and directs the Applicants to pay the accounts of the Monitor and counsel to the Monitor, among others.

5. The ARIO further provides that the Monitor and its legal counsel shall pass their accounts from time to time.

Activities of the Monitor

6. The Monitor has prepared the following reports in these CCAA Proceedings:

(a) the First Report of the Monitor, dated April 24, 2023;

(b) the Supplemental to the First Monitor's Report, dated April 25, 2023;

(c) the Second Report of the Monitor, dated May 18, 2023;

(d) the Third Report of the Monitor, dated June 27, 2023;

(e) the Supplemental to the Third Report of the Monitor, dated June 30, 2023; and

(f) the Fourth Report of the Monitor, dated July 18, 2023,

(collectively, the "**Monitor's Reports**").

7. The Monitor's Reports outline the activities taken by the Monitor in the CCAA Proceedings for which the Monitor seeks approval by this Honourable Court. A detailed description of such activities are set out in: (i) paragraph 19 of the Fourth Monitor's Report;, (ii) paragraph 16 of the Third Monitor's Report; (iii) paragraph 14 of the Second Monitor's Report; and (iv) paragraph 14 of the First Monitor's Report.

8. As outlined in the Monitor's Reports, and in accordance with its duties under the orders made in these CCAA Proceedings, including the ARIO and under the CCAA, the Monitor has, among others: (a) assisted in preparing and monitoring the Applicant's cash flow forecasts; (b) responded to inquiries from the Applicant's creditors and other stakeholders; (c) assisted in carrying out the SISP; (d) assisted in carrying out the Expedited SAVO Protocols; (e) assisted in reviewing the Tolling Agreement; and, (f) reviewed information and materials from Sequeira in relation to the proposed sale of the R'Ohan Shares.

<u>Fees of the Monitor and Counsel to the Monitor</u>

9. The details of the Monitor's fees and disbursement are more fully set out in the Affidavit of Matthew McCulloch, sworn July 18, 2023 (the "**First McCulloch Affidavit**"). As set out in paragraphs 5-9 of the First McCulloch Affidavit, from February 18, 2023 to June 2, 2023, the Monitor billed approximately 822.5 hours in connection with these CCAA Proceedings, representing total fees and disbursements incurred by the Monitor at their standard rates and charges during the relevant period of approximately $393,750, inclusive of taxes.

First McCulloch Affidavit, at paras 5-9 and Exhibit A.

10. The details of the McCarthy's fees and disbursement are set out in the Affidavit of Sean Collins, sworn July 19, 2023 (the "**First Collins Affidavit**"). As set out in paragraphs 4, 6 and 7 of the First Collins Affidavit, from April 8, 2023 to June 30, 2023, the McCarthy billed approximately 106 hours in connection with these CCAA Proceedings, representing total fees and disbursements incurred by McCarthy at their standard rates and charges during the relevant period of approximately $85,122.61, inclusive of taxes.

First Collins Affidavit, at paras 4, 6 and 7 and Exhibit A.

III. ISSUES

11. The sole issue to be determined by this Honourable Court on the within Application is whether the fees and activities of the Monitor and the fees of McCarthy, as counsel to the Monitor, should be approved.

IV. LAW AND ARGUMENT

A. <u>The Monitor's Activities should be Approved</u>

12. The Monitor seeks the approval of the Court with respect to its activities set out in the Monitor's Reports.

13. As noted by Regional Senior Justice Morawetz (as he then was) in *Target Canada Co. (Re),* 2015 ONSC 7574, "there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process."

***Target Canada Co. (Re),* 2015 ONSC 7574, at para 22.**

14. Approval of the Monitor's activities at this time is appropriate in the circumstances because such approval will, among other things:

(a) bring the Monitors activities in issue before the Court, providing an opportunity for any concerns of the court, the Applicants and other stakeholders to be addressed;

(b) enable the court, tasked with supervising these proceedings, to satisfy itself that the Monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(c) provide protection for the court's officer not otherwise provided by the CCAA or other orders of this court; and

(d) protect creditors from delay that might otherwise be occasioned by:

(i) the re-litigation of steps taken to date; and

(ii) potential indemnity claims by the Monitor.

Target Canada Co. (Re), **2015 ONSC 7574, at paras 12 and 23.**

15. The approval sought by the Monitor is not a general approval of its activities but is the approval of the specific activities taken by the Monitor as detailed in the Monitor's Reports filed with this court. Such activities taken by the Monitor were done pursuant to and in accordance with, the terms of the Initial Order, the ARIO, and the provisions of the CCAA.

B. <u>The Fees and Accounts of the Monitor and counsel to the Monitor should be Approved</u>

16. The ARIO expressly provides that the Monitor and its counsel shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), at their standard rates and charges. Further, the ARIO directs that the Monitor and its legal counsel shall pass their accounts from time to time.

ARIO, at paras 28-29.

17. In *Winalta Inc. (Re),* Justice Topolniski, held that on an application to approve a Monitor's fees in a CCAA proceeding:

> The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process.

Winalta Inc. (Re), **2011 ABQB 399, at para 30;**

***Re Nortel Networks Corporation et al*, 2017 ONSC 673 at para 13.**

18. Courts will considered the following non-exhaustive factors in assessing the reasonableness of a monitor’s fees:

(a) the nature, extent and value of the assets;

(b) the complications and difficulties encountered by the monitor;

(c) the degree of assistance provided by the debtor;

(d) the time spent by the monitor;

(e) the monitor's knowledge, experience and skill;

(f) the diligence and thoroughness displayed by the monitor;

(g) the responsibilities assumed;

(h) the results of the monitor's efforts; and

(i) cost of comparable services when performed in a prudent and economical manner.

***Re Nortel Networks Corporation et al*, supra, at para 14;**

***Bank of Nova Scotia v Diemer*, 2014 ONCA 851, at para 33;**

***Belyea v Federal Business Development Bank* (1983), 44 NBR (2d) 248 (CA), at para 9.**

19. Similar factors have been considered by the Courts when conducting an assessment of the accounts of legal counsel to the court officer, such non-exhaustive factors include:

(a) the time expended;

(b) the complexity of the proceeding;

(c) the degree of responsibility assumed by the lawyers;

(d) the amount of money involved, including the amount of proceeds after payments to the creditors;

(e) the degree and skill of the lawyers involved;

(f) the results achieved; and

(g) the client's expectations as to the fee.

***Redcorp Ventures Ltd. (Re), 2016 BCSC 188,* at para 33.**

20. The Monitor submits that its fees and disbursements, and that of its counsel, McCarthy, are fair and reasonable in the circumstances as evidenced in the Monitor's Reports, the First McCulloch Affidavit and the First Collins Affidavit.

21. Regarding the Monitor's Fees, the Monitor submits that the:

(a) Monitor's Fees were properly incurred, and consistent with fees charged by other insolvency firms of a similar size for work of a similar size, nature, and complexity in Alberta;

Fourth Monitor's Report, at para 24.

(b) work completed by the Monitor was delegated to the appropriate professionals within Ernst & Young Inc.'s organization, with the appropriate seniority and appropriate hourly rates;

First McCulloch Affidavit, at para 9;

Fourth Monitor's Report, at para 24.

(c) work completed by the Monitor was necessary to the Monitor in carrying out its obligations pursuant to the ARIO and the provisions of the CCAA.

First McCulloch Affidavit, at para 9.

22. The Monitor further submits that McCarthy's Fees are fair and reasonable in the circumstances as:

(a) McCarthy's professional fees and disbursements were properly incurred, and consistent with fees charged by similar firms with the expertise and capacity to serve a matter of comparable size and complexity in Alberta;

First Collins Affidavit, at para 8.

First McCulloch Affidavit, at para 12;

Fourth Monitor's Report, at paras 26-27.

(b) the work completed by McCarthy was delegated to the appropriate professionals in McCarthy's organization with the appropriate seniority and hourly rates;

First Collins Affidavit, at para 8.

(c) McCarthy's invoices were provided to the Monitor when rendered, and all have been approved by the Monitor.

First Collins Affidavit, at para 8.

First McCulloch Affidavit, at para 12;

V. RELIEF REQUESTED

23. The Monitor respectfully requests that this Honourable Court grant the Monitor's Application, seeking an order approving the interim fees and disbursements of the Monitor and counsel to the Monitor, and approving the activities of the Monitor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2023

McCarthy Tétrault LLP

Per: *"McCarthy Tétrault LLP"*

Sean Collins / Erinn Wilson

Counsel for Ernst & Young Inc., in its capacity as the court-appointed monitor of J.W. Carr Holdings Ltd., Spruce Grove Industrial Park Inc., 272649 Alberta Ltd., 279896 Alberta Ltd., Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd., and not in its personal or corporate capacity

VI. INDEX OF AUTHORITIES

1. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851;
2. *Belyea v Federal Business Development Bank (1983)*, 44 NBR (2d) 248 (CA);
3. *Re Nortel Networks Corporation et al*, 2017 ONSC 673;
4. *Redcorp Ventures Ltd. (Re)*, 2016 BCSC 188;
5. *Target Canada Co. (Re)*, 2015 ONSC 7574; and,
6. *Winalta Inc. (Re)*, 2011 ABQB 399, at para 30.