Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985 c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE

OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED**
AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE

OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

JOINT BOOK OF AUTHORITIES OF THE COURT-APPOINTED MEDIATOR & MONITORS

Motions for Meeting Orders and Claims Procedure Orders
(Returnable October 31, 2024)

VOLUME 2 OF 2

October 28, 2024

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COURT OF APPEAL FOR BRITISH COLUMBIA

NO. CA12944
VANCOUVER REGISTRY

IN THE MATTER OF THE COMPANY ACT R.S.B.C. 1979, c. 59 AND IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 c. C-36 AND IN THE MATTER OF: CHEF READY FOODS LTD. AND ISTONIO FOODS LTD. BETWEEN: CHEF READY FOODS LTD. RESPONDENT (PETITIONER) AND: HONGKONG BANK OF CANADA APPELLANT (RESPONDENT)	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE GIBBS

Before: The Honourable Mr. Justice Carrothers
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Gibbs

Counsel for the Appellant: D. I. Knowles and H. M. Ferris

Counsel for the Respondent: R. H. Sahrmann and L. D. Goldberg

Date and Place Heard: October 12, 1990
Vancouver, British Columbia

Date and Place Handed Down: October 29, 1990
Vancouver, British Columbia

The sole issue on this appeal is whether a stay order made by a Chambers judge under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, Chap. C-36 is a bar to realization by the Hongkong Bank of Canada (the "Bank") on security granted to it under s. 178 of the Bank Act, R.S.C. 1985, Chap. B-1.

The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant Bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the Bank Act. Accordingly the Bank holds what is commonly referred to as "section 178 security".

Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the Bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.443 per day. Chef Ready did not pay.

On August 27, 1990 the Bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the Bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the Companies' Creditors Arrangement Act (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the Bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A., for an order to be issued that day granting the relief claimed in the petition.

The application was heard in Chambers in the afternoon of August 28, 1990 and the following day. The Bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the Chambers judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990 the Chambers judge granted the order and delivered oral reasons at the end of which he said:

> "I therefore conclude that the Companies' Creditors Arrangement Act is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable."

The reasons refer specifically to the accounts receivable because the Bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under clause 4 of the s. 178 security instrument:

> " 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts."

The formal order made by the Chambers judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> " THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or

> corporation under the Bankruptcy Act (Canada) or the Winding-Up Act (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any person, firm or corporation to realize upon or otherwise deal with any property, right or security held by that person, firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed;"
>
> (Emphasis added.)

The jurisdiction in the court to make such a stay order is found in s. 11 of the C.C.A.A.:

> " 11. Notwithstanding anything in the Bankruptcy Act or the Winding-Up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-Up Act or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the

> leave of the court and subject to such terms as the court imposes."

The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding...against the company" is not before the court on this appeal. The Bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A. it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the Bank asks only that the stay order be varied to free up the s. 178 security:

> "NATURE OF ORDER SOUGHT
>
> An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security..."

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company

incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. ll.

There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the Bank Act to consider.

There is nothing in the Loans and Security division of the Bank Act either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless the Bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. or orders made under it can penetrate. In support of its position the Bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in Flintoft v. Royal Bank of Canada (1964), S.C.R. 631.

The principal issue in Hall was whether ss. 19 to 36 of the Saskatchewan Limitation of Civil Rights Act applied to a security taken under ss. 178 and 179 of the Bank Act. The court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the Bank Act" (p. 154). In the course of arriving at its decision the court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations

have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However , a few extracts will serve to illustrate the Bank's reliance:

> "...a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower" (p. 134)
>
> "...the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers" (p.139)
>
> "...These sections of the Bank Act have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking" (p. 139)
>
> "The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" (p. 143)
>
> "...the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the Bank Act..." (p. 143)
>
> "The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, and immediate right to seize and sell those goods..." (p. 152)
>
> "...it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the Bank Act itself" (p. 154)
>
> "...Parliament, under its power to regulate banking, has enacted a complete code that at once

> defines and provides for the realization of a security interest" (p. 155).

It is the insular theme which runs through these propositions that the Bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the Bank under ss. 178 and 179? It does not detract from the Bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of the right to seize and sell; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the Bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the Bank Act to the application of the C.C.A.A. to s. 178 security and the Bank's rights in respect of it.

Having regard to the broad public policy objectives of the C.C.A.A. there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became

insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-Up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by Stanley E. Edwards at p.587 of 1947 Vol. 25 of the Canadian Bar Review, entitled "Reorganizations Under The Companies' Creditors Arrangement Act", explain very well the historic and continuing purposes of the Act:

> " It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little The trade connections associated with the system and held by the management may also be

valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)

" There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.

Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be

> made for reorganization of insolvent corporations." (p. 590)

It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preocuppied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded an unique status which renders those rights immune from the provisions of the C.C.A.A. the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the Bank signifies and collects the accounts receivable Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependant upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A.

was enacted it is difficult to imagine that the legislators of the day intended that result to follow.

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as Meridian Developments Inc. v. T.D. Bank (1984), 52 C.B.R. 109 (Alta.Q.B.); Northland Properties Limited v. Excelsior Life Insurance Company (1989), 34 B.C.L.R. (2d) 122 (B.C.C.A.); Re Feifer and Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Que.C.A.); Wynden Canada Inc. v. Gaz Metropolitaine (1982), 44 C.B.R. 285 (Que.S.C.); and Norcen Energy Resources v. Oakwood Petroleums (1988) 72 C.B.R. 2 (Alta.Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails.

For these reasons the disposition by the Chambers judge of the application made by Chef Ready will be upheld. It follows that the appeal is dismissed.

"The Honourable Mr. Justice Gibbs"

I AGREE: The Honourable Mr. Justice Carrothers

I AGREE: The Honourable Mr. Justice Cumming

See paras. 61, 83

CITATION: Cline Mining Corporation (Re), 2014 ONSC 6998
COURT FILE NO.: CV-14-10781-00CL
DATE: 2014-12-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 COMPROMOISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick* and *Logan Willis*, for the Applicants

J. Swartz, for the Secured Noteholders

Marc Wasserman and Michael De Lellis, for FTI Consulting Canada Inc., Proposed Monitor

HEARD: December 3, 2014

ENDORSEMENT

[1] Cline Mining Corporation ("Cline"), New Elk Coal Company LLC ("New Elk"), North Central Energy Company ("North Central") and, together with Cline and New Elk (the "Applicants") are in the business of locating, exploring and developing mineral resource properties, with a focus on gold and metallurgical coal (the "Cline Business"). The Applicants, along with their wholly-owned subsidiary, Raton Basin Analytical LLC ("Raton Basin") and, together with the Applicants (the "Cline Group") have interests in resource properties in Canada, the United States and Madagascar.

[2] The Applicants apply for an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("CCAA") and, if granted, the Applicants also seek an order (the "Claims Procedure Order") approving a claims process (the "Claims Procedure") for the identification and determination of claims against the Applicants and their present and former directors and officers. The Applicants also seek an order (the "Meetings Order") *inter alia*: (i) accepting the filing of a plan of compromise and arrangement in respect of the Applicants (the "Plan"); (ii) authorizing the Applicants to call, hold and conduct meetings (the "Meetings") of creditors whose claims are to be affected by the Plan for the purpose of enabling such creditors to consider and vote on a resolution to approve the Plan; and (iii) approving the procedures to be followed with respect to the calling and conduct of the Meetings.

[3] The Cline Group has experienced financial challenges that necessitate a recapitalization of the Applicants under the CCAA. As set out in the affidavit of Mr. Matthew Goldfarb, Chief Restructuring Officer and Acting Chief Executive Officer of Cline, the performance of the Cline Business has been adversely affected by the broader industry wide challenges, particularly the protracted downturn in prevailing prices for metallurgical coal. Operations at the New Elk metallurgical coal mine in Colorado (the "New Elk Mine") were suspended in July 2012 because the mine could not operate profitably as a result of a decline in the market price of metallurgical coal. The suspension of mining activities was intended to be temporary. However, Mr. Goldfarb contends that market conditions in the coal industry have not sufficiently recovered and the suspension of full scale mining activities is still in effect.

[4] Mr. Goldfarb contends that the Cline Group's other resource investments remain at the feasibility, exploration and/or development stages and the Cline Group's current inability to derive profit from the New Elk Mine has rendered the Applicants unable to meet their financial obligations as they become due.

[5] Cline is in default of its 2011 series 10% Senior Secured Notes (the "2011 Notes") as well as its 2013 series 10% Senior Secured Notes (the "2013 Notes", and collectively with the 2011 Notes, the "Secured Notes"). As at December 1, 2014, total obligations in excess of $110 million are owed in respect of the Secured Notes, which matured on June 15, 2014. The Secured Notes were subject to Forbearance Agreements that expired on November 28, 2014 and Mr. Goldfarb contends that the Applicants do not have the ability to repay the Secured Notes.

[6] The Secured Notes are issued by Cline and guaranteed by New Elk and North Central. The indenture trustee in respect of the Secured Notes (the "Trustee") holds a first ranking security interest over substantially all the assets of Cline, New Elk and North Central. Mr. Goldfarb states that the amounts owing under the Secured Notes exceed the value of the Cline Business and that there would be no recovery for unsecured creditors if the Trustee were to enforce its security against the Applicants in respect of the Secured Notes.

[7] The Secured Notes are held by beneficial owners whose investments are managed by Marret Asset Management Inc. ("Marret"). Marret exercises all discretion and authority in respect of the holders of the Secured Notes (the "Secured Noteholders"). Cline has engaged in discussions with representatives of Marret regarding a consensual recapitalization of the Applicants and these discussions have resulted in a proposed recapitalization transaction that is supported by Marret, on behalf of the Secured Noteholders (the "Recapitalization").

[8] Mr. Goldfarb states that if implemented, the Recapitalization would:

a. maintain the Cline Group as a unified corporate enterprise;

b. reduce the Applicants' secured indebtedness by more than $55 million;

c. reduce the Applicants' annual interest expense in the near term;

d. preserve certain tax attributes within the restructured company; and

e. effectuate a reduced debt structure to enable the Cline Group to better withstand prolonged weakness in the price of metallurgical coal.

[9] Mr. Goldfarb also states that the Recapitalization would also provide a limited recovery for the Applicants' unsecured creditors, who would otherwise receive no recovery in a security enforcement or asset sale scenario. It is contemplated that the Recapitalization would be implemented pursuant to a plan of compromise and arrangement under the CCAA (the "CCAA Plan) that is recognized in the United States under Chapter 15, Title 11 of the United States Bankruptcy Code ("Chapter 15").

[10] Cline and Marret have entered into a Support Agreement dated December 2, 2014 that sets forth the principal terms of the proposed Recapitalization. Based on Marret's agreement to the Recapitalization (on behalf of the Secured Noteholders), the Applicants have achieved support from their senior ranking creditors, which represent in excess of 95% of the Applicants' total indebtedness.

[11] The Applicants seek the Initial Order to stabilize their financial situation and to proceed with the Recapitalization as efficiently as possible, and to this end, the Applicants request that the Court also grant the Claims Procedure Order and the Meetings Order.

[12] Cline is a public company incorporated under the laws of British Columbia, with its registered head office located in Vancouver. Cline commenced business under the laws of Ontario in 2003 and Mr. Goldfarb states that its principal office, which serves as the head office and nerve centre of the Cline Group is located in Toronto.

[13] Cline is the direct or indirect parent company of New Elk, North Central and Raton Basin. Cline also holds minority interests in Iron Ore Corporation in Madagascar SARL, Strike Minerals Inc. and UMC Energy plc, all of which are exploration companies.

[14] Cline is the sole shareholder of New Elk, a limited liability company incorporated pursuant to the laws of Colorado. New Elk holds mining rights in the New Elk Mine and maintains a Canadian bank account with the Bank of Montreal in Toronto.

[15] New Elk is the sole shareholder of North Central and Raton Basin, both of which are incorporated pursuant to the laws of Colorado. North Central holds a fee-simple interest in certain coal parcels on which the New Elk Mine is situated and maintains a Canadian bank account with the Bank of Montreal in Toronto. Raton Basis in inactive and is not an applicant in the proceedings.

[16] Cline Group prepares its financial statements on a consolidated basis. The required financial statements are in the record. As at August 31, 2014, the Cline Group's liabilities were approximately $99 million. The primary secured liabilities were the 2011 Notes in the principal amount in excess of $71 million, plus accrued and unpaid interest, and the 2013 Notes in the principal amount of approximately $12 million, plus accrued and unpaid interest. Both the 2011 Notes and the 2013 Notes matured on June 15, 2014.

[17] Pursuant to an Inter-Creditor Agreement, the 2011 Notes and the 2013 Notes have a first ranking security interest on the property and undertakings of the Applicants and rank *pari passu* as between each other.

[18] Cline and New Elk are defendants in an uncertified class action lawsuit alleging that they violated the *WARN Act* by failing to provide personnel who provided services to New Elk with at least 60 days advance written notice of the suspension of both scale production at the New Elk Mine. These allegations are disputed.

[19] The Applicants are aware of approximately $3.5 million in other unsecured claims.

[20] On December 16, 2013, Cline was unable to make semi-annual interest payments in respect of both the 2011 and 2013 Notes. A Forbearance Agreement was entered into. During the forbearance period, the Applicants engaged Moelis & Company to conduct a comprehensive sale process in an effort to maximize value for the Applicant and its stakeholders (the "Sales Process"). No offers or expressions of interest were received in the Sale Process.

[21] The forbearance period expired on November 28, 2014 and Mr. Goldfarb has stated that Marret has confirmed that the Secured Noteholders have given instructions to the Trustee to accelerate the Secured Notes.

[22] Accordingly, Cline is immediately required to pay in excess of $110 million in respect of the Secured Notes. Mr. Goldfarb states that the Cline Group does not have the ability to pay these amounts and consequently the Trustee is in a position to enforce its security over the assets and property of the Applicants.

[23] In light of these financial conditions, Mr. Goldfarb states that the Applicants are insolvent.

[24] Mr. Goldfarb also contends that without the benefit of CCAA protection, there could be an erosion of the value of the Cline Group and that the stay of proceedings under the CCAA is required to preserve the value of the Cline Group.

[25] The Applicants are seeking the appointment of FTI Consulting Canada Inc. ("FTI") as the proposed monitor in these proceedings (the "Monitor").

[26] The proposed Initial Order also provides for a court ordered charge (the "Administration Charge") to be granted in favour of the Monitor, its counsel, counsel to the Applicants, the Chief Restructuring Officer (the "CRO") and counsel to Marret in respect of their fees and disbursements incurred at the standard rates and charges. The proposed Administration Charge is an aggregate amount of $350,000.

[27] The directors and officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities. Mr. Goldfarb states that in order to continue to carry on business during the CCAA proceedings and in order to conduct the Recapitalization most effectively, the Applicants require the active and committed involvement

of the board and, accordingly, the proposed Initial Order provides for a court ordered charge (the "Directors' Charge") in the amount of $500,000 to secure the Applicants' indemnification of its directors and officers in respect of liabilities they may incur during the CCAA proceedings. The amount of the Directors' Charge has been calculated based on the estimated exposure of the directors and officers and has been reviewed with the prospective Monitor. The proposed Directors Charge would only apply to the extent that the directors and officers do not have coverage under the D&O insurance policy with AIG Insurance Company of Canada.

[28] The Applicants seek to complete the Recapitalization as quickly as reasonably possible and they anticipate that their existing cash resources will provide the Cline Group with sufficient liquidity during the CCAA proceedings.

[29] It is also contemplated that foreign recognition proceedings will be sought in Colorado pursuant to Chapter 15. The Applicants seek the authorization for the Monitor to act as the foreign representative of the Applicants in the CCAA proceedings and to seek recognition of these proceedings in the United States pursuant to Chapter 15.

[30] Having reviewed the record, including the affidavit of Mr. Goldfarb and the pre-filing report submitted by FTI, I am satisfied that each of the Applicants is "a debtor company" within the meaning of the defined term in s. 2 of the CCAA.

[31] Cline is a "company" within the meaning of the CCAA. It is incorporated under the laws of British Columbia with gold development assets in Ontario and does business from its head office in Toronto.

[32] New Elk and North Central are incorporated in Colorado, have assets in Canada, namely bank accounts in Toronto and are directed from Cline's head office in Toronto. In my view, each of New Elk and North Central is a "company" within the meaning of the CCAA because it is an incorporated company having assets in Canada.

[33] I am also satisfied that the Applicants meet both the traditional test for insolvency under the *Bankruptcy and Insolvency Act* and the expanded test for insolvency based on a looming liquidity condition given that Cline has been unable to make interest payments under the Secured Notes, the Secured Notes have matured, the Forbearance Agreement has expired and the Trustee is in a position to enforce its security over the property of the Applicants. Further, I am satisfied that the Applicants are unable to obtain traditional or alternative financing to support the day-to-day operations and there is no reasonable expectation that the Applicants will be able to generate sufficient cash flow from operations to support their existing debt obligations (see: *(Re) Stelco Inc.* (2004), 48 CBR (4^{th}) 299 (Ont. Sup. Ct. (Commercial List)); leave to appeal to CA refused (2004) O.J. No. 1903; leave to appeal to SCC refused (2004) SCC No. 336).

[34] It is also clear that the Applicants' liabilities far exceed the $5 million threshold amount under the CCAA.

[35] In my view, the CCAA applies to the Applicants' as "debtor companies" in accordance with s. 3(1) of the CCAA.

[36] The Applicants have filed the required financial information, including audited financial statements and the cash-flow forecast.

[37] The Applicants in the Initial Order seek authorization (but not a requirement) to make certain pre-filing payments, including, *inter alia*:

a. payments to employees of effective wages, benefits and related amounts;

b. the amounts owing to respective individuals working as independent contractors;

c. the fees and disbursements of any consultants, agents, experts, accountants, counsel or other persons currently retained by the Applicants in respect of the CCAA; and

d. certain expenses incurred by the Applicants in carrying on the business in the ordinary course, that pertains to the period prior to the date of the Initial Order, if, in the opinion of the Applicants and with the consent of the Monitor, the applicable supplier or service provider is critical to the Cline Business and the ongoing operations of the Cline Group.

[38] The court has jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor's companies (see: *(Re) Canwest Global Communications Corp.* (2009), 59 CBR (5^{th}) 72; *(Re) Cinram International Inc*., 2012 ONSC 3767 and *(Re) Skylink Aviation Inc*., 2013 ONSC 1500). In granting such authorization, the courts consider a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' need for the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the monitor;

d. the monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate;

e. whether the applicants had sufficient inventory of goods on hand to meet their needs; and

f. the effect on the debtor's ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[39] In this case, the Applicants are of the view that their employees and certain of their independent contractors, certain suppliers of goods and services and certain providers of permits and licences are critical to the operation of the Cline Business. Mr. Goldfarb believes that such

persons should be paid in the ordinary course, including in respect of pre-filing amounts, in order to avoid disruption to the Applicants' operations during the CCAA proceedings.

[40] I am satisfied that it is appropriate in the present circumstances to grant the Applicants the authority to pay certain pre and post-filing obligations, subject to the terms and conditions in the proposed Initial Order.

[41] Turning now to the request for the Administration Charge, s. 11.52 of the CCAA expressly provides the court with the jurisdiction to grant the Administration Charge. In *(Re) Canwest Publishing Inc.*, 2010 ONSC 222, the court noted that s. 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provide a list of non-exhaustive factors to consider in making such an assessment. The list of factors to consider include:

a. the size and complexity of the business being restructured;

b. the proposed role of the beneficiaries of the charge;

c. whether there is unwarranted duplication of roles;

d. whether the quantum of the proposed charge appears to be fair and reasonable;

e. the position of the secured creditors likely to be affected by the charge; and

f. the position of the monitor.

[42] The Applicants submit that the Administration Charge is warranted and necessary for the reasons set forth in Mr. Goldfarb's affidavit at paragraphs 133 – 140.

[43] I am satisfied that in these circumstances, the granting of the Administration Charge is warranted and necessary and that it is appropriate for the court to exercise its jurisdiction to grant the Administration Charge in the amount of $350,000.

[44] The Applicants also seek a Directors' Charge in the amount of $500,000.

[45] Section 11.51 of the CCAA affords the court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis. The court has granted director and officer charges in a number of cases including *Canwest Global, supra*, *Canwest Publishing, supra*, *Cinram, supra* and *Skylink, supra*.

[46] The Applicants submit that the Directors' Charge is warranted and necessary and that it is appropriate in the present circumstances for the court to exercise its jurisdiction and grant the charge in the amount of $500,000.

[47] For the reasons set out in Mr. Goldfarb's affidavit at paragraphs 134 - 138, I accept these submissions.

[48] The Applicants have also indicated that, with the assistance of the Monitor as foreign representative, they intend to commence Chapter 15 proceedings in the United States Bankruptcy Court for the District of Colorado. Pursuant to s. 56 of the CCAA, the court has the authority to appoint a foreign representative of the Applicants for the purpose of having these proceedings recognized in a jurisdiction outside of Canada.

[49] The Applicants seek authorization for each of the Applicants and the Monitor to apply to any court for recognition of the Initial Order and authorization for the Monitor to act as representative in respect of these CCAA proceedings for the purpose of having the CCAA proceedings recognized outside of Canada.

[50] I am satisfied that it is appropriate to appoint the Monitor as foreign representative of the Applicants with respect to these proceedings.

[51] The Applicants, in their factum, also address the issue of the Applicants' "center of main interest" as being in Ontario. These submissions are set out at paragraphs 77 – 84 of the Applicants' Factum.

[52] Although the submissions are of interest, the determination of the Applicants' "center of main interest" ("COMI") is an issue to be considered by the United States Bankruptcy Court for the District of Colorado, rather than this court.

[53] The Applicants also seek a postponement of the Annual Shareholders Meeting. The previous Annual Meeting of Cline was held on August 15, 2013 and therefore Cline was required by statute to hold an annual general meeting by November 15, 2014.

[54] Mr. Goldfarb states that it would serve no purpose for Cline to call and hold its annual meeting of Shareholders given that the Shareholders of Cline no longer have an economic interest in Cline as a result of the insolvency. The Applicants submit that it is appropriate for the court to exercise its jurisdiction to relieve Cline from its obligation to call and hold its annual meeting of Shareholders until after the termination of the CCAA proceedings or further order of the court. In support of this request, the Applicants reference *Canwest Global, supra* and *Skylink, supra*.

[55] In my view, the request to postpone the annual Shareholders meeting is appropriate in the circumstances and is granted.

[56] In the result, I am satisfied that the Applicants meet all of the qualifications required to obtain the requested relief under the CCAA and the Initial Order is granted in the form presented.

[57] The Applicants also request two additional orders that they believe are necessary to advance the Recapitalization:

a. an order establishing a process for the identification and determination of claims against the Applicants and their present and former directors and officers (the Claims Procedure Order); and

b. an order authorizing the Applicants to file the Plan and to convene meetings of their affected creditors to consider and vote on the Plan (the Meetings Order).

[58] The Applicants seek the Claims Procedure Order and the Meetings Order at this stage because they wish to effectuate the recapitalization as efficiently as possible. Further, the Applicants submit that the "comeback clauses" included in the draft Claims Procedure Order and Meetings Order ensure that no party is prejudiced by the granting of such order at this time.

[59] The Applicants have submitted a factum in support of the Claims Procedure Order and Meetings Order. In the factual background to the Recapitalization and proposed Plan, the Claims Procedure and the meeting of creditors is set out at paragraphs 8 – 29 of the factum. For informational purposes, these paragraphs are set out in Appendix "A" to this Endorsement.

[60] The issues to be considered on this motion are whether:

(a) it is appropriate to proceed with the Claims Procedure;

(b) it is appropriate to permit the Applicants to file the Plan and call the meetings;

(c) the proposed classification of creditors is appropriate; and

(d) a consolidated plan is appropriate in the circumstances.

[61] In *(Re) Skylink, supra* at paragraph 35, I noted that while it is not the usual practice for applicants to request claims procedure and meetings order concurrently with an initial CCAA application, the court has granted such relief in appropriate circumstances. The support for a restructuring proposal from the only creditors with an economic interest, and the existence of a comeback hearing at which any issues in respect of the orders can be addressed, are two factors that militate in favour of granting the Claims Procedure and Meetings Order concurrently with the initial application.

[62] In my view, the foregoing comment is applicable in these proceedings.

[63] I also note that both the Claims Procedure Order and the Meetings Order provide that any interested party that wishes to amend the Claims Procedure Order or the Meetings Order, as applicable, can bring a motion on a comeback date to be set by the court.

[64] I also accept that most of the Applicants' known creditors are familiar with the Applicants and the Cline Business and the determination of most of the claims against the Applicants would be carried out by the Applicants using the Notice of Claim Procedure. As

such, the Applicants submit that a claims bar date of January 13, 2015 will provide sufficient time for creditors to assert their claims and will not result in any prejudice to said creditors.

[65] Based on the submissions of the Applicants, I accept this submission.

[66] Accordingly, I am satisfied that the court should exercise its discretion and grant the requested Claims Procedure Order at this time.

[67] Turning now to the issue as to whether it is appropriate to permit the Applicants to file the Plan and call the meetings, the court is not required to address the fairness and reasonableness of the Plan at this stage.

[68] In these circumstances, I am satisfied that it is appropriate to grant the Meetings Order at this time in order to allow the Meetings Procedure to proceed concurrently with the Claims Procedure, with a view to completing the Recapitalization as efficiently as possible.

[69] Commencing at paragraph 42 of the factum, the Applicants make submissions with respect to the proposed classification of creditors for voting purposes.

[70] The Applicants submit that the holders of the 2011 Notes and the 2013 Notes have a commonality of interest in respect of their *pro rata* share of the Secured Noteholders Allowed Secured Claim and should be placed in the same class for voting purposes.

[71] For the purposes of the motion today, I am prepared to accept that it is appropriate for the Secured Noteholders to vote in the same class in respect of their Secured Noteholders Allowed Secured Claim.

[72] The Affected Unsecured Creditors' Class includes creditors with unsecured claims against the Applicants, including the Secured Noteholders in respect of their Secured Noteholders Allowed Unsecured Claim and, if applicable, Marret in respect of the Marret Unsecured Claim. The Applicants submit that the affected Unsecured Creditors have a commonality of interest and should be placed in the same class for voting purposes.

[73] It is noted that the determination of the Secured Noteholders Allowed Unsecured Claim has been determined by the Applicants and Marret and, for purposes of voting at the Secured Noteholders Meeting, is set at $17.5 million.

[74] For the purposes of the motion today, I am prepared to accept the submissions of the Applicants including their determination of the affected Unsecured Creditors class.

[75] The *WARN Act* plaintiffs class consists of potential members of an uncertified class action proceeding. The Applicants submit that the *WARN Act* claims have been asserted by only two *WARN Act* plaintiffs on behalf of other potential members of the class and these claims have not been proven and are contested by the Applicants.

[76] Due to the unique nature and status of these claims, the Applicants have offered the *WARN Act* plaintiffs consideration that is different than the consideration offered to the Affected Unsecured Creditors.

[77] I accept, for the purposes of this motion, that the *WARN Act* plaintiffs should be placed in a separate class for voting purposes.

[78] With respect to holders of "Equity Claims", the Meetings Order provides that any person with a claim that meets the definition of "equity claim" under s. 2(1) of the CCAA will have no right to, and will not, vote at meetings; and the Plan provides that equity claimants will not receive a distribution under the Plan or otherwise recover anything in respect of their equity claims or equity interest.

[79] For the purposes of this motion, I accept the submission of the Applicants that it is appropriate for equity claimants to be prohibited from voting on the Plan.

[80] The Plan as proposed by the Applicants is a consolidated plan of arrangement that is intended to address the combined claims against all the Applicants. Courts will authorize a consolidated plan of arrangement to be filed for two or more related companies in appropriate circumstances (see, for example: *(Re) Northland Properties Ltd.* (1988), 69 CBR (NS) 226 (BCSC)*; (Re) Lehndorff General Partners Ltd.* (1993), 17 CBR (3d) 24).

[81] In this case, the Applicants submit that a consolidated plan is appropriate because:

a. New Elk is a wholly-owned subsidiary of Cline and North Central is a wholly-owned subsidiary of New Elk;

b. the Applicants are integrated members of the Cline Group, and there is significant sharing of business functions within the Cline Group;

c. the Applicants have prepared consolidated financial statements;

d. all three of the Applicants are obligors in respect of the Secured Notes;

e. the Secured Noteholders are the only creditors with an economic interest in any of the three Applicants and have a first ranking security interest over all or substantially all of the assets, property and undertakings of each of the Applicants;

f. the *WARN Act* claims are asserted against both Cline and New Elk under a "single employer" theory of liability;

g. North Central has no known liabilities other than its obligations in respect of the Secured Notes;

h. Unsecured Creditors of the Applicants would receive no recovery outside of the Plan; and

i. the filing of a consolidated plan does not prejudice any affected Unsecured Creditor or *WARN Act* plaintiff, since a consolidated plan will not eliminate any veto position with respect to approval of the plan that such creditors would have if separate plans of arrangement were filed in respect of each of the Applicants.

[82] For the purposes of the motion today, I accept these submissions and consider it appropriate to authorize the filing of a consolidated plan.

[83] In the result, I am satisfied that it is appropriate to grant both the Claims Procedure Order and the Meetings Order at this time.

[84] It is specifically noted that the "comeback clause" that is included in both the Claims Procedure and the Meetings Orders will allow parties to come back before this court to amend or vary the Claims Procedure Order or the Meetings Order. The comeback hearing has been scheduled for Monday, December 22, 2014.

_____

Regional Senior Justice G.B. Morawetz

Date: December 3, 2014

APPENDIX "A"

A. RECAPITALIZATION AND PROPOSED PLAN

(1) Overview of the Recapitalization

8. The Applicants have been actively engaged in discussions with Marret, on behalf of the Secured Noteholders, regarding a possible recapitalization of the Applicants. The Applicants believe that that the Recapitalization, in the circumstances, is in the best interests of the Applicants and their stakeholders. The Recapitalization provides for, *inter alia*, the following:

(a) the Secured Noteholders Allowed Secured Claim will be compromised, released and discharged as against the Applicants upon implementation of the Plan (the "**Plan Implementation Date**") for new Cline common shares representing 100% of the equity in Cline (the "**New Cline Common Shares**"), and new indebtedness in favour of the Secured Noteholders in the principal amount of $55 million (the "**New Secured Debt**");

(b) Cline will be the borrower and New Elk and North Central will be the guarantors of the New Secured Debt, which will be evidenced by a credit agreement with a term of seven (7) years, bearing interest at a rate of 0.01% per annum plus an additional variable interest payable only once the Applicants have achieved certain operating revenue targets;

(c) the claims of Affected Unsecured Creditors, which exclude the WARN Act Plaintiffs but include the Secured Noteholders in respect of the Secured Noteholders Allowed Unsecured Claim, will be compromised, released and discharged as against the Applicants on the Plan Implementation Date in exchange for an unsecured, subordinated, non-interest bearing entitlement to receive $225,000 from Cline on the date that is eight (8) years from the Plan Implementation Date (the "**Unsecured Plan Entitlement**");

(d) notwithstanding the Secured Noteholders Allowed Unsecured Claim, the Secured Noteholders will waive their entitlement to the proceeds of the Unsecured Plan Entitlement, and all such proceeds will be available for distribution to the other Affected Unsecured Creditors with valid claims who are entitled to the Unsecured Plan Entitlement, allocated on a *pro rata* basis;

(e) all Affected Unsecured Creditors with Affected Unsecured Claims of up to $10,000 will, instead of receiving their *pro rata* share of the Unsecured Plan Entitlement, be paid in cash for the full value of their claim and will be deemed to vote in favour of the Plan unless they indicate otherwise, provided that this cash payment will not apply to any Secured Noteholder with respect to its Secured Noteholders Allowed Unsecured Claim;

(f) all WARN Act Claims will be compromised, released and discharged as against the Applicants on the Plan Implementation Date in exchange for an unsecured, subordinated, non-interest bearing entitlement to receive $100,000 from Cline on the date this is eight (8) years from the Plan Implementation Date (the "**WARN Act Plan Entitlement**");

(g) certain claims against the Applicants, including claims covered by insurance, certain prior-ranking secured claims of equipment providers and the secured claim of Bank of Montreal in respect of corporate credit card payables, will remain unaffected by the Plan;

(h) existing equity interests in Cline will be cancelled for no consideration; and

(i) the shares of New Elk and North Central will not be affected by the Recapitalization and will remain owned by Cline and New Elk, respectively.

Goldfarb Affidavit at para. 124; Application Record, Tab 4.

9. Any Affected Creditor with a Disputed Distribution Claim will not be entitled to receive any distribution under the Plan with respect to such Disputed Distribution Claim unless and until such Claim becomes an Allowed Affected Claim. A Disputed Distribution Claim will be resolved in the manner set out in the Claims Procedure Order.

Plan, Section 3.6.

10. Unaffected Creditors will not be affected by the Plan and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

Plan, Sections 1.1, 2.3 and 3.5.

11. If implemented, the Recapitalization would result in a reduction of over $55 million in interest-bearing debt.

Goldfarb Affidavit at para. 126; Application Record, Tab 4.

12. The proposed Recapitalization is supported by Marret, which has the ability to exercise all discretion and authority of the Secured Noteholders. Consequently, the proposed Recapitalization is supported by 100% of the Secured Noteholders, both as secured creditors of the Applicants and as unsecured creditors of the Applicants in respect of the portion of their claims that is unsecured.

Goldfarb Affidavit at paras. 63, 67 and 145; Application Record, Tab 4.

(2) Classification for Purposes of Voting on the Plan

13. The only classes of creditors for the purposes of considering and voting on the Plan will be (i) the Secured Noteholders Class, (ii) the Affected Unsecured Creditors Class, and (iii) the WARN Act Plaintiffs Class.

Plan, Section 3.2.

Goldfarb Affidavit at para. 153; Application Record, Tab 4.

14. The Secured Noteholders Class consists of the Secured Noteholders in respect of the Secured Noteholders Allowed Secured Claim, being the portion of the Secured Noteholders Allowed Claim against the Applicants that is designated as secured. Each Secured Noteholder will be entitled to vote its *pro rata* portion of that amount in the Secured Noteholders Class.

Goldfarb Affidavit at para. 154; Application Record, Tab 4.

15. The Affected Unsecured Creditors Class consists of the unsecured creditors of the Applicants who are to be affected by the Plan, excluding the WARN Act Plaintiffs (who are addressed in a separate class). The Affected Unsecured Creditors Class includes the Secured Noteholders in respect of the Secured Noteholders Allowed Unsecured Claim, being the portion of the Secured Noteholders Allowed Claim that is designated as unsecured. Each Secured Noteholder will be entitled to vote its *pro rata* portion of the Secured Noteholders Allowed Unsecured Claim in the Affected Unsecured Creditors Class.

Goldfarb Affidavit at para. 155; Application Record, Tab 4.

16. Within the Affected Unsecured Creditors Class, unsecured creditors with Affected Unsecured Claims of up to $10,000 will be paid in full and will be deemed to vote in favour of the Plan, unless they indicate otherwise.

Goldfarb Affidavit at para. 156; Application Record, Tab 4.

17. The WARN Act Plaintiffs Class consists of all WARN Act Plaintiffs in the WARN Act Class Action who may assert WARN Act Claims against the Applicants. Each WARN Act Plaintiff will be entitled to vote its *pro rata* portion of all WARN Act Claims.

Goldfarb Affidavit at para. 157; Application Record, Tab 4.

18. Unaffected Creditors and Equity Claimants are not entitled to vote on the Plan at the Meetings in respect of their Unaffected Claims and Equity Claims, respectively.

Plan, Sections 3.4(3) and 3.5.

19. The Plan provides that, if the Plan is not approved by the required majorities of both the Unsecured Creditors Class and the WARN Act Plaintiffs Class, or the Applicants determine that such approvals are not forthcoming, the Applicants are permitted to withdraw the Plan and file an amended and restated plan with the features described on Schedule "B" to the Plan (the "Alternate Plan"). The Alternate Plan would provide, *inter alia*, that all unsecured claims and all WARN Act Claims against the Applicants would be treated as unaffected claims, the only voting class under the Alternate Plan would be the Secured Noteholders Class, and all assets of the Applicants would be transferred to an entity designated by the Secured Noteholders in exchange for a release of the Secured Noteholders Allowed Secured Claim.

Goldfarb Affidavit at para. 125; Application Record, Tab 4.

B. CLAIMS PROCEDURE

20. The Applicants wish to commence the Claims Procedure as soon as possible to ascertain all of the Claims against the Applicants for the purpose of voting and receiving distributions under the Plan.

21. Liabilities and claims against the Applicants that the Applicants are aware of, include, *inter alia*, secured obligations in respect of the Secured Notes, secured obligations in respect of leased equipment used at the New Elk Mine, contingent claims for damages and other amounts in connection with certain pending litigation claims against the Applicants, and unsecured liabilities in respect of accounts payable relating to ordinary course trade and employee obligations.

Goldfarb Affidavit at paras. 52-57; Application Record, Tab 4.

22. The draft Claims Procedure Order provides a process for identifying and determining claims against the Applicants and their directors and officers, including, *inter alia*, the following:

(a) Cline, with the consent of Marret, will determine the aggregate of all amounts owing by the Applicants under the 2011 Indenture and the 2013 Indenture up to the Filing Date, such aggregate amounts being the "**Secured Noteholders Allowed Claim**";

(b) the Secured Noteholders Allowed Claim will be apportioned between the Secured Noteholders Allowed Secured Claim and the Secured Noteholders Allowed Unsecured Claim (being the amount of the Secured Noteholders Allowed Claim that is designated as unsecured in the Plan);

(c) the Monitor will send a Claims Package to all Known Creditors, which Claims Package will include a Notice of Claim specifying the Known Creditor's Claim against the Applicants for voting and distribution purposes, as valued by the Applicants based on their books and records, and specifying whether the Known Creditor's Claim is secured or unsecured;

(d) the Claims Procedure Order contains provisions allowing a Known Creditor to dispute its Claim as set out in the applicable Notice of Claim for either voting or distribution purposes or with respect to whether such Claim is secured or unsecured, and sets out a procedure for resolving such disputes;

(e) the Monitor will publish a notice to creditors in The Globe and Mail (National Edition), the Denver Post and the Pueblo Chieftain to solicit Claims against the Applicants by Unknown Creditors who are as yet unknown to the Applicants;

(f) the Monitor will deliver a Claims Package to any Unknown Creditor who makes a request therefor prior to the Claims Bar Date, containing a Proof of Claim to be completed by such Unknown Creditor and filed with the Monitor prior to the Claims Bar Date;

(g) the proposed Claims Bar Date for Proofs of Claim for Unknown Creditors and for Notices of Dispute in the case of Known Creditors is January 13, 2015;

(h) the Claims Procedure Order contains provisions allowing the Applicants to dispute a Proof of Claim as against an Unknown Creditor and provides a procedure for resolving such disputes for either voting or distribution purposes and with respect to whether such claim is secured or unsecured;

(i) the Claims Procedure Order allows the Applicants to allow a Claim for purposes of voting on the Plan without prejudice to whether that Claim has been accepted for purposes of receiving distributions under the Plan;

(j) where the Applicants or the Monitor send a notice of disclaimer or resiliation to any Creditor after the Filing Date, such notice will be accompanied by a Claims Package allowing such Creditor to make a claim against the Applicants in respect of a Restructuring Period Claim;

(k) the Restructuring Period Claims Bar Date, in respect of claims arising on or after the date of the Applicants' CCAA filing, will be seven (7) days after the day such Restructuring Period Claim arises;

(l) for purposes of the matters set out in the Claims Procedure Order in respect of any WARN Act Claims: (i) the WARN Act Plaintiffs will be treated as Unknown Creditors since the Applicants are not aware of (and have not quantified) any bona fide claims of the WARN Act Plaintiffs; and (ii) Class Action Counsel shall be entitled to file Proofs of Claim, Notices of Dispute of Revision and

Disallowance, receive service and notice of materials and to otherwise deal with the Applicants and the Monitor on behalf of the WARN Act Plaintiffs, provided that Class Action Counsel shall require an executed proxy in order to cast votes on behalf of any WARN Act Plaintiffs at the WARN Act Plaintiffs' Meeting; and

(m) Creditors may file a Proof of Claim with respect to a Director/Officer Claim.

Goldfarb Affidavit at para. 151; Application Record, Tab 4.

23. As further discussed below, the Applicants may elect to proceed with the Meetings notwithstanding that the resolution of Claims in accordance with the Claims Procedure may not be complete. The Meetings Order provides for the separate tabulation of votes cast in respect of Disputed Voting Claims and provides that the Monitor will report to the Court on whether the outcome of any vote would be affected by votes cast in respect of Disputed Voting Claims.

Goldfarb Affidavit at paras. 161(f)-(h) and 162; Application Record, Tab 4.

24. The Claims Procedure Order includes a comeback provision providing interested parties who wish to amend or vary the Claims Procedure Order with the ability to appear before the Court or bring a motion on a date to be set by this Court.

Goldfarb Affidavit at para 149; Application Record, Tab 4.

C. MEETINGS OF CREDITORS

25. It is proposed that the Meetings to vote on the Plan will be held at Goodmans LLP, 333 Bay Street, Suite 3400, Toronto, Ontario on January 21, 2015 at 10:00 a.m. for the WARN Act Plaintiffs Class, 11:00 a.m. for the Affected Unsecured Creditors Class, and 12:00 p.m. for the Secured Noteholders Class.

Goldfarb Affidavit at para. 160; Application Record, Tab 4.

Meetings Order, Section 20.

26. The draft Meetings Order provides for, *inter alia*, the following in respect of the governance of the Meetings:

(a) an officer of the Monitor will preside as the chair of the Meetings;

(b) the only parties entitled to attend the Meetings are the Eligible Voting Creditors (or their proxyholders), representatives of the Monitor, the Applicants, Marret, all such parties' financial and legal advisors, the Chair, the Secretary, the Scrutineers,

and such other parties as may be admitted to a Meeting by invitation of the Applicants or the Chair;

(c) only Creditors with Voting Claims (or their proxyholders) are entitled to vote at the Meetings; provided that, in the event a Creditor holds a Disputed Voting Claim as at the date of a Meeting, such Disputed Voting Claim may be voted at the Meeting but will be tabulated separately and will not be counted for any purpose unless such Claim is ultimately determined to be a Voting Claim;

(d) each WARN Act Plaintiff (or its proxyholder) shall be entitled to cast an individual vote on the Plan as part of the WARN Act Plaintiffs Class, and Class Action Counsel shall be permitted to cast votes on behalf of those WARN Act Plaintiffs who have appointed Class Action Counsel as their proxy;

(e) the quorum for each Meeting is one Creditor with a Voting Claim, provided that if there are no WARN Act Plaintiffs voting in the WARN Act Plaintiffs Class, the Applicants will have the right to combine the WARN Act Plaintiffs Class with the Affected Unsecured Creditors Class and proceed without a vote of the WARN Act Plaintiffs Class, in which case there shall be no WARN Act Plan Entitlement under the Plan;

(f) the Monitor will keep separate tabulations of votes in respect of:

i. Voting Claims; and

ii. Disputed Voting Claims, if any;

(g) the Scrutineers will tabulate the vote(s) taken at each Meeting and will determine whether the Plan has been accepted by the required majorities of each class; and

(h) the results of the vote conducted at the Meetings will be binding on each creditor of the Applicants whether or not such creditor is present in person or by proxy or voting at a Meeting.

Goldfarb Affidavit at para. 161; Application Record, Tab 4.

27. The Applicants may elect to proceed with the Meetings notwithstanding that the resolution of Claims in accordance with the Claims Procedure may not be complete. The Meetings Order, if approved, authorizes and directs the Scrutineers to tabulate votes in respect of Voting Claims separately from votes in respect of Disputed Voting Claims, if any. If the approval or non-approval of the Plan may be affected by the votes cast in respect of Disputed Voting Claims, then the Monitor will report such matters to the Court and the Applicants and the Monitor may seek advice and directions at that time. This way, the Meetings can proceed concurrently with the Claims Procedure without prejudice to the Applicants' Creditors.

Goldfarb Affidavit at paras. 161(f)-(h) and 162; Application Record, Tab 4.

28. Like the Claims Procedure Order, the Meetings Order includes a comeback provision providing interested parties who wish to amend or vary the Meetings Order with the ability to appear before the Court or bring a motion on a date to be set by the Court.

Meetings Order, Section 68.

29. By seeking the Claims Procedure Order and the Meetings Order concurrently, the Applicants hope to move efficiently and expeditiously towards the implementation of the Recapitalization.

Goldfarb Affidavit at para. 148; Application Record, Tab 4.

Court File No. CV-19-00628233-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 28th
	)	
JUSTICE HAINEY	)	DAY OF MAY, 2020

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 FOREVER XXI ULC

Applicant

CLAIMS PROCEDURE ORDER

THIS MOTION, made by Forever XXI ULC ("**F21 Canada**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") for an order, *inter alia*, establishing a claims procedure for the identification and quantification of certain claims against (i) F21 Canada and (ii) the current and former directors and officers of F21 Canada, was heard this day by video conference at Toronto, Ontario.

ON READING the Notice of Motion of F21 Canada, the Affidavit of Bradley Sell sworn May 21, 2020 including the exhibits thereto, the Sixth Report of PricewaterhouseCoopers Inc., in its capacity as Monitor (the "**Monitor**") dated May 25, 2020, and on hearing the submissions of respective counsel for F21 Canada, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavits of Service of Karin Sachar and Francesca Del Rizzo sworn May 21, 23 and 25, 2020, respectively:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS AND INTERPRETATION

2. THIS COURT ORDERS that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Initial Order in these proceedings dated September 29, 2019 as may be amended, restated, supplemented and/or modified from time to time (the "**Initial Order**").

3. For the purposes of this Order the following terms shall have the following meanings:

(a) "**Assessments**" means Claims of Her Majesty the Queen in Right of Canada or of any Province or Territory or Municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of objection, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any taxation authority;

(b) "**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;

(c) "**CCAA Proceedings**" means the CCAA proceedings commenced by F21 Canada in the Court under Court File No. CV-19-00628233-00CL;

(d) "**Claim**" means:

(i) any right or claim of any Person against F21 Canada, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of F21 Canada in existence on the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against F21 Canada with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts that existed prior to the Filing Date, including for greater certainty any Equity Claim and any claim against F21 Canada for indemnification by any Director or Officer in respect of a Prefiling D&O Claim (each, a "**Prefiling Claim**", and collectively, the "**Prefiling Claims**");

(ii) any right or claim of any Person against F21 Canada in connection with any indebtedness, liability or obligation of any kind whatsoever owed by F21 Canada to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by F21 Canada on or after the Filing Date of any contract, lease or other agreement whether written or oral (each, a "**Restructuring Period Claim**", and collectively, the "**Restructuring Period Claims**");

(iii) any right or claim of any Person against one or more of the Directors and/or Officers arising based in whole or in part on facts that existed prior to the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution, indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or arising or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer (each a "**Prefiling D&O Claim**", and collectively, the "**Prefiling D&O Claims**"); and

(iv) any right or claim of any Person against one or more of the Directors and/or Officers arising after the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution, indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or arising or

commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer (each a "**Restructuring Period D&O Claim**", and collectively, the "**Restructuring Period D&O Claims**");

provided, however, that in any case "**Claim**" shall not include an Excluded Claim, but for greater certainty, shall include any Claim arising through subrogation against F21 Canada or any Director or Officer;

(e) "**Claimant**" means (a) a Person asserting a Prefiling Claim or a Restructuring Period Claim against F21 Canada, and (b) a Person asserting a D&O Claim against any of the Directors or Officers of F21 Canada;

(f) "**Claims Bar Date**" means 5:00 p.m. on June 30, 2020;

(g) "**Claims Officer**" means the individual(s) designated by the Court pursuant to paragraph 35 of this Order;

(h) "**Claims Process**" means the procedures outlined in this Order in connection with the assertion of Claims against F21 Canada and/or the Directors and Officers;

(i) "**Court**" means the Ontario Superior Court of Justice (Commercial List);

(j) "**D&O Claim**" means any Prefiling D&O Claim and any Restructuring Period D&O Claim, and "**D&O Claims**" means, collectively, the Prefiling D&O Claims and the Restructuring Period D&O Claims;

(k) "**D&O Claim Instruction Letter**" means the letter containing instructions for completing the D&O Proof of Claim form, substantially in the form attached as Schedule "H" hereto;

(l) "**D&O Proof of Claim**" means the proof of claim referred to herein to be filed by Claimants in connection with any D&O Claim, substantially in the form attached as Schedule "I" hereto, which shall include all available supporting documentation in respect of such D&O Claim;

(m) "**Director**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of F21 Canada, in such capacity;

(n) "**Employee**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a current or former employee of F21 Canada whether on a full-time, part-time or temporary basis, other than a Director or Officer, including any individuals on disability leave, parental leave or other absence;

(o) "**Equity Claim**" has the meaning set forth in section 2(1) of the CCAA;

(p) "**Excluded Claim**" means any right or claim that would otherwise be a Claim that is a:

(i) Claim secured by the Administration Charge and any indemnity claims of Directors and Officers that are secured by the Directors' Charge;

(ii) Claim enumerated in sections 5.1(2) and 19(2) of the CCAA;

(iii) Claim of Forever 21 Global B.V. on account of the refund cheque issued to Forever 21 Global B.V., received by F21 Canada on December 17, 2019 and held by F21 Canada, in the amount of $5,055,000, on account of withholding taxes paid by F21 Canada under the *Income Tax Act* (Canada) with respect to certain transactions entered into between Forever 21 Global, B.V. and F21 Canada; and

(iv) Claim in respect of a Gift Card;

(q) "**Filing Date**" means September 29, 2019;

(r) "**General Claims Package**" means the document package which shall be disseminated by the Monitor in accordance with the terms of this Order to any potential Claimant that requests to submit a claim in the Claims Process not covered by any Notice of Claim, and shall consist of a Proof of Claim form, a Proof of Claim Instruction Letter, a D&O Proof of Claim form, a D&O Claim Instruction Letter, and such other materials as the Monitor, in consultation with F21 Canada, may consider appropriate;

(s) "**Gift Card**" means a valid gift card with a balance of funds remaining thereon as of the Filing Date, issued in respect of F21 Canada;

(t) "**Intercompany Claimant**" means any affiliated company, partnership, or other corporate entity of F21 Canada, including without limitation, Forever 21, Inc., Forever 21 Logistics, LLC, Forever 21 Retail, Inc. and Forever 21 Global B.V., and any valid assignee thereof, including F21 OpCo, LLC;

(u) "**Known Claim**" means all of the following Claims against F21 Canada, which Claims shall be deemed to be accepted for voting and distribution purposes unless otherwise disputed by a Known Claimant in accordance with the procedures outlined herein:

(i) Claims of Landlords in respect of amounts owing under any real property lease or occupancy agreement for any of F21 Canada's leased premises as of the Filing Date;

(ii) Claims of Employees who were employed as at the Filing Date in respect of the termination of such Employees' employment, including for termination and severance pay, calculated in accordance with applicable employment standards legislation;

(iii) Claims of Forever 21, Inc., Forever 21 Logistics, LLC and Forever 21 Retail, Inc. against F21 Canada in respect of inventory, purchases, shared services and other chargeable amounts which Claims have been assigned, transferred and conveyed to F21 OpCo, LLC; and

(iv) Claims of all other Known Claimants existing against F21 Canada as of the Filing Date, including trade creditors of F21 Canada;

based on the books and records of F21 Canada and any negotiations with such Known Claimants regarding the amounts owed by F21 Canada to such Known Claimants;

(v) "**Known Claimant**" means any Person known to F21 Canada as having a valid Claim against F21 Canada based on the books and records of F21 Canada, including

without limitation certain Employees, Landlords, Intercompany Claimants, and trade creditors;

(w) "**Known Claims Package**" means the document package which shall be disseminated by the Monitor to any Known Claimant in accordance with the terms of this Order and shall consist of the Known Claimant's Notice of Claim, a Notice of Dispute of Claim form, and such other materials as the Monitor, in consultation with F21 Canada, may consider appropriate;

(x) "**Landlord**" means a landlord under any real property lease or occupancy agreement for any of F21 Canada's leased premises as of the Filing Date;

(y) "**Meeting**" means a meeting of the creditors of F21 Canada called for the purpose of considering and voting in respect of a Plan;

(z) "**Meeting Order**" means an Order under the CCAA that, among other things, sets the date for the Meeting, as same may be amended, restated or varied from time to time;

(aa) "**Monitor's Website**" means www.pwc.com/ca/forever21;

(bb) "**Notice of Claim**" means the notice prepared by F21 Canada, in consultation with the Monitor, to be disseminated by the Monitor to all Known Claimants, which notice shall state the amount of such Known Claimant's Known Claim for voting and distribution purposes, and which notice shall be substantially in the form attached as Schedule "F" hereto;

(cc) "**Notice of Dispute of Claim**" means the notice, substantially in the form attached as Schedule "G" hereto, which may be delivered to the Monitor by a Known Claimant disputing a Notice of Claim, with reasons for its dispute;

(dd) "**Notice of Dispute of Revision or Disallowance**" means the notice, substantially in the form attached as Schedule "E" hereto, which may be delivered to the Monitor by a Claimant disputing a Notice of Revision or Disallowance received by such Claimant;

(ee) "**Notice of Revision or Disallowance**" means the notice, substantially in the form attached as Schedule "D" hereto, which may be delivered by the Monitor to a Claimant revising or disallowing, in part or in whole, a Claim submitted by such Claimant in a Proof of Claim or D&O Proof of Claim for voting and/or distribution purposes;

(ff) "**Notice to Claimants**" means the notice for publication by the Monitor as described in paragraph 16 herein, substantially in the form attached as Schedule "A" hereto;

(gg) "**Officer**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of F21 Canada, in such capacity;

(hh) "**Order**" means this Claims Procedure Order;

(ii) "**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate

investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;

(jj) "**Plan**" means the proposed plan of compromise or arrangement filed in respect of F21 Canada pursuant to the CCAA as the same may be amended, supplemented or restated from time to time in accordance with the terms thereof;

(kk) "**Proof of Claim**" means the proof of claim referred to herein to be filed by any Claimant in respect of any Prefiling Claim and Restructuring Period Claim for which such Claimant has not received a Notice of Claim, substantially in the form attached as Schedule "C" hereto, which shall include all available supporting documentation in respect of such Claim; and

(ll) "**Proof of Claim Instruction Letter**" means the letter containing instructions for completing the Proof of Claim form, substantially in the form attached as Schedule "B" hereto.

4. THIS COURT ORDERS that all references as to time herein shall mean local time in Toronto, Ontario, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein, and any reference to an event occurring on a day that is not a Business Day shall mean the next following day that is a Business Day.

5. THIS COURT ORDERS that all references to the word "including" shall mean "including without limitation", all references to the singular herein include the plural, the plural include the singular, and any gender includes all genders.

GENERAL PROVISIONS

6. THIS COURT ORDERS that any Claim denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada noon exchange rate in effect at the Filing Date.

7. THIS COURT ORDERS that notwithstanding any other provisions of this Order, the solicitation by the Monitor of Proofs of Claim and D&O Proofs of Claim, the delivery by the Monitor of Notices of Claim, and the filing by any Claimant of any Proof of Claim or D&O Proof of Claim shall not, for that reason only, grant any Person any rights, including without limitation, in respect of the nature, quantum and priority of its Claims or its standing in the CCAA Proceedings, except as specifically set out in this Order.

8. THIS COURT ORDERS that the Monitor, in consultation with F21 Canada and the applicable Directors and Officers in respect of any D&O Claim, is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which any forms delivered hereunder are completed and executed and the time in which they are submitted, and may, where the Monitor, in consultation with F21 Canada and the applicable Directors and Officers in respect of any D&O Claim, is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order, including in respect of the completion, execution and time of delivery of such forms; provided that it is recognized and understood that certain Claims may be contingent in nature and therefore may not contain particulars of such Claims that are not yet known as at the time they are filed.

9. THIS COURT ORDERS that amounts claimed in Assessments shall be subject to this Order and there shall be no presumption of validity or deeming of the amount due in respect of the Claim set out in any Assessment.

MONITOR'S ROLE

10. THIS COURT ORDERS that, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, the Initial Order and any other orders of the Court in the CCAA Proceedings, the Monitor is hereby authorized, directed and empowered to implement the Claims Process set out herein and to take such other actions and fulfill such other roles as are authorized by this Order or incidental thereto.

11. THIS COURT ORDERS that the Monitor: (i) shall have all of the protections given to it by the CCAA, the Initial Order, any other orders of the Court in the CCAA Proceedings, and this Order, or as an officer of the Court, including the stay of proceedings in its favour; (ii) shall incur no liability or obligation as a result of the carrying out of the provisions of this Order, other than in respect of its gross negligence or wilful misconduct; (iii) shall be entitled to rely on the books and records of F21 Canada and any information provided by F21 Canada, all without independent investigation; (iv) shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information; and (v) may seek such assistance as may be reasonably required to carry out its duties and obligations pursuant to this Order from F21 Canada or any of its affiliated companies, partnerships, or other corporate entities, including making such inquiries and obtaining such records and information as it deems appropriate in connection with the Claims Process.

12. THIS COURT ORDERS that F21 Canada and its current and former shareholders, Officers, Directors, employees, agents and representatives shall fully cooperate with the Monitor in the exercise of its powers and discharge of its duties and obligations under this Order.

NOTICE TO CLAIMANTS

13. THIS COURT ORDERS that as soon as practicable, but no later than 5:00 p.m. on June 2, 2020, the Monitor shall cause a Known Claims Package to be sent to every Known Claimant, as evidenced by the books and records of F21 Canada, at their respective last known municipal or e-mail addresses as recorded in F21 Canada's books and records. The Monitor and F21 Canada shall specify in the Notice of Claim included in the Known Claims Package the Known Claimant's Claim as valued by F21 Canada, in consultation with the Monitor, based on the books and records of F21 Canada, for voting and distribution purposes.

14. THIS COURT ORDERS that as soon as practicable, but no later than 5:00 p.m. on June 2, 2020, the Monitor shall cause a General Claims Package to be sent to each Person that appears on the Service List or has requested a Proof of Claim and any Person known to F21 Canada or the Monitor as potentially asserting a Claim that is not a Known Claim.

15. THIS COURT ORDERS that the Monitor shall cause the Notice to Claimants to be published once in *The Globe and Mail* (National Edition) as soon as practicable after the date of this Order.

16. THIS COURT ORDERS that the Monitor shall cause the Notice to Claimants and the General Claims Package to be posted to the Monitor's Website as soon as practicable after the date of this Order.

17. THIS COURT ORDERS that to the extent any Claimant requests documents or information relating to the Claims Process prior to the Claims Bar Date or if F21 Canada and the Monitor become aware of any further Claims, the Monitor shall forthwith send such Claimant a General Claims Package or Known Claims Package, as appropriate, direct such Claimant to the

documents posted on the Monitor's Website, or otherwise respond to the request for documents or information as the Monitor, in consultation with F21 Canada, may consider appropriate in the circumstances.

18. THIS COURT ORDERS that the Claims Process and the forms of Notice to Claimants, Proof of Claim Instruction Letter, D&O Claim Instruction Letter, Notice of Claim, Proof of Claim, D&O Proof of Claim, Notice of Revision or Disallowance, Notice of Dispute of Revision or Disallowance, and Notice of Dispute of Claim are hereby approved. Notwithstanding the foregoing, the Monitor may, from time to time, make minor non-substantive changes to the forms as the Monitor, in its sole discretion, may consider necessary or desirable.

19. THIS COURT ORDERS that the sending of the Known Claims Package and the General Claims Package to the applicable Persons as described above, and the publication of the Notice to Claimants, each in accordance with this Order, and the completion of the other requirements of this Order, shall constitute good and sufficient service and delivery of notice of this Order and the Claims Bar Date on all Persons who may be entitled to receive notice and who may wish to assert a Claim, and no other notice or service need be given or made and no other document or material need be sent to or served upon any Person in respect of this Order.

CLAIMS PROCEDURE FOR KNOWN CLAIMS

(A) Known Claims

20. THIS COURT ORDERS that if a Known Claimant wishes to dispute the amount of its Known Claim as set out in the Notice of Claim, the Known Claimant shall deliver to the Monitor a Notice of Dispute of Claim which must be received by the Monitor by no later than the Claims Bar Date. Such Known Claimant shall specify therein the details of the dispute with respect to its

Claim and shall specify whether it disputes the determination of the Claim for voting and/or distribution purposes.

21. THIS COURT ORDERS that if a Known Claimant does not deliver to the Monitor a completed Notice of Dispute of Claim such that it is received by the Monitor by the Claims Bar Date disputing its Claims as set out in the Notice of Claim for voting and/or distribution purposes, then (a) such Known Claimant shall be deemed to have accepted the valuation of the Known Claimant's Claims as set out in the Notice of Claim for both voting and distribution purposes, and (b) any and all of the Known Claimant's rights to dispute the Claims as determined in the Notice of Claim or to otherwise assert or pursue such Claims other than as they are determined in the Notice of Claim shall be forever extinguished and barred without further act or notification. A Known Claimant may accept a determination of a Claim for voting purposes as set out in the Notice of Claim and dispute the determination of the Claim for distribution purposes provided that it does so in its Notice of Dispute of Claim and such Notice of Dispute of Claim is received by the Monitor by the Claims Bar Date. A determination of a Claim of a Known Claimant for voting purposes does not in any way affect and is without prejudice to the process to determine such Known Claimant's Claim for distribution purposes.

(B) Adjudication and Resolution of Claims

22. THIS COURT ORDERS that the Monitor, in consultation with F21 Canada, shall review all Notices of Dispute of Claim received on or before the Claims Bar Date. If the Monitor disagrees with the amount or priority of the Claim as set out in the Notice of Dispute of Claim, the Monitor shall, in consultation with F21 Canada, attempt to resolve such dispute and settle the purported Claim with the Known Claimant for voting and/or distribution purposes. In the event that a dispute is not settled within a time period or in a manner satisfactory to the Monitor, in consultation with

F21 Canada, the Monitor shall refer the dispute raised in the Notice of Dispute of Claim to a Claims Officer or the Court for adjudication at its election and shall send written notice of such election to the Known Claimant. In the event that the Monitor is not able to settle a disputed Known Claim for voting purposes by the date on which a vote is held at any Meeting, the ability of such Known Claimant to vote its disputed Claim shall be governed by the Meeting Order.

CLAIMS PROCEDURE FOR GENERAL CLAIMS

(A) Prefiling Claims and Prefiling D&O Claims

23. THIS COURT ORDERS that any Claimant that intends to assert a Prefiling Claim or a Prefiling D&O Claim that is not captured in any Notice of Claim sent to such Claimant shall file a Proof of Claim or D&O Proof of Claim, as applicable, with the Monitor on or before the Claims Bar Date. For the avoidance of doubt, a Proof of Claim or D&O Proof of Claim, as applicable, must be filed with the Monitor by every Claimant in respect of every Prefiling Claim or Prefiling D&O Claim that is not captured in any Notice of Claim, regardless of whether or not a legal proceeding in respect of such Prefiling Claim or Prefiling D&O Claim has been previously commenced.

(B) Restructuring Period Claims

24. THIS COURT ORDERS that upon becoming aware of a circumstance giving rise to a Restructuring Period Claim, the Monitor shall send a General Claims Package to the Claimant in respect of such Restructuring Period Claim in the manner provided for herein.

25. THIS COURT ORDERS that any Claimant that intends to assert a Restructuring Period Claim or Restructuring Period D&O Claim that is not captured in any Notice of Claim sent to such Claimant shall file a Proof of Claim or D&O Proof of Claim, as applicable, with the Monitor on or before the Claims Bar Date. For the avoidance of doubt, a Proof of Claim or D&O Proof of

Claim must be filed with the Monitor by every Claimant in respect of every Restructuring Period Claim or Restructuring Period D&O Claim that is not captured in any Notice of Claim, regardless of whether or not a legal proceeding in respect of such Restructuring Period Claim or Restructuring Period D&O Claim has been previously commenced.

(C) Claims Bar Date

26. THIS COURT ORDERS that any Claimant (other than any Known Claimant in respect of its Known Claim as set out in a Notice of Claim) that does not file a Proof of Claim or D&O Proof of Claim in accordance with paragraphs 23 to 25, as applicable, so that such Proof of Claim or D&O Proof of Claim is actually received by the Monitor on or before the Claims Bar Date, or such later date as the Court may otherwise direct:

(a) be and is hereby forever barred, estopped and enjoined from asserting or enforcing any such Claim against F21 Canada and all such Claims shall be forever extinguished;

(b) will not be permitted to vote at any Meeting on account of such Claim(s);

(c) will not be entitled to receive further notice with respect to the Claims Process or these proceedings unless the Monitor and/or F21 Canada become aware that such Claimant may have a separate Claim or Claims pursuant to which the potential Claimant is permitted to participate in the Claims Process; and

(d) will not be permitted to participate in any distribution under the Plan on account of such Claim(s).

(D) Adjudication and Resolution of Claims

27. THIS COURT ORDERS that the Monitor, in consultation with F21 Canada, shall review all Proofs of Claim and D&O Proofs of Claim received on or before the Claims Bar Date, and shall accept, revise or reject each Claim set out therein for voting and/or distribution purposes. With respect to a D&O Claim set out in a D&O Proof of Claim, the Monitor shall, in consultation with F21 Canada and the applicable Directors and Officers named in respect of such D&O Claim, accept, revise or reject such D&O Claim, provided that the Monitor shall not accept or revise any portion of a D&O Claim absent consent of the applicable Directors and Officers or further Order of the Court.

28. THIS COURT ORDERS that if the Monitor disagrees with the amount of the Claim as set out in any Proof of Claim or D&O Proof of Claim filed in accordance with paragraph 26 herein, the Monitor shall, in consultation with F21 Canada and the applicable Directors and Officers, attempt to resolve such dispute and settle the purported Claim with the Claimant for voting and/or distribution purposes.

29. THIS COURT ORDERS that if the Monitor intends to revise or reject a Claim that has been filed in accordance with paragraph 26 herein for voting purposes (and distribution purposes if the Monitor elects to do so), the Monitor shall notify the Claimant who has delivered such Proof of Claim or D&O Proof of Claim, as applicable, that such Claim has been revised or rejected for voting purposes (and distribution purposes, if applicable), and the reasons therefor, by sending a Notice of Revision or Disallowance by no later than July 13, 2020, unless otherwise ordered by this Court. For greater certainty, if a Notice of Revision or Disallowance has not been sent by the Monitor to a Claimant by July 13, 2020, such Claimant's Claim as set out in its Proof of Claim or D&O Proof of Claim shall be deemed to have been accepted by the Monitor for voting purposes

in the amount filed by such Claimant, unless otherwise ordered by the Court. For voting purposes, any Claimant who disputes a Notice of Revision or Disallowance sent pursuant to this paragraph 29 shall contact the Monitor as soon as possible and the Monitor shall attempt to negotiate and settle the purported Claim with the Claimant for voting purposes prior to any Meeting. In the event that the Monitor is not able to settle a Claim for voting purposes by the date on which a vote is held at any Meeting, the ability of such Claimant to vote its disputed Claim shall be governed by the Meeting Order. A determination of a Claim for voting purposes does not in any way affect and is without prejudice to the process to determine such Claimant's Claim for distribution purposes.

30. THIS COURT ORDERS that if the Monitor intends to revise or reject a Claim that has been filed in accordance with paragraph 26 herein for distribution purposes, the Monitor shall notify each Claimant who has delivered such Proof of Claim or D&O Proof of Claim (and who did not receive a Notice of Revision or Disallowance for distribution purposes pursuant to paragraph 29 herein) that such Claim has been revised or rejected for distribution purposes, and the reasons therefor, by sending a Notice of Revision or Disallowance by no later than July 31, 2020, unless otherwise ordered by this Court. For greater certainty, if a Notice of Revision or Disallowance has not been sent by the Monitor to a Claimant by July 31, 2020, such Claimant's Claim as set out in its Proof of Claim or D&O Proof of Claim shall be deemed to have been accepted by the Monitor for distribution purposes in the amount filed by such Claimant, unless otherwise ordered by the Court.

31. THIS COURT ORDERS that any Claimant who intends to dispute a Notice of Revision or Disallowance sent pursuant to paragraphs 29 or 30 above with respect to a Claim for distribution purposes shall deliver a completed Notice of Dispute of Revision or Disallowance, along with the

reasons for its dispute, to the Monitor by no later than thirty (30) days after the date on which the Claimant is deemed to receive the Notice of Revision or Disallowance.

32. THIS COURT ORDERS that, where a Claimant that receives a Notice of Revision or Disallowance pursuant to paragraphs 29 or 30 above does not file a Notice of Dispute of Revision or Disallowance by the time set out in paragraph 31 above, then such Claimant's Claim for distribution purposes shall be deemed to be as determined in the Notice of Revision or Disallowance and any and all of the Claimant's rights to dispute the Claim as determined in the Notice of Revision or Disallowance or to otherwise assert or pursue such Claim other than as determined in the Notice of Revision or Disallowance for distribution purposes shall be forever extinguished and barred without further act or notification.

33. THIS COURT ORDERS that upon receipt of a Notice of Dispute of Revision or Disallowance in respect of a Claim, the Monitor shall attempt to resolve such dispute and settle the purported Claim with the Claimant, and in the event that a dispute raised in a Notice of Dispute of Revision or Disallowance is not settled within a time period or in a manner satisfactory to the Monitor, in consultation with F21 Canada and the applicable Directors and Officers in respect of any D&O Claim, the Monitor shall, at its election, refer the dispute raised in the Notice of Dispute of Revision or Disallowance to a Claims Officer or the Court for adjudication.

34. THIS COURT ORDERS that the Monitor, in consultation with F21 Canada and the applicable Directors and Officers in respect of any D&O Claim, may refer any Claim to a Claims Officer or the Court for adjudication at its election by sending written notice to the applicable parties at any time.

CLAIMS OFFICERS

35. THIS COURT ORDERS that Mr. Kevin McElcheran, and such other Persons as may be appointed by the Court from time to time on a motion by F21 Canada or the Monitor, be and are hereby appointed as the Claims Officers for the Claims Process.

36. THIS COURT ORDERS that the decision as to whether a disputed Claim should be adjudicated by the Court or a Claims Officer shall be in the sole discretion of the Monitor.

37. THIS COURT ORDERS that a Claims Officer shall determine the validity and amount of disputed Claims in accordance with this Order and to the extent necessary may determine whether any Claim or part thereof constitutes an Excluded Claim and shall provide written reasons. A Claims Officer shall determine all procedural matters which may arise in respect of his or her determination of these matters, including the manner in which any evidence may be adduced. A Claims Officer shall have the discretion to mediate any dispute that is referred to such Claims Officer at its election. A Claims Officer shall also have the discretion to determine by whom and to what extent the costs of any hearing or mediation before a Claims Officer shall be paid.

38. THIS COURT ORDERS that the Monitor, the Claimant, F21 Canada and/or the applicable Directors and Officers in respect of any D&O Claim may, within ten (10) days of such party receiving notice of a Claims Officer's determination of the value of a Claimant's Claim, appeal such determination or any other matter determined by the Claims Officer in accordance with paragraph 37 or otherwise to the Court by filing a notice of appeal, and the appeal shall be initially returnable for scheduling purposes within ten (10) days of filing such notice of appeal.

39. THIS COURT ORDERS that if no party appeals the determination of value of a Claim by a Claims Officer within the time set out in paragraph 38 above, the decision of the Claims Officer

in determining the value of the Claimant's Claim shall be final and binding upon F21 Canada, the applicable Directors and Officers in respect of any D&O Claim, the Monitor and the Claimant, and there shall be no further right of appeal, review or recourse to the Court from the Claims Officer's final determination of a Claim.

NOTICE OF TRANSFEREES

40. THIS COURT ORDERS that from the date of this Order until seven (7) days prior to the date fixed by the Court for the first distribution in the CCAA Proceedings or any other proceeding, including a bankruptcy, to the extent required, leave is hereby granted to permit a Claimant to provide notice to the Monitor of assignment or transfer of a Claim to any third party, and that no assignment or transfer of a partial Claim shall be permitted.

41. THIS COURT ORDERS that subject to the terms of any subsequent Order of this Court, if, after the Filing Date, the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor F21 Canada shall be obligated to give notice to or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until written notice of such transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received and acknowledged by the Monitor in writing and thereafter such transferee or assignee shall, for the purposes hereof, constitute the "Claimant" in respect of such Claim or D&O Claim and the Monitor shall thereafter only be required to deal with such transferee or assignee and not the original Claimant. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken or not taken in respect of such Claim in accordance with this Order prior to receipt and acknowledgement by the Monitor of satisfactory evidence of such transfer or assignment. A transferee or assignee of a Claim takes the Claim subject to any rights of set-off to which F21 Canada and/or the applicable Directors and Officers

may be entitled with respect to such Claim. A transferee or assignee of a Claim shall not be entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to F21 Canada and/or the applicable Directors and Officers.

42. THIS COURT ORDERS that no transfer or assignment shall be effective for voting purposes at any Meeting unless sufficient notice and evidence of such transfer or assignment has been received by the Monitor no later than 5:00 p.m. on the date that is seven (7) days prior to the date fixed by the Court for any Meeting, failing which the original Claimant shall have all applicable rights as the "Claimant" with respect to such Claim as if no transfer or assignment of the Claim had occurred.

SERVICE AND NOTICE

43. THIS COURT ORDERS that the Monitor may, unless otherwise specified by this Order, serve and deliver or cause to be served and delivered the Known Claims Package, the General Claims Package, and any letters, notices or other documents, to the appropriate Claimants or any other interested Persons by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or email to such Persons at the physical or electronic address, as applicable, last shown on the books and records of F21 Canada or, where applicable, as set out in such Claimant's Proof of Claim or D&O Proof of Claim. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Ontario, the fifth Business Day after mailing within Canada (other than within Ontario), and the tenth Business Day after mailing internationally; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by facsimile

transmission or email by 5:00 p.m. on a Business Day, on such Business Day, and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

44. THIS COURT ORDERS that any notice or communication required to be provided or delivered by a Claimant to the Monitor under this Order shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email addressed to:

PricewaterhouseCoopers Inc., LIT
Monitor of Forever XXI ULC
18 York Street, Suite 2600
Toronto, Ontario
M5J 0B2

Attention: Tammy Muradova
Email: cmt_processing@ca.pwc.com
Fax: (416) 814-3219

Any such notice or communication delivered by a Claimant shall be deemed received upon actual receipt by the Monitor thereof during normal business hours on a Business Day, or if delivered outside of normal business hours, the next Business Day.

45. THIS COURT ORDERS that if, during any period during which notices or other communications are being given pursuant to this Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or email in accordance with this Order.

MISCELLANEOUS

46. THIS COURT ORDERS that the Monitor may from time to time apply to this Court to extend the time for any action which the Monitor is required to take if reasonably required to carry out its duties and obligations pursuant to this Order and for advice and directions concerning the discharge of its powers and duties under this Order or the interpretation or application of this Order.

47. THIS COURT ORDERS that nothing in this Order shall prejudice the rights and remedies of any Directors or Officers or other Persons under the Directors' Charge or any applicable insurance policy or prevent or bar any Person from seeking recourse against or payment from F21 Canada's insurance and any Director's or Officer's liability insurance policy or policies that exist to protect or indemnify the Directors or Officers or other Persons, whether such recourse or payment is sought directly by the Person asserting a Claim from the insurer or derivatively through the Director or Officer or F21 Canada; provided, however, that nothing in this Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Order limit, remove, modify or alter any defence to such Claim available to the insurer pursuant to the provisions of any insurance policy or at law; and further provided that any Claim or portion thereof for which the Person receives payment directly from, or confirmation that he or she is covered by, F21 Canada's insurance or any Director's or Officer's liability insurance or other liability insurance policy or policies that exist to protect or indemnify the Directors or Officers or other Persons shall not be recoverable as against F21 Canada or the Director or Officer, as applicable.

48. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada.

49. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of

America, to give effect to this Order and to assist F21 Canada, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to F21 Canada and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist F21 Canada and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAY 29 2020

PER / PAR:

SCHEDULE "A"

NOTICE TO CLAIMANTS OF FOREVER XXI ULC

RE: NOTICE OF CLAIMS PROCESS FOR FOREVER XXI ULC PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT* (the "CCAA")

PLEASE TAKE NOTICE that on May 28, 2020, the Ontario Superior Court of Justice (Commercial List) issued an order (the "**Claims Procedure Order**") in the CCAA proceedings of Forever XXI ULC (the "**Applicant**"), requiring that all Persons who assert a Claim (capitalized terms used in this notice and not otherwise defined have the meaning ascribed to them in the Claims Procedure Order) against the Applicant, whether unliquidated, contingent or otherwise, and all Persons who assert a claim against the Directors and/or Officers of the Applicant (as defined in the Claims Procedure Order, a "**D&O Claim**"), in each case other than any Known Claimant in respect of its Known Claim as set out in any Notice of Claim, **must file a Proof of Claim (with respect to Claims against Forever XXI ULC) or D&O Proof of Claim (with respect to D&O Claims) with PricewaterhouseCoopers Inc. as Court-appointed monitor of the Applicant (in such capacity and not in its personal or corporate capacity, the "Monitor") on or before 5:00 p.m. (Toronto time) on June 30, 2020 (the "Claims Bar Date")**, by sending the Proof of Claim or D&O Proof of Claim to the Monitor by prepaid ordinary mail, registered mail, courier, personal delivery or electronic transmission at the following address:

PricewaterhouseCoopers Inc., LIT
Monitor of Forever XXI ULC
18 York Street, Suite 2600
Toronto, Ontario
M5J 0B2

Attention: Tammy Muradova
Email: cmt_processing@ca.pwc.com
Fax: 416 814 3219

Pursuant to the Claims Procedure Order, Known Claims Packages will be sent to all Known Claimants on or before June 2, 2020, which Known Claims Packages will contain a Notice of Claim that specifies each Known Claimant's Claim for voting and distribution purposes as valued by F21 Canada, in consultation with the Monitor, based on the books and records of F21 Canada.

The Monitor will also send or cause to be sent, on or before June 2, 2020, a General Claims Package (that will include the form of Proof of Claim and D&O Proof of Claim) to each Person that appears on the Service List or has requested a Proof of Claim and any Person known to F21 Canada or the Monitor as potentially asserting a Claim that is not a Known Claim.

Claimants may also obtain the Claims Procedure Order and a General Claims Package from the Monitor's website at www.pwc.com/ca/forever21, or by contacting the Monitor by telephone at 1-888-444-1193.

Only Proofs of Claim and D&O Proofs of Claim actually received by the Monitor on or before 5:00 p.m. (Toronto time) on June 30, 2020 will be considered filed by the Claims Bar Date. **It is your responsibility to ensure that the Monitor receives your Proof of Claim or D&O Proof of Claim by the Claims Bar Date if you wish to assert any Claim that is not a Known Claim.**

If you have received a Notice of Claim, your Claim will be deemed to be accepted at the amount specified therein for voting and distribution purposes, and you do not need to take any further steps with respect to such Claim unless you disagree with the amount specified therein. If you wish to dispute your Claim as specified in your Notice of Claim, you must file a Notice of Dispute of Claim with the Monitor on or before the Claims Bar Date. Notices of Dispute of Claim must be actually received by the Monitor on or before 5:00 p.m. (Toronto time) on June 30, 2020 to be considered filed by the Claims Bar Date. **It is your responsibility to ensure that the Monitor receives your Notice of Dispute of Claim if you wish to dispute the Claim as listed in your Notice of Claim.**

CLAIMS (THAT ARE NOT KNOWN CLAIMS) AND D&O CLAIMS WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

DATED this ● day of ●, 2020.

SCHEDULE "B"

PROOF OF CLAIM INSTRUCTION LETTER

This instruction letter has been prepared to assist Claimants in filling out the Proof of Claim form for Claims against Forever XXI ULC. If you have any additional questions regarding completion of the Proof of Claim, please consult the Monitor's website at www.pwc.com/ca/forever21 or contact the Monitor, whose contact information is set out below.

If you have received a Notice of Claim, your Claim will be deemed to be accepted at the amount specified therein for voting and distribution purposes, and you do not need to take any further steps with respect to such Claim unless you disagree with the amount specified therein.

A Proof of Claim package is intended only to be used by Claimants who wish to assert a Claim and have not received a Notice of Claim.

Additional copies of the Proof of Claim may be found at the Monitor's website address noted above.

Please note that this is a guide only, and that in the event of any inconsistency between the terms of this guide and the terms of the Claims Procedure Order made on May 28, 2020 (the "**Claims Procedure Order**"), the terms of the Claims Procedure Order will govern.

SECTION 1A - ORIGINAL CLAIMANT

1. A separate Proof of Claim must be filed by each legal entity or person asserting a claim against Forever XXI ULC.

2. The Claimant shall include any and all Claims that it asserts against Forever XXI ULC in a single Proof of Claim filed, except for Claims described in any Notice of Claim sent to such Claimant by the Monitor. **Claims included in a Proof of Claim that are already covered by such Claimant's Notice of Claim will not be accepted by the Monitor.** Any Claimant who wishes to dispute any Claim set out in a Notice of Claim shall file a Notice of Dispute of Claim in respect of such Claim.

3. The full legal name of the Claimant must be provided.

4. If the Claimant operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.

5. If the Claim has been assigned or transferred to another party, Section 1B must also be completed.

6. Unless the Claim is assigned or transferred, all future correspondence, notices, etc., regarding the Claim will be directed to the address and contact indicated in this section.

SECTION 1B - ASSIGNEE

7. If the Claimant has assigned or otherwise transferred its Claim, then Section 1B must be completed.

8. The full legal name of the Assignee must be provided.

9. If the Assignee operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.

10. If the Monitor, in consultation with Forever XXI ULC, is satisfied that an assignment or transfer has occurred, all future correspondence, notices, etc., regarding the Claim will be directed to the Assignee at the address and contact indicated in this section.

SECTION 2 - AMOUNT OF CLAIM OF CLAIMANT AGAINST DEBTOR

11. Indicate the amount Forever XXI ULC was and still is indebted to the Claimant in the Amount of Claim column, including interest, if applicable, up to and including September 28, 2019.

Currency

12. The amount of the Claim must be provided in the currency in which it arose.

13. Indicate the appropriate currency in the Currency column.

14. If the Claim is denominated in multiple currencies, use a separate line to indicate the Claim amount in each such currency. If there are insufficient lines to record these amounts, attach a separate schedule indicating the required information.

15. If necessary, currency will be converted in accordance with the Claims Procedure Order.

Unsecured Claim

16. Check this box ONLY if the Claim recorded on that line is an unsecured claim.

Secured Claim

17. Check this box ONLY if the Claim recorded on that line is a secured claim.

SECTION 3 - DOCUMENTATION

18. Attach to the Proof of Claim form all particulars of the Claim and all available supporting documentation, including amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the Claim, including any claim assignment/transfer agreement or similar document, if applicable and amount of invoices, particulars of all credits, discounts, etc., claimed, description of the security, if any, granted by Forever XXI ULC to the Claimant and estimated value of such security.

SECTION 4 - CERTIFICATION

19. The person signing the Proof of Claim should:

    (a) be the Claimant or an authorized representative of the Claimant;

    (b) have knowledge of all the circumstances connected with this Claim;

(c) assert the Claim against Forever XXI ULC as set out in the Proof of Claim and certify all available supporting documentation is attached; and

(d) have a witness to its certification.

20. By signing and submitting the Proof of Claim, the Claimant is asserting the Claim against Forever XXI ULC.

SECTION 5 - FILING OF CLAIM

21. **The Proof of Claim must be received by the Monitor on or before 5:00 p.m. (Toronto time) on June 30, 2020 (the "Claims Bar Date") by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email at the following address:**

PricewaterhouseCoopers Inc., LIT
Monitor of Forever XXI ULC
18 York Street, Suite 2600
Toronto, Ontario
M5J 0B2

Attention:	**Tammy Muradova**
Email:	**cmt_processing@ca.pwc.com**
Fax:	**(416) 814-3219**

Failure to file your Proof of Claim so that it is actually received by the Monitor on or before 5:00 p.m. on the Claims Bar Date will result in your claim being barred and you will be prevented from making or enforcing a Claim against Forever XXI ULC (except for any Claim outlined in any Notice of Claim that may have been addressed to you). In addition, you shall not be entitled to further notice of and shall not be entitled to participate as a creditor in the CCAA proceedings of Forever XXI ULC.

SCHEDULE "C"

PROOF OF CLAIM FORM FOR CLAIMS AGAINST FOREVER XXI ULC

DEBTOR: FOREVER XXI ULC

1A. Original Claimant (the "Claimant")

Legal Name of Claimant: _____

Address

_____

_____

City _____ Prov /State _____

Postal/Zip Code _____

Name of Contact _____

Title _____

Phone # _____

Fax # _____

Email _____

1B. Assignee, if claim has been assigned

Legal Name of Assignee: _____

Address

_____

_____

City _____ Prov /State _____

Postal/Zip Code _____

Name of Contact _____

Title _____

Phone # _____

Fax # _____

Email _____

2. Amount of Claim

The Debtor was and still is indebted to the Claimant as follows:

Prefiling Claims

Currency	Amount of Prefiling Claim *(including interest, if applicable, up to and including September 28, 2019)*	Unsecured Claim	Secured Claim
_____	_____	☐	☐
_____	_____	☐	☐
_____	_____	☐	☐
_____	_____	☐	☐
_____	_____	☐	☐

Restructuring Period Claims

Currency	Amount of Restructuring Period Claim	Unsecured Claim	Secured Claim
_____	_____	☐	☐
_____	_____	☐	☐
_____	_____	☐	☐
_____	_____	☐	☐
_____	_____	☐	☐

3. Documentation

Provide all particulars of the Claim and all available supporting documentation, including amount, and description of transaction(s) or agreement(s), or legal breach(es) giving rise to the Claim, including any claims assignment/transfer agreement or similar document, if applicable, and amount of invoices, particulars of all credits, discounts, etc., claimed, description of the security, if any, granted by Forever XXI ULC to the Claimant and estimated value of such security.

4. Certification

I hereby certify that:

1. I am the Claimant or an authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant asserts this Claim against the Debtor as set out above.
4. All available documentation in support of this Claim is attached.

Signature: _____	Witness:
Name: _____	_____ (signature)
Title: _____	_____ (print)

Dated at _____ this _____ day of _____, 2020.

5. Filing of Claim

This Proof of Claim must be received by the Monitor on or before 5:00 p.m. (Toronto time) on June 30, 2020 by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email at the following address:

PricewaterhouseCoopers Inc., LIT
Monitor of Forever XXI ULC
18 York Street, Suite 2600
Toronto, Ontario
M5J 0B2

Attention:	**Tammy Muradova**
Email:	**cmt_processing@ca.pwc.com**
Fax:	**(416) 814-3219**

For more information see www.pwc.com/ca/forever21, or contact the Monitor by telephone at 1-888-444-1193.

SCHEDULE "D"

NOTICE OF REVISION OR DISALLOWANCE

For Persons that have asserted Claims against Forever XXI ULC and/or D&O Claims against the Directors and/or Officers of Forever XXI ULC

Claims Reference Number: _____

To: _____
(the "**Claimant**")

Capitalized terms not defined in this Notice of Revision or Disallowance have the meaning ascribed to them in the Order of the Ontario Superior Court of Justice (Commercial List) in the CCAA proceedings of Forever XXI ULC dated May 28, 2020 (the "**Claims Procedure Order**").

Pursuant to the Claims Procedure Order, the Monitor hereby gives you notice that it has reviewed your Proof of Claim or D&O Proof of Claim and has revised or disallowed all or part of your purported Claim set out therein for voting and/or distribution purposes. Subject to further dispute by you in accordance with the Claims Procedure Order, your Claim will be as follows:

Prefiling Claims

	Amount as submitted		**Amount allowed by Monitor for voting purposes:**	**Amount allowed by Monitor for distribution purposes:**
	Currency			
A. Unsecured		$	$	$
B. Secured		$	$	$
C. D&O Claim		$	$	$
D. Total Claim		$	$	$

Restructuring Period Claims

	Amount as submitted		**Amount allowed by Monitor for voting purposes:**	**Amount allowed by Monitor for distribution purposes:**
	Currency			
A. Unsecured		$	$	$
B. Secured		$	$	$
C. D&O Claim		$	$	$
D. Total Claim		$	$	$

Reasons for Revision or Disallowance:

_____

_____

_____

_____

SERVICE OF DISPUTE NOTICES

If you disagree with the amount of your Claim specified herein for voting purposes, you should contact the Monitor as soon as possible at the address specified below to attempt to resolve and settle your Claim for voting purposes. In the event that the Monitor is not able to settle a Claim for voting purposes prior to the date set for any Meeting, your Claim for voting purposes shall be as set out in this Notice of Revision or Disallowance, and shall be recorded as a Disputed Voting Claim in accordance with the Meeting Order dated May 28, 2020. A determination of your Claim for voting purposes does not in any way affect and is without prejudice to the process to determine your Claim for distribution purposes.

If you intend to dispute your Claim specified in this Notice of Revision or Disallowance for distribution purposes, you must, no later than 5:00 p.m. (prevailing time in Toronto) on the day that is thirty (30) calendar days after this Notice of Revision or Disallowance is deemed to have been received by you (in accordance with the Claims Procedure Order), deliver a Notice of Dispute of Revision or Disallowance to the Monitor by ordinary prepaid mail, registered mail, courier, personal delivery, facsimile transmission or email to the following address:

PricewaterhouseCoopers Inc., LIT
Monitor of Forever XXI ULC
18 York Street, Suite 2600
Toronto, Ontario
M5J 0B2

Attention: Tammy Muradova
Email: cmt_processing@ca.pwc.com
Fax: (416) 814-3219

In accordance with the Claims Procedure Order, notices shall be deemed to be received by the Monitor upon actual receipt thereof by the Monitor during normal business hours on a Business Day, or if delivered outside of normal business hours, on the next Business Day.

The form of Notice of Dispute of Revision or Disallowance is enclosed and can also be accessed on the Monitor's website at www.pwc.com/ca/forever21.

IF YOU FAIL TO FILE A NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU FOR DISTRIBUTION PURPOSES.

DATED this day of , 2020.

PRICEWATERHOUSECOOPERS INC., LIT, solely in its capacity as Court-appointed Monitor of Forever XXI ULC, and not in its personal or corporate capacity

Per: _____

For more information see www.pwc.com/ca/forever21, or contact the Monitor by telephone at 1-888-444-1193.

SCHEDULE "E"

NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE

With respect to Claims against Forever XXI ULC and/or
D&O Claims against the Directors and/or Officers of Forever XXI ULC

(with respect to Claims for Distribution Purposes only)

Claims Reference Number: _____

1. Particulars of Claimant:

Full Legal Name of Claimant (include trade name, if different)

_____

_____

(the "Claimant")

Full Mailing Address of the Claimant:

_____

_____

Other Contact Information of the Claimant:

Telephone Number: _____

Email Address: _____

Facsimile Number: _____

Attention (Contact Person): _____

Particulars of original Claimant from whom you acquired the Claim or D&O Claim (if applicable):

Have you acquired this purported Claim by assignment?

Yes: ☐ No: ☐

If yes and if not already provided, attach documents evidencing assignment.

Full Legal Name of original Claimant(s): _____

Dispute of Revision or Disallowance of Claim:

The Claimant hereby disagrees with the value of its Claim as set out in the Notice of Revision or Disallowance for distribution purposes and asserts a Claim as follows:

Prefiling Claims

	Currency	Amount allowed by Monitor in the Notice of Revision or Disallowance for distribution purposes:	Amounts claimed by Claimant for distribution purposes:[1]
A. Unsecured		$	$
B. Secured		$	$
C. D&O Claim		$	$
D. Total Claim		$	$

Restructuring Period Claims

	Currency	Amount allowed by Monitor in the Notice of Revision or Disallowance for distribution purposes:	Amounts claimed by Claimant for distribution purposes:[2]
A. Unsecured		$	$
B. Secured		$	$
C. D&O Claim		$	$
D. Total Claim		$	$

Note: This Notice of Dispute of Revision or Disallowance relates only to any disputes with respect to your Claim **for distribution purposes** as set out in a Notice of Revision or Disallowance. If you disagree with the amount of your Claim specified in a Notice of Revision or Disallowance for voting purposes, you should contact the Monitor as soon as possible to attempt to resolve and settle your Claim for voting purposes. In the event that the Monitor is not able to settle a Claim for voting purposes prior to the date set for any Meeting, your Claim for voting purposes shall be as set out in the Notice of Revision or Disallowance, and shall be recorded as a Disputed Voting Claim in accordance with the Meeting Order dated May 28, 2020. A determination of your Claim for voting purposes does not in any way affect and is without prejudice to the process to determine your Claim for distribution purposes.

Reasons for Dispute:

Please describe the reasons and basis for your dispute of the amount allowed by the Monitor in the Notice of Revision or Disallowance for distribution purposes. You may attach a

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1 If necessary, currency will be converted in accordance with the Claims Procedure Order.

2 If necessary, currency will be converted in accordance with the Claims Procedure Order.

separate schedule if more space is required. Provide all applicable documentation supporting your dispute.

_____

_____

_____

_____

_____

_____

Signature of Claimant: _____ Name: _____ Title: _____	Witness: _____ (signature) _____ (print)
Dated at _____ this _____ day of _____, 2020.	

SCHEDULE "F"

NOTICE OF CLAIM

(Letterhead of the Monitor)

●, 2020

[Name]
[Address]

Dear ●:

Re: Known Claims in the CCAA Proceedings of Forever XXI ULC (Court File: CV-19-00628233-00CL)

Amount of Known Claim against Forever XXI ULC has been assessed as a claim in the amount of $● CAD

As you know, Forever XXI ULC (the "**Applicant**") filed for and was granted creditor protection under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**"), pursuant to an order (the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") (the "**CCAA Proceedings**"). Pursuant to the Initial Order, the Court appointed PricewaterhouseCoopers Inc. as monitor of the Applicant to, among other things, oversee the CCAA Proceedings (in such capacity and not in its personal or corporate capacity, the "**Monitor**"). A copy of the Initial Order and other information relating to the CCAA Proceedings has been posted to www.pwc.com/ca/forever21 (the "**Monitor's Website**").

The purpose of this Notice of Claim is to inform you about your claim in the claims process approved by the Court on May 28, 2020 (the "**Claims Process**"). The Claims Process governs the process for the identification and quantification of certain claims against Forever XXI ULC and its directors and officers in the CCAA Proceedings. All terms used but not defined in this Notice of Claim shall have the meanings ascribed thereto in the Claims Procedure Order of the Court dated May 28, 2020 (the "**Claims Procedure Order**"). In the event of any inconsistency between the terms of this Notice of Claim and the terms of the Claims Procedure Order, the terms of the Claims Procedure Order will govern.

Claims Process

Under the Claims Procedure Order, the Monitor is required to send a notice prepared by the Applicant, in consultation with the Monitor, to each Known Claimant outlining the quantum of their Known Claim that the Monitor is prepared to allow for voting and distribution purposes in the Claims Process ("**Notice of Claim**").

This Notice of Claim contains the full amount of your Known Claim against the Applicant that the Monitor will allow as an accepted Claim for voting and distribution purposes in the Claims Process, based on the books and records of the Applicant and any negotiations that the

Applicant and/or the Monitor has had with you regarding the amounts owed by the Applicant to you.

Your total claim has been assessed by Forever XXI ULC, in consultation with the Monitor, as follows:

Your Known Claim against Forever XXI ULC has been assessed as a claim in the amount of $● CAD. Details of your claim are set out in the attached schedule.

If you agree with Forever XXI ULC's assessment of your claim, you need not take any further action.

IF YOU WISH TO DISPUTE THE ASSESSMENT OF YOUR CLAIM, YOU MUST TAKE THE STEPS OUTLINED BELOW.

Disagreement with Assessment:

If you disagree with the assessment of your claim set out in this Notice of Claim, you must complete and return to the Monitor a completed Notice of Dispute of Claim asserting a claim in a different amount supported by appropriate documentation. A blank Notice of Dispute of Claim form is enclosed. The Notice of Dispute of Claim with supporting documentation disputing the within assessment of your claim **must be received by the Monitor no later than 5:00 p.m. (Toronto time) on June 30, 2020 (the "Claims Bar Date").**

If no such Notice of Dispute of Claim is received by the Monitor by the Claims Bar Date, the amount of your claim will be, subject to further order of the Court, conclusively deemed to be as shown in this Notice of Claim for voting and distribution purposes.

The Notice of Dispute of Claim should be delivered by registered mail, personal delivery, courier, facsimile transmission or email (in PDF format) to:

PricewaterhouseCoopers Inc., LIT
Monitor of Forever XXI ULC
18 York Street, Suite 2600
Toronto, Ontario
M5J 0B2

Attention: Tammy Muradova
Email: cmt_processing@ca.pwc.com
Fax: (416) 814-3219

Important Deadlines:

If you do not file a Notice of Dispute of Claim by June 30, 2020, you will have no further right to dispute your claim against Forever XXI ULC, as assessed by Forever XXI ULC in consultation with the Monitor, and you will be barred from filing any such dispute in the future.

In addition, if you believe you have any claims against Forever XXI ULC or any of its Directors and/or Officers that are not captured in this Notice of Claim, you must submit a Proof of Claim or D&O Proof of Claim by the Claims Bar Date. Copies of the Proof of Claim and D&O Proof of Claim forms may be found at the Monitor's Website. **Claims against Forever XXI ULC and D&O Claims (that are not Known Claims) which are not received by the Claims Bar Date will be barred and extinguished forever.**

More Information:

If you have questions regarding the foregoing, you may contact the Monitor at 1-888-444-1193 or cmt_processing@ca.pwc.com.

Yours truly,

SCHEDULE "G"

NOTICE OF DISPUTE OF CLAIM

With respect to Forever XXI ULC

Claims Reference Number: _____

1. Particulars of Claimant:

Full Legal Name of Claimant (include trade name, if applicable)

_____

_____

(the "Claimant")

Full Mailing Address of the Claimant:

_____

_____

Other Contact Information of the Claimant:

Telephone Number: _____

Email Address: _____

Facsimile Number: _____

Attention (Contact Person): _____

Particulars of original Known Claimant from whom you acquired the Claim (if applicable):

Have you acquired this purported Claim from a Known Claimant by assignment?

Yes: ☐ No: ☐

If yes and if not already provided, attach documents evidencing assignment.

Full Legal Name of original Known Claimant: _____

Dispute of Notice of Claim:

The Claimant hereby disagrees with the value of its Claim as set out in the Notice of Claim and asserts a Claim as follows:

	Currency	Amount in Notice of Claim:	Amount claimed by Known Claimant for voting purposes:[3]	Amount claimed by Known Claimant for distribution purposes:[4]
Total Claim		$	$	$

Reasons for Dispute:

Please describe the reasons and basis for your dispute of the amount set out in your Notice of Claim. You may attach a separate schedule if more space is required. Provide all applicable documentation supporting your dispute.

_____

_____

_____

_____

_____

_____

Signature of Claimant: _____ Name: _____ Title: _____	Witness: _____ (signature) _____ (print)
Dated at _____ this _____ day of _____, 2020.	

3 If necessary, currency will be converted in accordance with the Claims Procedure Order.

4 If necessary, currency will be converted in accordance with the Claims Procedure Order.

SCHEDULE "H"

CLAIMANT'S GUIDE TO COMPLETING THE D&O PROOF OF CLAIM FORM FOR CLAIMS AGAINST DIRECTORS AND/OR OFFICERS OF FOREVER XXI ULC

This Guide has been prepared to assist Claimants in filling out the D&O Proof of Claim form for claims against the Directors and/or Officers of Forever XXI ULC (the "**Applicant**"). If you have any additional questions regarding completion of the D&O Proof of Claim, please consult the Monitor's website at www.pwc.com/ca/forever21 or contact the Monitor, whose contact information is set out below.

The D&O Proof of Claim form is ONLY for Claimants asserting a claim against any Directors and/or Officers of the Applicant, and NOT for claims against Forever XXI ULC itself. For claims against Forever XXI ULC that are not covered in any Notice of Claim, please use the form titled "Proof of Claim Form for Claims Against Forever XXI ULC", which is available on the Monitor's website at www.pwc.com/ca/forever21.

Additional copies of the D&O Proof of Claim form may be found at the Monitor's website address noted above.

Please note that this is a guide only, and that in the event of any inconsistency between the terms of this guide and the terms of the Claims Procedure Order made on May 28, 2020 (the "**Claims Procedure Order**"), the terms of the Claims Procedure Order will govern.

SECTION 1. - DEBTOR

1. The full name of all of the Applicant's Directors or Officers against whom the Claim is asserted must be listed.

SECTION 2A. - ORIGINAL CLAIMANT

1. A separate D&O Proof of Claim must be filed by each legal entity or person asserting a claim against the Applicant's Directors or Officers.

2. The Claimant shall include any and all D&O Claims that it asserts against the Applicant's Directors or Officers in a single D&O Proof of Claim.

3. The full legal name of the Claimant must be provided.

4. If the Claimant operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.

5. If the claim has been assigned or transferred to another party, Section 2B, described below, must also be completed.

6. Unless the claim is assigned or transferred, all future correspondence, notices, etc., regarding the claim will be directed to the address and contact indicated in this section.

SECTION 2B. - ASSIGNEE

7. If the Claimant has assigned or otherwise transferred its claim, then Section 2B must be completed.

8. The full legal name of the Assignee must be provided.

9. If the Assignee operates under a different name or names, please indicate this in a separate schedule in the supporting documentation.

10. If the Monitor, in consultation with the Applicant, is satisfied that an assignment or transfer has occurred, all future correspondence, notices, etc., regarding the claim will be directed to the Assignee at the address and contact indicated in this section.

SECTION 2. - AMOUNT OF CLAIM OF CLAIMANT AGAINST DEBTOR

11. Indicate the amount the Director(s) and/or Officer(s) was/were and still is/are indebted to the Claimant in the Amount of Claim column, including interest, if applicable, up to and including September 28, 2019.

Currency

12. The amount of the claim must be provided in the currency in which it arose.

13. Indicate the appropriate currency in the Currency column.

14. If the claim is denominated in multiple currencies, use a separate line to indicate the claim amount in each such currency. If there are insufficient lines to record these amounts, attach a separate schedule indicating the required information.

15. If necessary, currency will be converted in accordance with the Claims Procedure Order.

DOCUMENTATION

16. Attach to the D&O Proof of Claim form all particulars of the claim and all available supporting documentation, including amount and description of transaction(s) or agreement(s) or legal breach(es) giving rise to the claim.

CERTIFICATION

17. The person signing the D&O Proof of Claim should:

    (a) be the Claimant or an authorized representative of the Claimant;

    (b) have knowledge of all of the circumstances connected with this claim;

    (c) assert the claim against the Debtor(s) as set out in the D&O Proof of Claim and certify all available supporting documentation is attached; and

    (d) have a witness to its certification.

18. By signing and submitting the D&O Proof of Claim, the Claimant is asserting the claim against the Debtor(s) specified therein.

FILING OF CLAIM

19. **The D&O Proof of Claim must be received by the Monitor on or before 5:00 p.m. (Toronto time) on June 30, 2020 (the "Claims Bar Date") by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email at the following address:**

PricewaterhouseCoopers Inc., LIT
Forever XXI ULC
18 York Street, Suite 2600
Toronto, Ontario
M5J 0B2

Attention: **Tammy Muradova**
Email: **cmt_processing@ca.pwc.com**
Fax: **(416) 814-3219**

Failure to file your D&O Proof of Claim so that it is actually received by the Monitor on or before 5:00 p.m. on the Claims Bar Date will result in your claim being barred and you will be prevented from making or enforcing a claim against the Directors and Officers of Forever XXI ULC. In addition, you shall not be entitled to further notice of and shall not be entitled to participate as a creditor in the Applicant's CCAA proceedings.

SCHEDULE "I"

PROOF OF CLAIM FORM FOR CLAIMS AGAINST DIRECTORS OR OFFICERS OF FOREVER XXI ULC (the "D&O Proof of Claim")

This form is to be used only by Claimants asserting a claim against any Directors and/or Officers of Forever XXI ULC (the "**Applicant**") and NOT for claims against Forever XXI ULC itself. For claims against Forever XXI ULC that are not covered in any Notice of Claim, please use the form titled "Proof of Claim Form for Claims Against Forever XXI ULC", which is available on the Monitor's website at www.pwc.com/ca/forever21.

1. Name of Officer(s) and/or Director(s) (the "Debtor(s)")

Debtor(s): _____

2A. Original Claimant (the "Claimant")

Legal Name of Claimant: _____

Address

_____

_____

City _____ Prov /State _____

Postal/Zip Code _____

Name of Contact _____

Title _____

Phone # _____

Fax # _____

Email _____

2B. Assignee, if claim has been assigned

Legal Name of Assignee: _____

Address

_____

_____

City _____ Prov /State _____

Postal/Zip Code _____

Name of Contact _____

Title _____

Phone # _____

Fax # _____

Email _____

3. Amount of Claim

Name(s) of Director(s) and/or Officer(s)	Currency	Amount of Prefiling D&O Claim *(including interest, if applicable, up to and including September 28, 2019)*	Amount of Restructuring Period D&O Claim

Documentation

Provide all particulars of the Claim and all available supporting documentation, including any claim assignment/transfer agreement or similar document, if applicable, and including amount and description of transaction(s) or agreement(s) or legal breach(es) giving rise to the Claim.

Certification

I hereby certify that:

1. I am the Claimant or an authorized representative of the Claimant.
2. I have knowledge of all the circumstances connected with this Claim.
3. The Claimant asserts this Claim against the Debtor(s) as set out above.
4. All available documentation in support of this Claim is attached.

Signature: _____

Name: _____

Title: _____

Witness: _____

(signature)

_____

(print)

Dated at _____ this _____ day of _____, 2020.

Filing of Claim

This D&O Proof of Claim must be received by the Monitor on or before 5:00 p.m. (Toronto time) on June 30, 2020 by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or email at the following address:

PricewaterhouseCoopers Inc., LIT
Forever XXI ULC
18 York Street, Suite 2600
Toronto, Ontario
M5J 0B2

Attention: **Tammy Muradova**
Email: **cmt_processing@ca.pwc.com**
Fax: **(416) 814-3219**

For more information see www.pwc.com/ca/forever21, or contact the Monitor by telephone at 1-888-444-1193.

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 **FOREVER XXI ULC**

Court File No: CV-19-00628233-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

CLAIMS PROCEDURE ORDER

OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto ON M5X 1B8

Tracy C. Sandler – LSO# 32443N
Email: tsandler@osler.com

Jeremy Dacks – LSO# 41851R
Email: jdacks@osler.com

Karin Sachar – LSO# 59944E
Email: ksachar@osler.com

Tel: 416.362.2111
Fax: 416.862.6666

Lawyers for the Applicant

Court File No. CV-19-00628233-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 28th
	)	
JUSTICE HAINEY	)	DAY OF MAY, 2020
	)	

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 FOREVER XXI ULC

Applicant

MEETING ORDER

THIS MOTION, made by Forever XXI ULC ("**F21 Canada**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") for an order, *inter alia*, (a) accepting the filing of the Plan of Compromise and Arrangement pursuant to the CCAA filed by F21 Canada dated May 28, 2020 (the "**Plan**"), (b) authorizing F21 Canada to establish one class of Affected Creditors for the purpose of considering and voting on the Plan, (c) authorizing F21 Canada to call, hold and conduct a meeting of the Affected Creditors (the "**Creditors' Meeting**") to consider and vote on a resolution to approve the Plan, (d) approving the procedures to be followed with respect to the calling and conduct of the Creditors' Meeting, and (e) setting the date for the hearing of F21 Canada's motion seeking sanction of the Plan, was heard this day via video conference at Toronto, Ontario.

ON READING the Affidavit of Bradley Sell sworn May 21, 2020 (the "**Sell Affidavit**"), and the exhibits thereto and the Sixth Report of PricewaterhouseCoopers Inc., in its capacity as

Monitor (the "**Monitor**") dated May 25, 2020, and on hearing the submissions of respective counsel for F21 Canada, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavits of Service of Karin Sachar and Francesca Del Rizzo sworn May 21, 23 and 25, 2020, respectively:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. THIS COURT ORDERS that any capitalized terms used and not otherwise defined herein shall have the meaning ascribed thereto in the Plan or in the Initial Order in these proceedings dated September 29, 2019 as may be amended, restated, supplemented and/or modified from time to time (the "**Initial Order**").

PLAN OF COMPROMISE AND ARRANGEMENT

3. THIS COURT ORDERS that the Plan is hereby accepted for filing, and F21 Canada is hereby authorized to seek approval of the Plan from the Affected Creditors in the manner set forth herein.

4. THIS COURT ORDERS that F21 Canada, with the consent of the Monitor, be and is hereby authorized to make and to file a modification or restatement of, or amendment or supplement to, the Plan (each a "**Plan Modification**") prior to or at the Creditors' Meeting, in which case any such Plan Modification shall, for all purposes, be and be deemed to form part of and be incorporated into the Plan. F21 Canada shall give notice of any such Plan Modification at the Creditors' Meeting prior to the vote being taken to approve the Plan. F21 Canada may give

notice of any such Plan Modification at or before the Creditors' Meeting by notice which shall be sufficient if, in the case of notice at the Creditors' Meeting, given to those Affected Creditors present (or deemed present) at such meeting in person or by Proxy and, in the case of notice before the Creditors' Meeting, provided to those Persons listed on the service list posted on the Monitor's Website (as amended from time to time, the "**Service List**"). The Monitor shall forthwith post on the Monitor's Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

5. THIS COURT ORDERS that after the Creditors' Meeting (and both prior to and subsequent to the obtaining of any Sanction and Vesting Order), F21 Canada may at any time and from time to time, with the consent of the Monitor, effect a Plan Modification (a) pursuant to an Order of the Court or (b) where such Plan Modification concerns a matter which, in the opinion of F21 Canada and the Monitor, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction and Vesting Order or to cure any errors, omissions or ambiguities, and in either circumstance is not materially adverse to the financial or economic interests of the Affected Creditors. The Monitor shall forthwith post on the Monitor's Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

FORMS OF DOCUMENTS

6. THIS COURT ORDERS that the Notice of Creditors' Meeting substantially in the form attached hereto as Schedule "A" (the "**Notice of Creditors' Meeting**"), the Proxy substantially in the form attached hereto as Schedule "B" (the "**Proxy**") and the form of Resolution substantially in the form attached as Schedule "C" (the "**Resolution**") are each hereby approved and F21 Canada with the consent of the Monitor is authorized and directed to make such changes to such forms of

documents as it considers necessary or desirable to conform the content thereof to the terms of the Plan or this Meeting Order.

CLASSIFICATION OF CREDITORS

7. THIS COURT ORDERS that for the purposes of considering and voting on the Plan, the Affected Creditors shall constitute a single class, the "Unsecured Creditors' Class".

NOTICE OF CREDITORS' MEETING

8. THIS COURT ORDERS that the Monitor shall cause to be sent by regular pre-paid mail, courier, fax or e-mail copies of the Notice of Creditors' Meeting, the Proxy, the Resolution, the Plan, the Letter to Creditors attached as Exhibit "B" to the Sell Affidavit, and a personal meeting identification number to access the Creditors' Meeting by electronic means (each, a "**Personal Meeting Identifier**") (collectively, the "**Meeting Materials**"), as soon as practicable after the granting of this Meeting Order and, in any event, no later than June 2, 2020, to each Affected Creditor with a Known Claim (as defined in the Claims Procedure Order) (a "**Known Affected Creditor**") at their last known municipal or e-mail address as recorded in F21 Canada's books and records.

9. THIS COURT ORDERS that the Monitor shall forthwith post an electronic copy of the Meeting Materials (without a Personal Meeting Identifier) on the Monitor's Website, send a copy of the Meeting Materials (without a Personal Meeting Identifier) to the Service List and shall provide a written copy (without a Personal Meeting Identifier) to any Person upon request by such Person.

10. THIS COURT ORDERS that the Monitor shall send a Personal Meeting Identifier to any Affected Creditor who was not a Known Affected Creditor and who submits a Proof of Claim or

D&O Proof of Claim that is accepted or revised by the Monitor as a Voting Claim, at the municipal or e-mail address set out in such Affected Creditor's Proof of Claim or D&O Proof of Claim, as applicable.

11. THIS COURT ORDERS that on or before June 30, 2020, the Monitor shall cause the Notice of Creditors' Meeting to be published once in *The Globe and Mail* (National Edition). The Notice of Creditors' Meeting shall include a statement advising that any Affected Creditor wishing to attend the Creditors' Meeting who has not received a Personal Meeting Identifier should request access to the Creditors' Meeting from the Monitor.

12. THIS COURT ORDERS that the delivery of the Meeting Materials in the manner set out in paragraphs 8 and 10 hereof, posting of the Meeting Materials on the Monitor's Website in accordance with paragraph 9 hereof, and the publication of the Notice of Creditors' Meeting in accordance with paragraph 11 hereof shall constitute good and sufficient service of this Meeting Order and of the Plan, and good and sufficient notice of the Creditors' Meeting on all Persons who may be entitled to receive notice thereof or who may wish to be present (or deemed present) in person or by Proxy at the Creditors' Meeting or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons.

13. THIS COURT ORDERS that on or before July 10, 2020, the Monitor shall serve a report regarding the Plan on the Service List and promptly thereafter post such report on the Monitor's Website.

CONDUCT AT THE CREDITORS' MEETING

14. THIS COURT ORDERS that F21 Canada is hereby authorized to call, hold and conduct the Creditors' Meeting on July 21, 2020 at 10:00 a.m. for the purpose of considering, and if deemed

advisable by the Unsecured Creditors' Class, voting in favour of, with or without variation, the Resolution to approve the Plan. In light of the COVID-19 pandemic, the Monitor shall be authorized to hold the Creditors' Meeting by means of a telephonic or electronic facility using a third party service provider.

15. THIS COURT ORDERS that a representative of the Monitor, designated by the Monitor, shall preside as the chair of the Creditors' Meeting (the "**Chair**") and, subject to any further Order of this Court, shall decide all matters relating to the conduct of the Creditors' Meeting.

16. THIS COURT ORDERS that the Chair is authorized to accept and rely upon Proxies or such other forms as may be acceptable to the Chair.

17. THIS COURT ORDERS that the quorum required at the Creditors' Meeting shall be one (1) Affected Creditor with a Voting Claim present at such meeting in person or by Proxy. Any Affected Creditors who establish a communications link to the Creditors' Meeting by telephonic or electronic means shall be deemed to be present in person at the Creditors' Meeting.

18. THIS COURT ORDERS that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at the Creditors' Meeting. A Person designated by the Monitor shall act as secretary at the Creditors' Meeting.

19. THIS COURT ORDERS that if (a) the requisite quorum is not present at the Creditors' Meeting, or (b) the Creditors' Meeting is postponed by the vote of the majority in value of Affected Creditors holding Voting Claims present in person or by Proxy at the Creditors' Meeting, then the Creditors' Meeting shall be adjourned by the Chair to such time and place (which may be a telephonic or electronic facility) as the Chair deems necessary or desirable.

20. THIS COURT ORDERS that the Chair be, and he or she is hereby, authorized to adjourn, postpone or otherwise reschedule the Creditors' Meeting on one or more occasions to such time(s), date(s) and place(s) (which may be a telephonic or electronic facility), as the Chair deems necessary or desirable (without the need to first convene such Creditors' Meeting for the purpose of any adjournment, postponement or other rescheduling thereof). None of F21 Canada, the Chair or the Monitor shall be required to deliver any notice of the adjournment of the Creditors' Meeting or adjourned Creditors' Meeting, provided that the Monitor shall: (a) announce the adjournment of the Creditors' Meeting or adjourned Creditors' Meeting, as applicable; (b) post notice of the adjournment at the originally designated time on the website provided for the Creditors' Meeting or adjourned Creditors' Meeting, as applicable; (c) forthwith post notice of the adjournment on the Monitor's Website; and (d) forthwith provide notice of the adjournment to the Service List. Any Proxies validly delivered in connection with the Creditors' Meeting shall be accepted as Proxies in respect of any adjourned Creditors' Meeting.

21. THIS COURT ORDERS that the only Persons entitled to attend and speak at the Creditors' Meeting are representatives of F21 Canada and its respective legal counsel and advisors, the Monitor and its legal counsel and advisors, and all other Persons, including the holders of Proxies, entitled to vote at the Creditors' Meeting and their respective legal counsel and advisors. Any other Person may be admitted to the Creditors' Meeting on invitation of the Chair.

VOTING PROCEDURE AT THE CREDITORS' MEETING

22. THIS COURT ORDERS that the Chair shall direct a vote on the Resolution to approve the Plan and any amendments or variations thereto made in accordance with the Plan and this Meeting Order.

23. THIS COURT ORDERS that any Proxy in respect of the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) must be received by the Monitor by 10:00 a.m. on July 17, 2020, or 48 hours (excluding Saturdays, Sundays and statutory holidays) prior to any adjourned, postponed or rescheduled Creditors' Meeting (the "**Proxy Deadline**").

24. THIS COURT ORDERS that, in the absence of instruction to vote for or against the approval of the Resolution in a duly signed and returned Proxy, the Proxy shall be deemed to include instructions to vote for the approval of the Resolution, provided the Proxy holder does not otherwise exercise its right to vote at the Creditors' Meeting.

25. THIS COURT ORDERS that each Affected Creditor with a Voting Claim shall be entitled to one vote equal to the dollar value of its Affected Claim determined as a Voting Claim in accordance with the Claims Procedure Order and paragraph 29 of this Meeting Order. Unaffected Creditors shall not be entitled to vote at the Creditors' Meeting.

26. THIS COURT ORDERS that an Affected Creditor's Voting Claim shall not include fractional numbers and Voting Claims shall be rounded down to the nearest whole Canadian Dollar amount.

27. THIS COURT ORDERS that an Affected Creditor may transfer or assign the whole of its Claim prior to the Creditors' Meeting, provided that neither F21 Canada nor the Monitor shall be obligated to give notice to or otherwise deal with the transferee or assignee of such Claim as an Affected Creditor in respect thereof, including allowing such transferee or assignee of an Affected Claim to vote at the Creditors' Meeting, unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received and acknowledged by the Monitor in writing no later than 5:00 p.m. on the date that is seven (7) days prior to the Creditors' Meeting. Thereafter such transferee or assignee shall, for all purposes in

accordance with the Claims Procedure Order and this Meeting Order, constitute an Affected Creditor and shall be bound by any and all notices previously given to the transferor or assignor and steps taken in respect of such Claim. Such transferee or assignee shall not be entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such transferee or assignee to F21 Canada.

28. THIS COURT ORDERS that an Affected Creditor may transfer or assign the whole of its Claim after the Creditors' Meeting provided that F21 Canada shall not be obligated to make any distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as an Affected Creditor in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received and acknowledged by the Monitor in writing. Thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order, this Meeting Order and the Plan, constitute an Affected Creditor, and shall be bound by any and all notices previously given to the transferor or assignor and steps taken in respect of such Claim.

DISPUTED VOTING CLAIMS

29. THIS COURT ORDERS that the dollar value of any Claim of an Affected Creditor which is validly disputed for voting purposes in accordance with the Claims Procedure Order and which remains subject to adjudication for voting purposes in accordance with the Claims Procedure Order as of the date of the Creditors' Meeting (a "**Disputed Voting Claim**") shall, for the purposes of voting at the Creditors' Meeting, be the dollar value of such Disputed Voting Claim as set out in such Affected Creditor's Notice of Claim or Notice of Revision or Disallowance (each as defined in the Claims Procedure Order), as applicable, delivered by the Monitor pursuant to the Claims Procedure Order prior to the Creditors' Meeting, without prejudice to the determination of the

dollar value of such Affected Creditor's Claim for distribution purposes in accordance with the Claims Procedure Order. For greater certainty, an Affected Creditor that receives a Notice of Revision or Disallowance pursuant to paragraph 29 of the Claims Procedure Order will not have validly disputed its Claim for voting purposes unless it contacts the Monitor in advance of any Meeting to advise that such Affected Creditor disputes such Notice of Revision or Disallowance.

30. THIS COURT ORDERS that the Monitor shall keep a separate record of votes cast by Affected Creditors holding Disputed Voting Claims and shall report to the Court with respect thereto at the motion seeking approval of the Sanction and Vesting Order in respect of the Plan (the "**Sanction Motion**").

APPROVAL OF THE PLAN

31. THIS COURT ORDERS that in order to be approved, the Plan must receive an affirmative vote by the Required Majority.

32. THIS COURT ORDERS that following the vote at the Creditors' Meeting, the Monitor (or its designated representative) shall tally the votes and determine whether the Plan has been approved by the Required Majority.

33. THIS COURT ORDERS that the results of and all votes provided at the Creditors' Meeting shall be binding on all Affected Creditors, whether or not any such Affected Creditor is present or voting at the Creditors' Meeting.

SANCTION HEARING

34. THIS COURT ORDERS that the Monitor shall provide a report to the Court as soon as practicable after the Creditors' Meeting (the "**Monitor's Report Regarding the Creditors' Meeting**") with respect to:

(a) the results of voting at the Creditors' Meeting on the Resolution;

(b) whether the Required Majority has approved the Plan;

(c) the separate tabulation for Disputed Voting Claims required by paragraph 30 herein; and

(d) in its discretion, any other matter relating to the Sanction Motion.

35. THIS COURT ORDERS that an electronic copy of the Monitor's Report Regarding the Creditors' Meeting, the Plan, including any Plan Modifications, and a copy of the Sanction Motion, shall be posted on the Monitor's Website prior to the Sanction Motion.

36. THIS COURT ORDERS that in the event the Plan has been approved by the Required Majority, F21 Canada may bring the Sanction Motion before this Court on August 4, 2020, or such later date as shall be acceptable to F21 Canada and the Monitor as set by this Court upon motion by F21 Canada, seeking the Sanction and Vesting Order.

37. THIS COURT ORDERS that service of this Meeting Order by F21 Canada to the parties on the Service List, the delivery of the Meeting Materials in accordance with paragraphs 8 and 10 hereof, posting of the Meeting Materials on the Monitor's Website in accordance with paragraph 9 hereof, and the publication of the Notice of Creditors' Meeting in accordance with paragraph 11 hereof shall constitute good and sufficient service and notice of the Sanction Motion.

38. THIS COURT ORDERS that any Person intending to oppose the Sanction Motion shall (i) file or have filed with the Court a Notice of Appearance and serve such Notice of Appearance on the Service List at least five (5) days before the date set for the Sanction Motion; and (ii) serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used to oppose the Sanction Motion that are available by at least five (5) days before the date set for the Sanction Motion, or such shorter time as the Court, by Order, may allow.

39. THIS COURT ORDERS that in the event that the Sanction Motion is adjourned, only those Persons appearing on the Service List as of the date of service shall be served with notice of the adjourned date.

40. THIS COURT ORDERS that, subject to any further Order of the Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Plan and this Meeting Order, the terms, conditions and provisions of the Plan shall govern and be paramount, and any such provision of this Meeting Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

EXTENSION OF STAY PERIOD

41. THIS COURT ORDERS that the Stay Period (as defined in paragraph 14 of the Initial Order) is hereby extended until and including October 31, 2020.

GENERAL PROVISIONS

42. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the Initial Order, shall assist F21 Canada in connection with the matters described herein, and is hereby authorized and directed to take such other actions and fulfill such other roles as are contemplated by this Meeting Order. The Monitor shall work with the third

party service provider to facilitate the implementation of the Creditors' Meeting by telephonic or electronic means to the extent necessary or desirable in the sole opinion of the Monitor.

43. THIS COURT ORDERS that F21 Canada and the Monitor shall use reasonable discretion as to the adequacy of compliance with respect to the manner in which any forms hereunder are completed and executed and the time in which they are submitted and may waive strict compliance with the requirements of this Meeting Order including with respect to the completion, execution and time of delivery of required forms.

44. THIS COURT ORDERS that the Monitor may, if necessary, apply to this Court for advice and directions regarding its obligations under this Meeting Order.

45. THIS COURT ORDERS that any notice or other communication to be given under this Meeting Order by any Person to the Monitor or F21 Canada shall be in writing in substantially the form, if any, provided for in this Meeting Order and will be sufficiently given only if given by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or e-mail addressed to:

F21 Canada's Counsel:

Osler, Hoskin & Harcourt LLP
P.O. Box 50, 1 First Canadian Place
100 King Street West
Toronto, ON M5X 1B8

Attention: Tracy C. Sandler / Jeremy E. Dacks
E-mail: tsandler@osler.com / jdacks@osler.com
Fax: (416) 862-6666

The Monitor:

PricewaterhouseCoopers Inc., LIT
Monitor of F21 Canada
PWC Tower
18 York Street, Suite 2600
Toronto, ON M5J 0B2

Attention: Tammy Muradova
E-mail: cmt_processing@ca.pwc.com

Fax: (416) 814-3219

With a copy to Monitor's Counsel:
Goodmans LLP
Bay Adelaide Centre – West Tower
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Attention: Brendan O'Neill
E-mail: boneill@goodmans.ca
Fax: (416) 979-1234

46. THIS COURT ORDERS that any such notice or other communication shall be deemed to have been received: (a) if sent by prepaid ordinary mail or registered mail, on the third Business Day after mailing in Ontario, the fifth Business Day after mailing within Canada (other than within Ontario), and the tenth Business Day after mailing internationally; (b) if sent by courier or personal delivery, on the next Business Day following dispatch; and (c) if delivered by facsimile transmission or e-mail by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

47. THIS COURT ORDERS that, in the event that the day on which any notice or communication required to be delivered pursuant to this Meeting Order is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.

48. THIS COURT ORDERS that if, during any period during which notices or other communications are being given pursuant to this Meeting Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or e-mail in accordance with this Order.

49. THIS COURT ORDERS that all references to time in this Meeting Order shall mean prevailing local time in Toronto, Ontario and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on the Business Day unless otherwise indicated.

50. THIS COURT ORDERS that references to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

51. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada.

52. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Meeting Order and to assist F21 Canada, the Monitor and their respective agents in carrying out the terms of this Meeting Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to F21 Canada and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist F21 Canada and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAY 29 2020

NB

PER / PAR:

SCHEDULE "A"
NOTICE OF CREDITORS' MEETING

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF FOREVER XXI ULC

PROPOSED PLAN OF COMPROMISE AND ARRANGEMENT

NOTICE OF CREDITORS' MEETING

TO: The Affected Creditors of Forever XXI ULC ("**F21 Canada**")

NOTICE IS HEREBY GIVEN that a virtual only meeting of the Affected Creditors of F21 Canada will be held on July 21, 2020 at 10:00 a.m. by live audio webcast online at https://web.lumiagm.com/202615517 (Password: ●) (the "**Creditors' Meeting**") for the following purposes:

1. to consider and, if deemed advisable, to pass, with or without variation, a resolution (the "**Resolution**") approving the Plan of Compromise and Arrangement of F21 Canada pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") dated May 28, 2020 (as amended, restated, modified and/or supplemented from time to time in accordance with the terms thereof, the "**Plan**"); and

2. to transact such other business as may properly come before the Creditors' Meeting or any adjournment or postponement thereof.

The Creditors' Meeting is being held pursuant to an order (the "**Meeting Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on May 28, 2020.

Capitalized terms used and not otherwise defined in this Notice have the respective meanings given to them in the Plan or the Meeting Order.

The Plan contemplates the compromise of Claims of the Affected Creditors. Quorum for the Creditors' Meeting has been set by the Meeting Order as the presence, in person (by electronic means) or by Proxy, at the Creditors' Meeting of one Affected Creditor with a Voting Claim. Claims with respect to unused F21 Canada gift cards in existence as of September 29, 2019 will be treated as Unaffected Claims and holders of such claims will not be entitled to vote at the Creditors' Meeting.

In order for the Plan to be approved and binding in accordance with the CCAA, the Resolution must be approved by that number of Affected Creditors representing at least a majority in number of Voting Claims, whose Affected Claims represent at least two-thirds in value of the Voting Claims of Affected Creditors who validly vote (in person by electronic means or by Proxy) on the Resolution at the Creditors' Meeting in accordance with the Meeting Order (the "**Required Majority**"). Each Affected Creditor will be entitled to one vote at the Creditors' Meeting, which vote will have the value of such person's Voting Claim as determined in accordance with the Claims Procedure Order and the Meeting Order. If approved by the Required Majority, the Plan must also be sanctioned by the Court under the CCAA. Subject to the satisfaction of the other conditions precedent to implementation of the Plan, all Affected Creditors will then receive the treatment set forth in the Plan.

Attendance at the Creditors' Meeting

The Creditors' Meeting will be a virtual only meeting conducted by way of a live audio webcast online at https://web.lumiagm.com/202615517 (Password: ●).

Affected Creditors with accepted Voting Claims and duly appointed Proxy holders will be able to attend the virtual meeting, submit questions and vote in real time, provided they are connected to the internet and follow the instructions below:

Step 1: Log in online at https://web.lumiagm.com/202615517. We recommend that you log in at least 15 minutes before the meeting starts.

Step 2: Click "I have a Personal Meeting ID."

Step 3: Enter the Personal Meeting ID you were provided as your username.

Step 4: Enter the password: ● (case sensitive).

Step 5: Follow the instructions to view the meeting and vote when prompted.

Should legal counsel or other advisors of any Affected Creditors and/or its duly appointed Proxy holders wish to attend the meeting, such legal counsel or advisors should contact the Monitor in advance of the meeting to obtain a personal identifier number in order to enable access to the meeting.

All Known Affected Creditors will receive their Personal Meeting Identifier number (the "**Personal Meeting ID**") with the Meeting Materials sent to such Known Affected Creditors. Validly appointed Proxy holders (other than the Monitor's representatives named in the Proxy form) will be provided a separate Personal Meeting ID by the Monitor. Any Affected Creditor who wishes to attend the Creditors' Meeting and who has not received a Personal Meeting ID should contact the Monitor directly at the address listed below. If an Affected Creditor uses its Personal Meeting ID to log in to the meeting, and subsequently votes using the voting options provided during the meeting, it will be revoking any proxy it previously submitted. If an Affected Creditor does not wish to revoke a previously submitted Proxy, it may log in using its Personal Meeting ID and decline to vote at the meeting when prompted to do so.

It is the Affected Creditors' and Proxy holders' responsibility to ensure internet connectivity for the duration of the Creditors' Meeting and you should allow ample time to log in to the meeting online before it begins.

Proxy Form

An Affected Creditor may attend at the virtual Creditors' Meeting in person using the Personal Meeting ID provided to them or may appoint another person as its proxyholder by inserting the name of such person in the space provided in the form of Proxy provided to Affected Creditors by the Monitor, or by completing another valid form of Proxy. Persons appointed as proxyholders need not be Affected Creditors.

In order to be effective, proxies must be received by the Monitor by 10:00 a.m. on July 17, 2020, or 48 hours (excluding Saturdays, Sundays and statutory holidays) prior to any adjourned, postponed or rescheduled Creditors' Meeting (the "**Proxy Deadline**"). The address of the Monitor is:

PricewaterhouseCoopers Inc., LIT
Monitor of F21 Canada
18 York Street, Suite 2600
Toronto, ON M5J 0B2

Attention: Tammy Muradova
Facsimile: (416) 814-3219
E-mail: cmt_processing@ca.pwc.com

If an Affected Creditor specifies a choice with respect to voting on the Resolution on a Proxy, the Proxy will be voted in accordance with the specification so made. **In absence of such specification, a Proxy will be voted FOR the Resolution provided that the proxyholder does not otherwise exercise its right to vote at the Creditors' Meeting.**

NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved by the Required Majority at the Creditors' Meeting, F21 Canada intends to bring a motion before the Court on August 4, 2020 at 10:00 a.m. (Toronto time) at the Court located at 330 University Avenue, Toronto, Ontario M5G 1R8 or via video conference, if necessary. The motion will be seeking the granting of the Sanction and Vesting Order sanctioning the Plan under the CCAA and for ancillary relief consequent upon such sanction. Any Affected Creditor that wishes to appear or be represented, and to present evidence or arguments, at such Court hearing must file with the Court a Notice of Appearance and serve such Notice of Appearance on the Service List at least five (5) days before such Court hearing. Any Affected Creditor that wishes to oppose the relief sought at such Court hearing shall serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used at such hearing at least five (5) days before the date set for such hearing, or such shorter time as the Court, by Order, may allow. A copy of the Service List may be obtained by contacting the Monitor at the particulars set out above or from the Monitor's website set out below.

This Notice is given by F21 Canada pursuant to the Meeting Order.

You may view copies of the documents relating to this process on the Monitor's website at http://www.pwc.com/ca/forever21.

DATED this ● day of ●, 2020.

SCHEDULE "B"
FORM OF PROXY

PROXY AND INSTRUCTIONS
FOR AFFECTED CREDITORS IN THE MATTER OF THE
PROPOSED PLAN OF COMPROMISE AND ARRANGEMENT OF
FOREVER XXI ULC

MEETING OF AFFECTED CREDITORS

to be held pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on May 28, 2020 (the "**Meeting Order**") in connection with the Plan of Compromise and Arrangement of F21 Canada dated May 28, 2020 (as amended, restated, modified and/or supplemented from time to time, the "**Plan**")

on July 21, 2020 at 10:00 a.m. (Toronto time) by live audio webcast at

https://web.lumiagm.com/202615517
Password: ● (case sensitive)

and at any adjournment, postponement or other rescheduling thereof (the "**Creditors' Meeting**")

PLEASE COMPLETE, SIGN AND DATE THIS PROXY AND RETURN IT TO PRICEWATERHOUSECOOPERS INC. BY 10:00 A.M. (TORONTO TIME) ON JULY 17, 2020, OR 48 HOURS (EXCLUDING SATURDAYS, SUNDAYS AND STATUTORY HOLIDAYS) PRIOR TO ANY ADJOURNED, POSTPONED OR RESCHEDULED CREDITORS' MEETING (THE "**PROXY DEADLINE**"). PLEASE RETURN OR SEND YOUR ORIGINAL PROXY SO THAT IT IS ACTUALLY RECEIVED BY THE MONITOR ON OR BEFORE THE PROXY DEADLINE.

Please use this Proxy form if you do not wish to attend the Creditors' Meeting to vote in person but wish to appoint a proxyholder to attend the Creditors' Meeting, vote your Voting Claim to accept or reject the Plan and otherwise act for and on your behalf at the Creditors' Meeting and any adjournment(s), postponement(s) or rescheduling(s) thereof.

The Plan is included in the Meeting Materials delivered by the Monitor to all Known Affected Creditors, copies of which you have received. All capitalized terms used but not defined in this Proxy shall have the meanings ascribed to such terms in the Plan or the Meeting Order.

You should review the Plan before you vote. In addition, on May 28, 2020, the Court issued the Meeting Order establishing certain procedures for the conduct of the Creditors' Meeting, a copy of which is included in the Meeting Materials. The Meeting Order contains important information regarding the voting process. Please read the Meeting Order and the instructions sent with this Proxy prior to submitting this Proxy.

If the Plan is approved by the Required Majority and is sanctioned by the Court, it will be binding on you whether or not you vote.

APPOINTMENT OF PROXYHOLDER AND VOTE

By checking one of the two boxes below, the undersigned Affected Creditor hereby revokes all proxies previously given and nominates, constitutes and appoints either (*if no box is checked or the information listed below is not sufficiently provided, the Monitor will act as your proxyholder*):

☐ _____ (name of proxyholder)

_____ (telephone of proxyholder)

_____ (email address of proxyholder)

or

☐ a representative of PricewaterhouseCoopers Inc. in its capacity as Monitor of F21 Canada

as proxyholder, with full power of substitution, to attend, vote and otherwise act for and on behalf of the undersigned at the Creditors' Meeting and at adjournment(s), postponement(s) and rescheduling(s) thereof, and to vote the amount of the Affected Creditors' Voting Claim. Without limiting the generality of the power hereby conferred, the person named as proxyholder is specifically directed to vote as shown below. The person named as proxyholder is also directed to vote at the proxyholder's discretion and otherwise act for and on behalf of the undersigned with respect to any amendments or variations to the Plan and to any matters that may come before the Creditors' Meeting or at any adjournment, postponement or rescheduling thereof and to vote the amount of the Affected Creditor's Voting Claim as follows (*mark only one*):

☐ Vote **FOR** the approval of the Plan, or

☐ Vote **AGAINST** the approval of the Plan

Please note that if no specification is made above, the Affected Creditor will be deemed to have voted FOR approval of the Plan at the Creditors' Meeting provided the Affected Creditor does not otherwise exercise its right to vote at the Creditors' Meeting.

The Monitor will provide the proxyholder listed above with the Personal Meeting ID to enable such proxyholder to log in and vote at the Creditors' Meeting.

DATED at _____ this _____ day of _____, 20__.

AFFECTED CREDITOR'S SIGNATURE:

_____
(Print Legal Name of Affected Creditor)

_____
(Print Legal Name of Assignee, if applicable)

_____
(Signature of the Affected Creditor/Assignee or an Authorized Signing Officer of the Affected Creditor/Assignee)

_____
(Print Name and Title of Authorized Signing Officer of the Affected Creditor/Assignee, if applicable)

_____
(Mailing Address of the Affected Creditor/Assignee)

_____
(Telephone Number and E-mail of the Affected Creditor/Assignee or Authorized Signing Officer of the Affected Creditor/Assignee)

YOUR PROXY MUST BE <u>RECEIVED</u> BY THE MONITOR AT THE ADDRESS LISTED BELOW BEFORE THE PROXY DEADLINE.

PRICEWATERHOUSECOOPERS INC., LIT
MONITOR OF F21 CANADA

PWC Tower
18 York Street, Suite 2600
Toronto, ON M5J 0B2

Attention: Tammy Muradova
Facsimile: 416 814 3219
E-mail: cmt_processing@ca.pwc.com

IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT THE ADDRESS ABOVE OR VISIT THE MONITOR'S WEBSITE AT http://www.pwc.com/ca/forever21.

The foregoing special resolution is signed by all the shareholders of the Corporation. This resolution may be signed and delivered in counterpart and/or by electronic facsimile or by such other electronic means.

DATED:

LAMCO MARKETING LIMITED

By: _____
Authorized Signature
Colin G. Campbell, Director
I have the authority to bind this corporation.

B.J. Rykiss, as Tenant in Common

N.J. Deakon, as Tenant in Common

MELIA CORP.

By: _____
Authorized Signature
Mario Elia, Director
I have the authority to bind this corporation.

S.A. Hainey, as Tenant in Common

D.M. Humphrey, as Tenant in Common

M.A.L. Humphrey, as Tenant in Common

INSTRUCTIONS FOR COMPLETION OF PROXY

1. All capitalized terms used but not defined in this Proxy shall have the meanings ascribed to such terms in the Plan of Compromise and Arrangement of F21 Canada dated May 28, 2020 (the "**Plan**") or in the Meeting Order dated May 28, 2020, copies of which you have received.

2. Please read and follow these instructions carefully. Your Proxy must actually be received by the Monitor at PricewaterhouseCoopers Inc., Monitor of F21 Canada, 18 York Street, Suite 2600, Toronto, ON M5J 0B2 (Attention: Tammy Muradova), facsimile: (416) 814-3219, e-mail: cmt_processing@ca.pwc.com, prior to 10:00 a.m. (Toronto time) on July 17, 2020 or 48 hours (excluding Saturdays, Sundays and statutory holidays) prior to the time of any adjournment, postponement or rescheduling of the Creditors' Meeting (the "**Proxy Deadline**"). If your Proxy is not received by the Proxy Deadline, unless such time is extended, your Proxy will not be counted.

3. The aggregate amount of your Claim in respect of which you are entitled to vote (your "**Voting Claim**") shall be the amount as determined by the Monitor to be your Voting Claim in accordance with the Claims Procedure Order and the Meeting Order.

4. Each Affected Creditor who has a right to vote at the Creditors' Meeting has the right to appoint a person (who need not be an Affected Creditor) to attend, act and vote for and on behalf of the Affected Creditor and such right may be exercised by inserting in the space provided the name, telephone and email address of the person to be appointed, or to select a representative of the Monitor as its proxyholder. If no proxyholder is selected, or if the contact information for such proxyholder is not sufficiently provided, the Affected Creditor will be deemed to have appointed any officer of PricewaterhouseCoopers Inc., in its capacity as Monitor, or such other person as PricewaterhouseCoopers Inc. may designate, as proxyholder of the Affected Creditor, with power of substitution, to attend on behalf of and act for the Affected Creditor at the Creditors' Meeting to be held in connection with the Plan and at any and all adjournments, postponements or other rescheduling thereof. The proxyholder will be provided with a Personal Meeting ID to log in to and vote at the meeting.

5. Check the appropriate box to vote for or against the Plan. **If you do not check either box, you will be deemed to have voted FOR approval of the Plan provided you do not otherwise exercise your right to vote at the Creditors' Meeting.**

6. Sign the Proxy – your original signature is required on the Proxy to appoint a proxyholder and vote at the Creditors' Meeting. An electronic signature will be accepted and deemed to be an original with respect to any Proxy submitted by email or facsimile. If you are completing the proxy as a duly authorized representative of a corporation or other entity, indicate your relationship with such corporation or other entity and the capacity in which you are signing, and if subsequently requested, provide proof of your authorization to so sign. In addition, please provide your name, mailing address, telephone number and e-mail address.

7. Return the completed Proxy to the Monitor at PricewaterhouseCoopers Inc., Monitor of F21 Canada, 18 York Street, Suite 2600, Toronto, ON M5J 0B2 (Attention: Tammy Muradova), facsimile: (416) 814-3219, e-mail: cmt_processing@ca.pwc.com so that it is actually received by no later than the Proxy Deadline.

8. If you need additional Proxies, please immediately contact the Monitor.

9. If multiple Proxies are received from the same person with respect to the same Claims prior to the Proxy Deadline, the latest dated, validly executed Proxy timely received will supersede and revoke any earlier received Proxy. However, if a holder of Claims casts Proxies received by the Monitor dated with the same date, but which are voted inconsistently, such Proxies will not be counted. If a Proxy is not dated in the space provided, it shall be deemed dated as of the date it is received by the Monitor.

10. If an Affected Creditor validly submits a Proxy to the Monitor and subsequently attends and votes at the Creditors' Meeting by logging in using its personal identifier number, it will be revoking the earlier received Proxy. If an Affected Creditor wishes to attend the Creditors' Meeting but does not wish to revoke its Proxy, it may log in using its personal identifier number and decline to vote at the Creditors' Meeting when prompted to do so.

11. Proxies may be accepted for purposes of an adjourned, postponed or other rescheduled Creditors' Meeting if received by the Monitor by the Proxy Deadline.

12. Any Proxy that is illegible or contains insufficient information to permit the identification of the claimant will not be counted.

13. After the Proxy Deadline, no Proxy may be withdrawn or modified, except by an Affected Creditor voting in person at the Creditors' Meeting, without the prior consent of the Monitor and F21 Canada.

IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT THE ADDRESS LISTED IN THE PROXY FORM OR VISIT THE MONITOR'S WEBSITE AT http://www.pwc.com/ca/forever21.

SCHEDULE "C"
FORM OF RESOLUTION

BE IT RESOLVED THAT:

1. The Plan of Compromise and Arrangement of Forever XXI ULC ("**F21 Canada**") pursuant to the *Companies' Creditors Arrangement Act* (Canada) dated May 28, 2020 (the "**Plan**"), which Plan has been presented to this meeting and which is substantially in the form attached as Exhibit "A" to the Affidavit of Bradley Sell, sworn May 21, 2020 (as such Plan may be amended, restated, supplemented and/or modified as provided for in the Plan) be and it is hereby accepted, approved, agreed to and authorized; and

2. any director or officer of F21 Canada be and is hereby authorized and directed, for and on behalf of F21 Canada (whether under its respective corporate seal or otherwise), to execute and deliver, or cause to be executed and delivered, any and all documents and instruments and to take or cause to be taken such other actions as he or she may deem necessary or desirable to implement this resolution and the matters authorized hereby, including the transactions required by the Plan, such determination to be conclusively evidenced by the execution and delivery of such documents or other instruments or the taking of any such actions.

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 **FOREVER XXI ULC**

Court File No: CV-19-00628233-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

MEETING ORDER

OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto ON M5X 1B8

Tracy C. Sandler – LSO# 32443N
Email: tsandler@osler.com

Jeremy Dacks – LSO# 41851R
Email: jdacks@osler.com

Karin Sachar – LSO# 59944E
Email: ksachar@osler.com

Tel: 416.362.2111
Fax: 416.862.6666

Lawyers for the Applicant

IN THE SUPREME COURT OF BRITISH COLUMBIA

See para. 36

Citation: *Inca One Gold Corp. (Re)*, 2024 BCSC 1478

Date: 20240814
Docket: S243645
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

- and -

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

- and -

In the Matter of the Plan of Compromise and Arrangement of Inca One Gold Corp.

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner, Inc One Gold Corp.:	R. Clark, K.C. B. La Borie
Counsel for the Monitor, FTI Consulting Canada Inc.:	C. Brousson
Counsel for OCIM Metals and Mining SA:	P.J. Reardon L. Hiebert
Counsel for Equinox Gold Corp.:	P. Rubin
Counsel for Westmount Capital:	D. Gruber
Place and Dates of Hearing:	Vancouver, B.C. July 22 and 25, 2024
Place and Date of Ruling with Written Reasons to Follow:	Vancouver, B.C. July 25, 2024
Place and Date of Judgment:	Vancouver, B.C. August 14, 2024

INTRODUCTION

[1] On June 3, 2024, I granted an initial order in favour of the petitioner, Inca One Gold Corp. ("Inca One"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. FTI Consulting Canada Inc. was appointed as the monitor (the "Monitor").

[2] After successfully continuing these proceedings at the comeback hearing, Inca One now seeks an extension of the stay to continue its restructuring efforts and approval of interim financing to allow that to continue.

[3] Inca One's senior secured creditor, OCIM Metals and Mining SA ("OCIM") has other plans. OCIM agrees that the stay should continue, but with interim financing to be provided by it, under strict conditions that would result in OCIM having significant control in these proceedings. In addition, OCIM seeks an order to approve a sales and investment solicitation process ("SISP") immediately, which is opposed by Inca One.

[4] After hearing considerable arguments by both sides, other interested stakeholders, and the Monitor, I opted for a middle course. This course would allow Inca One more time and the interim financing that it sought. However, I also only granted Inca One a short extension – to August 26, 2024 - to provide Inca One with a further opportunity to establish to the Court and the stakeholders a more credible and realistic basis upon which to delay the implementation of a SISP.

[5] These are the reasons for my order.

BACKGROUND FACTS

[6] Inca One is a public company, based in Vancouver. It provides industrial, manufacturing and trading services through Peruvian subsidiaries in relation to gold milling facilities in Peru.

[7] Essentially, the Peruvian operations are divided into two separate holdings:

a) the “Chala One Plant”, over which OCIM has security. OCIM is owed approximately USD$10 million (over CAD$13 million); and

b) the “Kori One Plant” which is a majority interest over which Equinox Gold Corp. (“Equinox”) has security. Equinox is owed just over CAD$7.1 million.

[8] The *CCAA* filing was precipitated by Inca One’s lack of working capital, which led to a wind-down of operations such that the mines in Peru were being placed in care and maintenance.

[9] In addition, on April 8, 2024, OCIM issued a notice of default and on May 23, 2024, demanded payment and delivered a notice of intention to enforce its security.

[10] At the initial hearing (June 3, 2024), Inca One advised that it was in discussions with potential lenders to replace the OMIC facility and that it was close to finalizing a term sheet for that purpose. Given OCIM’s lack of support, replacement of the OCIM funding remains a high priority for Inca One, which Inca One considers will allow it to present a plan of arrangement to its creditors. Inca One indicated that, if replacement security was not available, it would engage in a sales process for one or both Peruvian operations.

[11] At the comeback hearing (June 13, 2024), I granted an amended and restated initial order (“ARIO”). At that time, Inca One was continuing its discussions with both OCIM and replacement lenders for OCIM’s security, if necessary. OCIM did not oppose any extension of the stay, but wanted a shorter time frame, such as two weeks. In the Monitor’s First Report dated June 12, 2024, the Monitor supported an extension of the stay to allow Inca One’s discussions with OCIM to continue on a fairly expedited basis.

[12] In the ARIO, I extended the stay by about five weeks to July 22, 2024. By this time, the post-ARIO discussions between Inca One and OCIM had not been successful and no deal could be reached.

DISCUSSION

[13] Inca One seeks the following relief:

a) An extension of the stay to October 5, 2024; and

b) Approval of interim financing from 401601 B.C. Ltd. (“401”), a shareholder of Inca One, in the amount of USD$1 million. Inca One seeks an accompanying interim lender’s charge for 401.

[14] In substance, Inca One’s initial argument that these proceedings should continue (i.e. their “germ of a plan”) was to arrange a refinancing of OCIM’s debt. On July 9, 2024, Inca One indicated it had secured a term sheet from Westmount Capital (“Westmount”) for USD$25 million, which would allow them to repay OCIM via a closing no later than September 30, 2024. Therefore, by early October 2024, Inca One planned to have repaid OCIM through the Westmount refinancing and developed a plan of arrangement for its other creditors.

[15] However, on July 17, 2024, only days before this hearing, the viability of Inca One’s “plan” was put in doubt when Westmount revealed that it did not have USD$25 million at the ready to use for the funding. Rather, Westmount intended to source funds from its network of potential investors “in the near future”. Westmount did intend to allocate 40% of its commission toward the financing.

[16] As such, the Westmount funding became substantially more uncertain than was originally thought. This was an added level of uncertainty beyond the pre-existing conditions imposed by Westmount that the refinancing was subject to due diligence (likely in Peru) and execution of legal documentation acceptable to Westmount.

[17] This more recent news from Westmount has caused some consternation among the stakeholders. Equinox expressed concern. The Monitor also expressed concern as to the amount, timing and terms of the Westmount refinancing.

[18] The most concern arose in OCIM's corner. In response, OCIM presented its own views as to the outcome of this application, along with forcefully asserting to Inca One that it wished to be repaid as soon as possible. OCIM seeks approval of its own interim financing on terms, which I will discuss below. In addition, as a condition of the interim financing, OCIM requires approval of a SISP to commence immediately, which is to be conducted by the Monitor under certain expanded powers in the ARIO. OCIM also seeks an extension of the stay to October 31, 2024.

[19] The issues to be addressed are fundamentally around how these *CCAA* proceedings should progress:

a) which interim financing should be approved?

b) should the SISP be approved and if so, when? and

c) what length of stay is appropriate?

Interim Financing / SISP

[20] All parties and the Monitor agree that interim financing is necessary for Inca One to continue funding its operations and restructuring efforts, in both the short and long term. In that sense, a detailed analysis of the s. 11.2 factors in the *CCAA* is not necessary.

[21] The question is - who should be the interim lender?

[22] 401's financial proposal would provide USD$1 million at an interest rate of 20% per annum. Drawdown fees (5%) and standby charge (2%) fees apply. The effective annualized rate is 36%, which the Monitor notes is higher than the normal range, but driven by the short term loan and nature of the collateral.

[23] Warrants are due to 401 if there is a re-listing of Inca One on the TSX Venture Exchange, although there is likely little, if any value in such warrants. The 401 financing is due upon the earlier of a demand, implementation of a plan, termination of the *CCAA* proceedings, or November 30, 2024.

[24] OCIM's financial proposal would provide CAD$2 million to fund ordinary course expenditures and administration costs in the *CCAA* proceedings in minimum draw amounts. The effective annualized rate is 22%, which the Monitor notes is within the normal range of other interim financings of a similar nature and scale. The OCIM financing is due upon certain events, such as the earlier of a demand, implementation of a plan, termination of the *CCAA* proceedings by the lifting or setting aside of the stay or ARIO, or October 31, 2024.

[25] No significant difference in the financial terms as between the two proposals was apparent. Inca One's counsel has calculated that the OCIM financing is slightly cheaper, by approximately $35,000 into fall 2024.

[26] However, the "package deal" presented by OCIM – which includes the SISP and the Monitor's expanded powers - requires a consideration of the terms upon which the interim financing is to be provided and the proposed Monitor powers, as I will discuss in more detail below.

[27] OCIM also argues that the SISP should start now since the Westmount refinancing is uncertain.

[28] Equinox, the secured creditor of the Kori One Plant, is supportive of OCIM, including the OCIM interim financing and the immediate implementation of the SISP to be run by the Monitor. Having said that, my sense is that Equinox is also generally supportive of these proceedings, as a major investor and creditor of Inca One. Overall, Equinox supports a "dual track" approach in terms of the SISP that hedges the Westmount "bet" (my word) if it does not succeed.

[29] OCIM suggests that Inca One can continue its restructuring efforts, including the Westmount refraining, within the SISP.

[30] The Monitor indicates that it is prepared to accept the expanded role proposed by OCIM should the Court grant that order.

[31] There is no dispute that SISPs are regularly approved by this Court pursuant to the court's general statutory jurisdiction in s. 11 of the *CCAA* to grant orders that are appropriate.

[32] SISPs are granted in a variety of circumstances which will inevitability dictate whether they are appropriate and if so, when. In *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (S.C.), Justice Morawetz, as he then was, discussed that SISPs can be approved in the absence of a plan of arrangement. He set out factors that may be considered:

> [49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:
>
> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) is there a better viable alternative?

[33] SISPs are commonly granted in *CCAA* proceedings when a "true" reorganization of a debtor's existing assets is not feasible and a sale or sales of a debtor's assets is warranted to maximize value for the benefit of the entire stakeholder group: *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 [*Walter Energy* #1] at paras. 20–23; *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10 at paras. 42–46; *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.,* 2021 BCCA 382 at paras. 63–67.

[34] Often, implementation of a SISP is not controversial. If a SISP is to be granted, various considerations arise in relation to the proposed SISP, as I discussed in *Walter Energy #1* at para. 20:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[35] In respect of any proposed SISP, the factors discussed in s. 36(3) of the *CCAA* are also commonly considered.

[36] Similarly, courts in *CCAA* proceedings can and have granted a monitor expanded powers that go well beyond simply providing oversight of the debtor's activities: *8640025 Canada Inc. (Re)*, 2018 BCCA 93 at para. 49. Such powers can be granted by the court pursuant to s. 23(1)(k) of the *CCAA* or pursuant to s. 11 of the *CCAA*. Again, any such orders must be appropriate in light of what is needed in the circumstances, when considering the objectives of the *CCAA*.

[37] Those powers may include running a SISP, particularly when the monitor (or another court officer) has expertise in that respect that the debtor's management does not, or even perhaps when the debtor's management is no longer in place.

[38] OCIM cites various decisions of this Court where a monitor (or other court officer) has been granted expanded powers, including to run a SISP: *Walter Energy #1*; *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 [*Walter Energy #2*]; *North American Tungsten Corporation Ltd. (Re)*, 2016 BCSC 12; and *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 [*MEC*].

[39] However, each of the above cases presented significantly different facts that those before me. In *Walter Energy #1*, all of the directors had resigned or were about to resign (paras. 27–30). Similarly, in *Walter Energy #2*, the monitor was needed to run a claims process and take control of the debtor's affairs after a sale (para. 95). In *North American Tungsten*, the officers and directors had resigned (paras. 4–5). Finally, in *MEC*, management had resigned after a sale (para. 9).

[40] At a certain theoretical level, I have no difficulty with OCIM's submissions in that the proposed SISP process could be approved as appropriate. It appears to be a reasonable, fair and transparent process, designed to maximize value for the benefit of the stakeholders, consistent with the s. 36(3) factors in the *CCAA*. The process would involve a start of sales efforts on July 22, 2024, potentially leading to a closing date no later than October 31, 2024.

[41] The contentious issue is whether the SISP should be implemented *now* and before Inca One has an opportunity to develop the Westmount opportunity and determine if the refinancing can be achieved.

[42] As OCIM readily acknowledges, a full repayment of its debt would be welcomed, as envisioned through the Westmount transaction. This would obviate the need for OCIM's further involvement in these proceedings or any plan. Inca One seemingly accepts that further negotiations with OCIM would not be fruitful, even with the benefit of the stay in these *CCAA* proceedings, and that it is imperative that OCIM be repaid as soon as possible by a refinancing with a more supportive lender.

[43] However, OCIM does not propose a termination of these proceedings. OCIM is content to allow them to continue, on certain terms and conditions. As the saying goes, the devil is in the details. That leads me to a consideration of OCIM's terms or conditions under which it will provide the interim financing in the context of its further support of these proceedings.

[44] The conditions in the OCIM interim financing commitment letter include:

a) any order extending the ARIO must be on terms satisfactory to OCIM, acting reasonably;

b) Inca One cannot bring any motion to amend, vary or stay the ARIO or the stay extension or the order to enhance the Monitor's powers which may materially adversely affect OCIM, as determined by OCIM in its sole discretion;

c) one "maturity date" is when a plan of compromise or arrangement, acceptable to OCIM, and approved by the creditors and the Court, has been implemented;

d) during the term of the interim financing, Inca One must consult with OCIM in connection with any plan of compromise or arrangement to be

advanced, and any plan must be satisfactory to and subject to the approval of OCIM; and

e) an "event of default" includes the filing by Inca One of any motion or proceedings in the *CCAA* proceedings or otherwise (presumably without OCIM's consent) unless any order granted provides for full repayment of OCIM's debt.

[45] The conditions in OCIM's proposed order for the Monitor's expanded powers include the Monitor essentially assuming full control of Inca One's assets, operations and overall decision-making. This would include the Monitor:

a) assuming full control of Inca One's assets;

b) engaging the services of persons to assist in the restructuring or causing Inca One to engage, retain or terminate the services of any officer, employee, consultant, agent, representative or advisor;

c) directing Inca One's receipts and disbursements and implementing controls as is deemed necessary;

d) executing agreements in respect of Inca One's property, including exercising shareholder rights of Inca One (i.e. in relation to the subsidiaries who own the Peruvian assets);

e) engaging with, negotiating, agreeing or even settling any creditor or other claim against Inca One; and

f) prohibiting Inca One's directors and officers from having any further communications with any of Inca One's creditors or other stakeholders, except as approved by the Monitor.

[46] OCIM argues that these measures are appropriate because Inca One's management is doing a "poor job" and OCIM has lost faith in management's ability to proceed in the restructuring. This submission seemingly comes from the interim

financing factors set out in s. 11.2(4)(b) and (c) of the *CCAA* which require that the Court consider how the debtor is to be managed during the proceeding and whether the debtor's management has the confidence of its major creditors.

[47] The difficulty with OCIM's submission is that there is no evidence before me to support its contention as to Inca One's lacking management capabilities. The Monitor makes no mention in its Second Report dated July 19, 2024 of any concerns regarding Inca One's management being able to continue appropriately in the event of either interim financing being granted and the stay extended into fall 2024.

[48] Further, the Monitor expressly states that Inca One, through its existing management, is acting in good faith and with due diligence. No evidence exists to suggest otherwise.

[49] In its Second Report, the Monitor emphasizes the uncertainty of the Westmount refinancing and notes that the OCIM interim financing is supported by both OCIM and Equinox, the major secured creditors.

[50] The Monitor, somewhat tentatively in my view, recommends that the Court accept OCIM's proposal, including the enhancement of its powers and commencement of the SISP. However, the Monitor then immediately comments that, if OCIM is prepared to advance the interim financing on terms that allow Inca One's management to retain certain governance and restructuring powers over the stay extension, the Monitor is supportive of that scenario. As with OCIM, the Monitor is of the view that, even with this shift in the proceedings, Inca One could continue its efforts regarding the Westmount refinancing under the "dual track" approach.

[51] Over the course of this hearing, Westmount's position in relation to the competing interim financing proposals, the SISP and OCIM's proposal to invest the Monitor with enhanced powers has been somewhat elusive.

[52] On the first day, Westmount's counsel indicated that he did not have instructions to respond to OCIM's proposal. He did confirm that Westmount's funding efforts were still underway. Counsel also indicated that Westmount could decide to

proceed with the refinancing only if no SISP was being undertaken at the same time, since a sale of the assets would eliminate the need for such refinancing.

[53] On the second day of this application, Westmount's counsel came armed with instructions. Counsel indicated that Westmount would prefer that no SISP be implemented but, if that was required, Westmount would "live with it".

[54] In that event, both secured creditors – OCIM and Equinox – continued to support a parallel course that would involve the commencement of the SISP, while Inca One pursued the Westmount transaction. This position was largely based on their conclusion that, without the SISP, there was little hope of repayment and that the Westmount deal was, at this point, only a "hail Mary" not sufficiently credible to stand as the only option being pursued.

[55] My first observation is that this Court, and others across Canada, have been generally unreceptive to efforts by major creditors to insert controls into the proceeding that are not appropriate. This is particularly true of interim financing proposals which have been rejected for that reason: *Quest University Canada (Re)*, 2020 BCSC 318 at paras. 97–100; *Tacora Resources Inc. (Re)*, 2023 ONSC 6126 at paras. 123–125; *Essar Steel Algoma Inc. et al Re*, 2017 ONSC 3331 at paras 19–21; and *Essar Steel Algoma Inc. (Re*), 2017 ONSC 4652 at para. 9(e). SISPs are another source of such attempts by creditors to indirectly and inappropriately seek a benefit through the proceedings.

[56] Inca One argues, I think correctly, that OCIM's conditions of financing, as above, would result in the course and control of these proceedings being wrested away from it and would effectively turn this proceeding into a receivership.

[57] I would add another concern. My interpretation of OCIM's conditions are that they are designed, to a degree, to remove the discretion of the Court in terms of what orders may be granted in this proceeding, including in relation to its own court officer, the Monitor. In my view, such controls cannot stand as appropriate in the

sense that they would denude or hamstring this Court of the means by which it exercises its statutory mandate under the *CCAA*.

[58] In my view, OCIM's conditions are also contrary to the overall policy objectives of the *CCAA*. The oft-quoted words from *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 are apt here:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> [71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 1992 CanLII 2174 (BC CA), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.
>
> [Emphasis added.]

[59] OCIM and Equinox do not advance any "doomed to fail" argument in terms of Inca One's prospects.

[60] OCIM's proposal though does have the real prospect of lessening Inca One's chance to achieve a successful restructuring. Having said that, I agree with the caution expressed by both OCIM and Equinox, supported by the Monitor, that the Westmount transaction at present is tentative at best and may not result in any transaction at all, while time is wasting.

[61] Both OCIM and Equinox refer to potential prejudice they may face arising from any further delay in implementing the SISP, although the extent of and nature of that prejudice is, as yet, unclear.

[62] I take Inca One's counsel's submissions at this application as essentially acknowledging that Inca One's options to restructure are narrowing as time marches on and that the Westmount deal, such as it is, stands as the only result that may avoid a sale of the assets, either as a going concern, or by a liquidation.

[63] In the circumstance, I have concluded that the implementation of a SISP is not warranted at this time. Inca One continues to pursue the Westmount transaction and, in my view, should be given more time to do so, while avoiding any negative repercussions that may be visited upon those funding efforts arising from a parallel SISP.

[64] I also conclude that the 401 interim financing should also be approved rather than OCIM's proposal. Since I have rejected a SISP at this time, the OCIM proposal falls away in any event. However, even without that consequence, I would have rejected OCIM's onerous and inappropriate conditions. They effectively strangle Inca One's management in terms of pursing its restructuring options, without any justification. They also tie the Court's hands in terms of its duty to supervise these proceedings, which is wholly objectionable.

Length of Stay

[65] Having granted the above relief, the question then becomes what length of time should Inca One be granted?

[66] The "breathing room" that is normally afforded in a *CCAA* proceeding is intended to allow a debtor the time and flexibility to carry out a supervised restructuring of an organized sales process: *North American Tungsten Corporation Ltd.*, 2015 BCSC 1376 at para. 25; *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359 at paras. 35 and 118, citing *Timminco Limited (Re)*, 2012 ONSC 2515 at para. 15.

[67] However, such “breathing room” is not unlimited and the length of the stay must be considered in the context of the facts of each case, with a view to the statutory objectives of the *CCAA*, in terms of what is appropriate.

[68] Again, the tentative nature of the Westmount opportunity must be balanced against the real and present interests of the entire stakeholder group. A SISP remains a viable option to maximize value for that group.

[69] I conclude that a relatively short stay should be granted to allow Inca One an opportunity of advancing the Westmount transaction and to give Inca One some further, albeit limited, time to provide the Court and the stakeholders with more substance about the progress of the funding and the feasibility of that transaction succeeding at the end of the day. Without that further evidence, lending further credence to Inca One’s suggestion that it should be afforded more time to pursue the refinancing, it may be that the option of implementing a parallel SISP will be a more reasonable path to be followed.

CONCLUSION

[70] The 401 interim financing is approved with a corresponding interim lender’s charge to secure any amounts advanced. The stay is extended to August 26, 2024, when the next hearing is to take place.

“Fitzpatrick J.”

CITATION: In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald, Imperial Tobacco and Rothmans, 2023 ONSC 2347
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-CL and CV-19-616779-00CL
DATE: 20230623

ONTARIO

See paras. 4, 7, 14

SUPERIOR COURT OF JUSTICE

BETWEEN:	)
	)
In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended	) *James Bunting and Maria Naimark*, Counsel for the Moving Party, the Heart and Stroke Foundation of Canada in connection with its motion for leave to appoint Tyr LLP as representative counsel for the Future Tobacco Harm Stakeholders
AND	)
In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald Corp.	) *Robert Thornton and Leanne Williams*, Counsel for JTI-Macdonald Corp.
AND	)
In the Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited	) *Deborah Glendinning, Craig Lockwood, Marc Wasserman and Marleigh Dick*, Counsel for Imperial Tobacco
AND	) *James Gage, Heather Meredith and Natasha Rambaran*, Counsel to Rothmans, Benson & Hedges Inc.
In the Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.	) *Linc Rogers and Pamela Huff*, Counsel for Deloitte Restructuring Inc. in its capacity as Monitor of JTI-Macdonald Corp.
	) *Natasha MacParland, Chanakya Sethi, Rui Gao and Benjamin Jarvis*, Counsel for FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited
	) *Jane Dietrich*, Counsel for Ernst & Young Inc. in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc.
	) *Avram Fishman and Mark Meland*, Counseil québécois sur le tabac et la santé,

) Jean-Yves Blais and Cécilia Létourneau
) (Quebec Class Action Plaintiffs)
)
) *Robert Cunningham*, Counsel for the
) Canadian Cancer Society
)
) *Maria Konyukhova*, Counsel for British
) American Tobacco p.l.c., B.A.T.
) Industries p.l.c. and British American
) Tobacco (Investments) Limited
)
) *Amanda McInnis*¸ Counsel for Grand
) River Enterprises Six Nations Ltd.
)
) *Jacqueline Wall*, Counsel for His Majesty
) the King in Right of Ontario
)
) *Adam Slavens*, Counsel for JT Canada
) LLC Inc. and PricewaterhouseCoopers
) Inc. in its capacity as receiver of JTI-
) Macdonald TM Corp.
)
) *Alex Fernet Brochu*, Counsel for La
) Nordique compagnie d'assurance du
) Canada
)
) *Kate Boyle and Raymond Wagner*,
) Representative Counsel for the Pan-
) Canadian Claimants
)
) *Heather Fisher and Nicholas Kluge*,
) Counsel for Philip Morris International
) Inc.
)
) *Guneev Bhinder*, Counsel for Province of
) Québec
)
) *Jeff Leon*, Counsel for the Provinces of
) British Columbia, Manitoba, New
) Brunswick, Nova Scotia, Prince Edward
) Island and Saskatchewan, in their
) capacities as plaintiffs in the HCCR
) Legislation claims
)
) *Patrick Flaherty and Bryan McLeese*,
) Counsel for R.J. Reynolds Tobacco

) Company and R.J. Reynolds Tobacco
) International Inc.
)
) *Douglas Lennox*, Counsel for
) representative plaintiff, Kenneth Knight,
) in the certified British Columbia class
) action, *Knight v. Imperial Tobacco*
) *Canada Ltd.*, Supreme Court of British
) Columbia, Vancouver Registry No.
) L031300
)
) *William V. Sasso*, Counsel for the Ontario
) Flue-Cured Tobacco Growers' Marketing
) Board
)
) *Jonathan Lisus and Nadia Campion*,
) Counsel for the court-appointed Mediator,
) The Honourable Mr. Winkler, O.C., O.On,
) K.C.
)
)
) **Heard: April 14, 2023**
)
)

MCEWEN, J.

REASONS FOR DECISION

[1] The Heart and Stroke Foundation of Canada ("HSF") seeks leave to bring a motion to appoint Tyr LLP ("Tyr") as representative counsel for the Future Tobacco Harm Stakeholders ("FTH Stakeholders") in the within Applications.

[2] The motion is opposed by the three Monitors: Deloitte Restructuring Inc. in its capacity as court-appointed Monitor of JTI-Macdonald Corp. ("JTIM"); FTI Consulting Canada Inc. it its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial"); and Ernst & Young Inc. in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc. ("RBH") (collectively the "Monitors"). The Province of Québec supports the Monitors. Neither JTIM, Imperial, RBH nor any other stakeholder take a position on this motion for leave. For the reasons that follow, I dismiss the HSF's motion.

BACKGROUND

[3] In March 2019, JTIM, Imperial and RBH (collectively the "Applicants") filed for protection pursuant to the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985,

c. C-36 (the "*CCAA*"). They sought, amongst other things, a resolution of several significant current and future litigation claims.

[4] I have been case-managing these three separate, but co-ordinated, Applications since that time (the "CCAA Proceedings"). The CCAA Proceedings are enormously complex. They involve multiple, significant tobacco-related actions brought against the Applicants as well as a number of potential tobacco-related claims that are currently unasserted or unascertained. These include ongoing class action proceedings as well as the outstanding judgment of the Court of Appeal of Quebec that largely upheld an earlier trial decision and awarded approximately $13.5 billion to the Quebec class action plaintiffs. Additionally, there are numerous ongoing proceedings involving government-initiated litigation.

[5] In April 2019, shortly after the CCAA Proceedings were initiated, I appointed the former Chief Justice for Ontario, The Honourable Warren K. Winkler O.C., O.Ont, K.C. (the "Court-Appointed Mediator") to mediate a global settlement of all claims against the Applicants, both current and future (the "Mediation"). Pursuant to the Appointment Order, the Court-Appointed Mediator is empowered to, amongst other things, adopt a process which in his discretion, he considers appropriate to facilitate negotiation of a global settlement, as well as deciding which stakeholders or other persons, if any, he considers appropriate to consult as part of the Mediation.

[6] It is noteworthy that in September 2019, the Canadian Cancer Society ("CCS") brought a motion seeking an order allowing it to participate in the Mediation. Amongst other things, the CCS argued that although it was not a creditor, it was an important public health stakeholder in the CCAA Proceedings. Therefore, it had a direct financial interest in the CCAA Proceedings, since any settlement would impact the financial resources to be devoted to patients, education and research to reduce tobacco use. In furtherance of its argument, the CCS submitted that it was well-positioned to advance tobacco control measures for inclusion in a settlement. The HSF provided a letter supporting the CCS's motion, while noting that it did not intend to bring a motion before the Court to participate in the CCAA Proceedings.

[7] I allowed the CCS limited participation in the CCAA Proceedings, but I did not allow it to participate in the Mediation. While I accepted that the CCS was a social stakeholder, I found that it did not have a direct financial interest in the CCAA Proceedings as it was neither a creditor nor a debtor. While I also accepted that the CCS had extensive experience as a health charity, and it was open to it to liaise with the government and other stakeholders outside of the Mediation, I had given the Court-Appointed Mediator broad discretion to shape the Mediation process. This included broad discretion to consult with a wide variety of persons or entities that he considered appropriate. I further noted that it was important to allow the Court-Appointed Mediator, who has vast experience in this area, the ability to carry on with the flexibility outlined in my Appointment Order in these very complicated and significant CCAA Proceedings.

[8] As part of my decision concerning the CCS's limited participation in the CCAA Proceedings I ordered that, if the CCS wished to initiate its own motion, it required leave that could be requested in writing, on notice to the Applicants and other stakeholders.

[9] Thereafter, in December 2019, the Monitors brought a motion seeking advice and direction with respect to orders appointing representative counsel regarding the unasserted and

unascertained claims. They proposed that representative counsel – the law practice of Wagner & Associates Inc. ("Wagners") – advance claims on behalf of individuals, with some limited exceptions that do not apply to the within motion, who have asserted claims or may be entitled to assert claims for Tobacco-Related Wrongs (respectively the "TRW Claims" and "TRW Claimants").

[10] As I noted in my decision dated December 6, 2019 (the "December Decision"), the thrust of the motion was that the multiplicity of actions against the Applicants across Canada did not provide comprehensive representation for all individuals in the CCAA Proceedings. It was therefore necessary to have representation for all the TRW Claimants so that they could be properly represented with respect to the primary goal of the CCAA Proceedings: a pan-Canadian global settlement. This would benefit the Applicants, the TRW Claimants and all stakeholders. I granted the relief sought by the Monitors and ordered that Wagners, as an experienced class action litigation firm, was well-qualified to act.

[11] The Order appointing Wagners provided the firm with a broad mandate to represent the TRW Claimants defined in Schedule "A" to the Order. Of importance to the within motion is the following partial definition of TRW Claimants set out in Schedule "A":

> "TRW Claimants" means **all individuals** (including their respective successors, heirs, assigns, litigation guardians and designated representatives under applicable provincial family law legislation) **who assert or may be entitled to assert a claim or cause of action as against one or more of the Applicants**, the ITCAN subsidiaries, the BAT Group, the JTIM Group or the PMI Group, each as defined below, or persons indemnified by such entities, **in respect of**:
>
> > (i) the development, manufacture, importation, production, marketing, advertising, distribution, purchase or sale of Tobacco Products (defined below),
> >
> > (ii) **the historical or ongoing use of or exposure to Tobacco Products**; or
> >
> > (iii) any representation in respect of Tobacco Products,
>
> [Emphasis added.]

[12] Over the past four years, the Mediation has been conducted by the Court-Appointed Mediator. Pursuant to the provisions of the Order Setting out the Attendance at Mediation Protocol, the Court-Appointed Mediator has continued to designate and require the attendance of persons or entities that he deems necessary as well as excluding persons or entities that he does not believe to be necessary.

[13] The Court-Appointed Mediator, in accordance with the Court-Appointed Mediator Communication and Confidentiality Protocol Endorsement continues to update the Court on the Mediation process.

[14] At the recent Stay Extension Motion I granted a further six-month stay to September 29, 2023. I noted in my Endorsement that the Mediation continues to progress and the Applicants and the stakeholders are optimistic that a resolution of these extremely significant and complicated CCAA Proceedings is in sight.

[15] Consistent with my decision concerning motions brought by the CCS, the HSF sought leave to bring this motion to act as the representative plaintiff for FTH Stakeholders. By way of my February 14, 2023 Endorsement, I ordered, over the objections of the HSF, that the leave motion be heard in advance of the motion itself, assuming leave was granted.

THE TEST FOR LEAVE

Position of the Parties

[16] The HSF and the Monitors disagree as to what test for leave should be applied in this case.

[17] The HSF submits that this Court has broad discretion pursuant to s. 11 of the *CCAA* to manage the CCAA Proceedings. Generally, s. 11 provides this Court with the jurisdiction to make any order that it considers appropriate in the circumstances.

[18] The HSF therefore submits that, based on s. 11, this Court has the jurisdiction to appoint representatives on behalf of a stakeholder in a *CCAA* matter. It further submits that the factors to be considered by the Court are those set out in *Canwest Publishing Inc. (Re)*, 2010 ONSC 1328, 65 C.B.R. (5th) 152, at para. 21:

- The vulnerability and resources of the group sought to be represented.
- Any benefit to the companies under *CCAA* protection.
- Any social benefit to be derived from representation of the group.
- The facilitation of the administration of the proceedings and efficiency.
- The avoidance of a multiplicity of legal retainers.
- The balance of convenience and whether it is fair and just including to the creditors of the estate.
- Whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order.
- The position of other stakeholders and the Monitor.

[19] In the context of the motion before me, the HSF argues that the most significant factor for this Court to consider is whether there appears to be an unrepresented interest that is appropriate for representation within the CCAA Proceedings. If this is the case, the HSF submits that this

Court ought to grant leave unless there are "exceptional factors or circumstances" that outweigh the substantial value and importance of having a valid and interested constituency represented within the CCAA Proceedings.

[20] The HSF concedes that this test has not previously been applied by any court; however, given the unique circumstances of this case and the provisions of the *CCAA*, it is a reasonable test and ought to be applied.

[21] The Monitors disagree.

[22] First, they submit that the HSF, as a stakeholder seeking leave, bears the onus to persuade the Court that leave ought to be granted: see *Village Green Lifestyle Community Corp., Re* (2007), 27 C.B.R. (5th) 199 (Ont. S.C.), at para. 12.

[23] Further, the Monitors argue that although there is no specific test for leave to bring a motion, whether under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 or in the insolvency context, general insolvency principles should guide this Court, including the baseline considerations that a court should always bear in mind when exercising *CCAA* authority[1] and the test under the *CCAA* for "comeback" relief.

[24] In the insolvency context, the Monitors further rely upon the decision in *Century Services Inc.* wherein the Supreme Court of Canada noted, at para. 59, that judicial discretion must be exercised in furtherance of the *CCAA*'s purposes.

[25] They also submit that, as outlined by the Supreme Court of Canada in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 49, citing *Century Services Inc.*, at paras. 69, 70, the aforementioned fundamental principle underlines three basic considerations that a supervising judge must keep in mind when addressing any request for relief:

(i) whether the order sought is "appropriate in the circumstances";

(ii) whether the party seeking relief has been acting "in good faith"; and

(iii) whether the party seeking relief has been acting "with due diligence".

[26] Building upon those principles, the Monitors submit that the first branch of the test set out in *Callidus*, i.e., whether the order sought is appropriate in the circumstances, ought to be expanded to include the considerations on the test for comeback relief. They therefore propose the following test for leave should be applied:

(i) whether the party seeking relief has been acting in good faith by bringing the motion;

(ii) whether the party seeking relief has been acting with due diligence;

[1] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70.

(iii) whether there has been a change in circumstances that would necessitate the variance to existing orders; and

(iv) whether the proposed variance will prejudice the progress of the CCAA Proceedings.

[27] The Monitors say the comeback relief test is appropriate because the HSF asks the Court to vary two of its earlier orders. The first being the Amended and Restated Initial Orders (the "ARIOs") wherein the Monitors submit that the HSF seeks to add new parties to the Mediation. The second being the Representative Council Order wherein the HSF seeks to appoint Tyr as additional representative counsel.

[28] The comeback relief test applies when an interested party applies to a *CCAA* court to vary an initial order. The factors that guide the Court's analysis in this respect are:

(i) "recourse through the comeback clause is available when circumstances change", meaning that recourse is unavailable when there are no changed circumstances;

(ii) "comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself"; and

(iii) comeback relief "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question."

See *Canada v. Canada North Group Inc.*, 2017 ABQB 550, 60 Alta. L.R. (6th) 103, at paras. 50, 56, 68, aff'd 2019 ABCA 314, 93 Alta. L.R. (6th) 29, aff'd 2021 SCC 30, 28 Alta. L.R. (7th) 1.

[29] With that background, the Monitors proposed the four-part test set out in para. 26 above. In relying upon the aforementioned test, the Monitors highlight that a leave test precludes any analysis of the merits of the ultimate motion and the merits should not be addressed on a motion for leave.

Analysis

[30] I prefer the leave test put forth by the Monitors and will employ that test in these Reasons.

[31] As can be seen from the above, the HSF and the Monitors agree that this Court has broad discretion to control and manage the CCAA Proceedings. They diverge, however, as to how the test ought to be applied.

[32] The HSF focuses on the factors set out in granting a representative order in *Canwest* and submits that while the Court did not mandate the application of any specific test, the most significant factor is whether there appears to be an unrepresented interest that is appropriate for representation. The HSF then goes further to say that if this is the case, the Court should grant leave unless there are exceptional factors or circumstances that outweigh the substantial value and importance of having a valid and interested constituency represented in the CCAA Proceedings. The Monitors, on the other hand, while agreeing that there is no specific test for leave, focus on general insolvency principles. They rely on the aforementioned three-part test in *Callidus*, which

they have expanded upon, that sets out baseline considerations in which the applicant bears the burden of proof.

[33] In reviewing the aforementioned case law and the submissions of the parties, I disagree with the HSF that where there is an unrepresented interest, and employing the other factors in *Canwest*, the Court should grant leave unless there are exceptional factors or circumstances. This flips the onus and there is no authority for not only shifting the onus, but also finding that exceptional factors or circumstances are required.

[34] I am of the view that at a leave motion in these CCAA Proceedings that the four-part test set out by the Monitors ought to be applied. I base this conclusion primarily on the fact that, as mentioned above, this is a motion for leave, not the motion itself. The ultimate merits of the motion should not be considered at this stage.

[35] This is precisely where the two tests diverge, and why I prefer the Monitors' test. The Monitors' test speaks to procedural factors that this Court ought to consider. That is appropriate on a motion for leave.

[36] The Monitors' test focuses on the procedural considerations on a motion for leave. For example, whether existing orders may be varied; whether the proposed variance will prejudice parties; and whether parties have exercised due diligence are all procedural considerations that do not stray into a merits analysis.

[37] Finally, the Monitors' test is consistent with the Supreme Court of Canada's jurisprudence on *CCAA* matters. The Supreme Court of Canada is clear in that the factors set out in *Callidus* are to be followed by judges when exercising their discretionary authority.

[38] On the other hand, the test proposed by the HSF blends these two considerations. In this regard, parts of the test stray into an analysis of the ultimate merits of the proposed motion. Such factors will be considered if leave on the motion is granted. It is also worth pointing out that the Court in *Canwest*, the primary authority relied upon by the HSF, was considering the motion itself for whether the representatives should be appointed, and not whether leave should be granted to bring the motion. Whether the Court should grant leave to bring the motion is the focus of the analysis here.

[39] It is also worth pointing out that procedural aspects of the HSF's test set out in *Canwest* overlap with the Monitors' test. Factors like the balance of convenience and the facilitation of the administration of the proceedings and efficiency are still generally considered under the Monitors' test.

[40] Further, in my view, when determining whether an order granting leave is appropriate in the circumstances, I must consider whether the existing ARIOs ought to be varied to add a new stakeholder to the Mediation and whether the Representative Counsel Order ought to be varied to add Tyr. This requires an examination of the nature of the FTH Stakeholders and whether it is appropriate to appoint Tyr as representative counsel on their behalf and insert them into the Mediation, over four years after the Mediation has begun and in its latter stages.

[41] It is with these factors in mind that I will conduct my analysis below.

APPLICATION OF THE TEST FOR LEAVE

The Position of the HSF

[42] In support of its motion for leave, the HSF submits that it is important for this Court to understand that it is not seeking leave to be added as a party to or to participate in the CCAA Proceedings. Instead, the HSF submits that this is simply a motion for leave to bring a motion for a representation order over a group of individuals, the FTH Stakeholders, who have a direct interest in the outcome of this proceeding and who are unrepresented. It is not proposed that the HSF will represent this group; instead, the FTH Stakeholders will be represented by Tyr which will receive advice from an independent, *pro-bono* committee.

[43] In this regard, the HSF makes three primary submissions.

[44] First, it submits that the FTH Stakeholders are a significant stakeholder group that is unrepresented in the Mediation. In this regard, the HSF submits that Wagners, in representing the interests of the TRW Claimants as defined above, does not represent the proposed FTH Stakeholders.

[45] The HSF submits that s. 19(1) of the *CCAA* claims can only be compromised if they predate the filing. Section 19(1) reads as follows:

> 19(1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
>
> (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[46] Based on the aforementioned wording and the wording contained in the Appointment Order concerning the definition of TRW Claimants, the HSF submits that there is no temporal connection since the FTH Stakeholders are individuals who have yet to suffer tobacco-related

harms since they are comprised of millions of Canadians who will purchase or consume tobacco products or be exposed to their use following the commencement of these CCAA Proceedings or any agreed claims bar date. The HSF submits that these future FTH Stakeholders will become addicted to tobacco, be unable to quit, and that this group has an important interest that is currently unrepresented. Their interests do not align with the current stakeholders in that current stakeholders, including the TRW Claimants, seek to maximize funding for their claims which will be funded, at least partially, by FTH Stakeholders.

[47] The HSF further submits that due to the addictive nature of tobacco, the FTH Stakeholders will suffer harm while they continue to fund, in part, relief sought by other stakeholders including the TRW Claimants.

[48] The HSF lastly submits on this point that even if it could be argued that the FTH Stakeholders and the TRW Claimants could be represented by Wagners, that scenario would present a conflict of interest since the future FTH Stakeholders would be funding the settlement of the TRW Claimants, while experiencing their own addictions.

[49] In these circumstances, the HSF submits that there is currently no one who independently represents the interests of the FTH Stakeholders.

[50] Second, the HSF argues that the interests of the FTH Stakeholders are substantial, important and worthy of at least hearing a motion to determine whether they ought to be included as stakeholders and represented by Tyr, including at the Mediation.

[51] The HSF submits that the FTH Stakeholders have a direct interest since the Applicants will not have sufficient money to fund a settlement and will rely upon post-petition cash flows which will be funded, in part, by FTH Stakeholders.

[52] The HSF further submits that the FTH Stakeholders are further directly impacted by the CCAA Proceedings and that they have a direct interest in the nature and quality of preventative programs that will be implemented through a proposal or settlement, thus making them social stakeholders as well.

[53] Either way, the HSF submits that the FTH Stakeholders have a critical interest that is worth addressing and considering at a motion.

[54] Third, the HSF submits that, based on its test for leave, there are no exceptional circumstances not to hear a motion to appoint it representative counsel. Here, the HSF attempts to refute a number of submissions made by the Monitors. The HSF, as previously noted, submits that it is important to realize that it is not seeking to be added as a party or to have direct participation in the CCAA Proceedings. Rather, it brings this motion for leave to bring a motion for a representation order over the FTH Stakeholders to be represented by Tyr, which will receive advice from an independent, *pro-bono* committee. The HSF therefore submits that its proposed motion is entirely different from the motion the CCS brought that sought direct participation in the Mediation on its own behalf.

[55] The HSF further submits that this is not a motion to vary, as submitted by the Monitors, the ARIOs. Rather the intent in seeking a representation order is to empower and enhance the Mediation and the exercise of the Court-Appointed Mediator's powers within the Mediation.

[56] Additionally, the HSF submits that the test for comeback relief cited above by the Monitors (which, as noted, I agree with) is inapplicable in the context of this motion as they are not fair and relevant considerations given the current lack of representation of the FTH Stakeholders. Specifically, the HSF disputes the Monitors' contention that the HSF delayed in seeking to appoint Tyr as representative counsel for the FTH Stakeholders. The HSF submits there has been no delay as the FTH Stakeholders are unrepresented, have never been represented and as such cannot be accused of having delayed in bringing this motion. As for the argument that the HSF delayed in bringing the motion, it cannot be reasonably argued that the responsibility to identify a group (the FTH Stakeholders) who would have an interest in the CCAA Proceedings should be left to a not-for-profit organization such as the HSF. The HSF argues that other stakeholders could have identified this gap and any alleged delay cannot be laid at the feet of the HSF who does not have insight into the Mediation process.

[57] Overall, therefore, the HSF submits that leave ought to be granted as the public will perceive it as important to properly canvass the interests of an important stakeholder group. Consideration of the motion and the potential appointment of the FTH Stakeholders also precludes potential objections to a settlement when this matter returns to be sanctioned by the Court. In this regard, the HSF points to the recent case involving Purdue Pharma where a proposed settlement announced in the U.S. faced public backlash and lengthened the proceedings: see Brian Mann and Martha Bebinger, "Purdue Pharma, Sacklers reach $6 billion deal with state attorneys general," NPR, March 3, 2022, available at: https://www.npr.org/2022/03/03/1084163626/purdue-sacklers-oxycontin-settlement; *In re: Purdue Pharma L.P., et al*, Motion Of Debtors Pursuant To 11 U.S.C. § 105(A) And 363(B) For Entry Of An Order Authorizing And Approving Settlement Term Sheet at para. 2, March 3, 2022, Case No. 19-23649, United States Bankruptcy Court for the Southern District of New York, available at:
https://www.marylandattorneygeneral.gov/press/2022/030322.

[58] Ultimately, in the *Purdue Pharma* case, a revised settlement included significant additional funds of approximately USD $277 million devoted exclusively to opioid-related abatement, including support and service for survivors, victims and their families.

[59] In these circumstances, the HSF submits that it is fair and reasonable to at least allow it an opportunity to argue the motion to appoint Tyr as representative counsel for the FTH Stakeholders. This will add to the constellation of interests that are necessary to resolve the CCAA Proceedings.

The Monitors' Position

[60] The Monitors first stress that pursuant to my earlier Order, the leave motion was to be heard prior to the HSF's motion. Accordingly, only the test for leave applies and it is premature to discuss the merits of the HSF's motion. The focus should only be placed on the threshold requirements and the four principles they submit underlie the basic considerations that a

supervising judge must keep in mind when addressing a request for leave in any *CCAA* matter as set out in para. 26 above.

[61] First, insofar as good faith is concerned, the Monitors concede that the HSF is proceeding in good faith. They submit, however, that the HSF fails to meet the other requirements.

[62] Second, insofar as due diligence is concerned, the Monitors point out that in December 2019, they brought a motion to appoint Wagners on behalf of the TRW Claimants as an effective tool to represent claims that were unascertained or unasserted.

[63] The Monitors submit that had a stakeholder, such as the HSF, thought that the scope of the Representative Counsel Order was not broad enough or that there was a conflict to respond to, that they would have brought a motion to have this Court decide the issue. The Monitors dispute the HSF's contention that as a not-for-profit organization it was not their obligation at the time to respond. Further, the Monitors argue that if the HSF's submission was self-evident, they should and would have known of it at that time.

[64] The Monitors further submit that the HSF delivered a letter of support with respect to the CCS's motion in September 2019 in which the CCS sought to participate in the Mediation which is very similar to the relief now sought by the HSF, albeit on behalf of the FTH Stakeholders. There is no material difference between the HSF's motion and the motion earlier brought by the CCS as both seek to advocate on behalf of other individuals. Based on the foregoing, the Monitors submit that the HSF has not acted with due diligence and in essence seeks to relitigate the issue as to whether a third party should be inserted into the Mediation.

[65] Third, the Monitors argue that there has been no change of circumstances that would justify variances to the ARIOs. The Monitors submit that the FTH Stakeholders are partly or entirely represented in the mediation. The Monitors submit that the definition of TRW Claimants includes the FTH Stakeholders and that it captures "all individuals … who assert or may be entitled to assert a claim or cause of action against one or more of the Applicants … in respect of … the historical or ongoing use of or exposure to Tobacco Products". Based on the plain wording of the above definition, the Monitors submit that this includes the FTH Stakeholders who are, by their own definition, "people who will purchase – consume tobacco products or be exposed to their use following commencement of these proceedings/or claims bar date."

[66] The Monitors further point to the December Decision wherein Wagners was appointed on behalf of the TRW Claimants and particularly paragraphs 30 and 42 where I state as follows:

> [30] The social benefits of access to justice, in the facilitating of a complex restructuring, are met. At this time many of the TRW Claims are unascertained and unasserted. As such, many of the TRW Claimants are likely unaware of these CCAA proceedings. The Representation Order sought would further promote access to justice by giving the TRW Claimants a powerful, single voice in the process.
>
> …

> [42] I agree with the Tobacco Monitors that a single point of contact is critical in these proceedings. As I have previously indicated, these restructurings are amongst the most complex in CCAA history for a number of reasons, which include the vast number and size of the complicated tobacco-related actions that have been, or could be, commenced against the Applicants.

[67] Based on the foregoing, the Monitors submit that this Court specifically anticipated that the TRW Claims included those that were unascertained and unasserted including those that had been, or could be, commenced against the Applicants. They also point to the fact that I further noted that a single point of contact was critical insofar as the TRW Claims were concerned.

[68] The Monitors alternatively argue that even if certain members of the FTH Stakeholders were not captured within the definition of the TRW Claimants, their interests are adequately represented in the Mediation and that this has been acknowledged by the HSF in its factum where it states that the concerns of the FTH Stakeholders are ultimately about "public health writ large". The Monitors submit that the interests of the public at large can be adequately accounted for and addressed by many different participants in the Mediation, including the provinces who represent public and social interests, including harm reduction; Wagners, who represent the individuals who assert or may be entitled to assert claims; the Monitors, who are officers of the court and have the obligation to consider the interests of all stakeholders; and the Court-appointed Mediator who has been provided with the broad discretion to consult with a variety of persons as he considers appropriate. Further, in this regard, the Monitors submit that what the HSF is really seeking to do is add new parties to the Mediation and therefore vary the ARIOs. The HSF's request is functionally the same as the CCS's earlier request and that as a result, Tyr, an additional representative counsel, would be inserted.

[69] Further, with respect to the HSF's submission that the FTH Stakeholders are in a conflict with respect to other TRW Claims, the Monitors submit that the HSF is passing off speculation as evidence and the HSF's affiant, Diego Marchese, an Executive Vice-President with the HSF, is not part of the Mediation. As such, he does not know the positions the parties have taken, particularly the TRW Claimants, or what action they have taken thereafter. In any event, the Monitors submit it is premature to even consider any issues of conflict since we are still at the leave stage and issues such as conflict are not yet engaged.

[70] Insofar as s. 19(1) of the *CCAA* is concerned, the Monitors submit that this motion does not raise any issues under s. 19(1). There is no claims bar date, no stakeholder is asking that these claims be compromised and the goal of the Mediation is to reach a settlement. Further, as noted, the Order appointing Wagners as counsel for the TRW Claimants provides for future claims or causes of action.

[71] Fourth, perhaps most significantly, the Monitors also submit that the belated introduction of the FTH Stakeholders jeopardizes the significant progress that has been achieved to date in the Mediation which, as noted, is hopefully entering its final stages. Accordingly, there is prejudice to the progress of the CCAA Proceedings.

[72] The Monitors submit, relying in part upon the decision of this Court in *Target Canada Co. Re*, 2016 ONSC 316, 32 C.B.R. (6th) 48, at para. 31 that the *CCAA* process is one of building

blocks. Stays are granted, plans are developed and orders are made. If parties wish to change the terms of such orders, such developments could run counter to the building block approach that underpins the proceedings. The Monitors submit that this is particularly true in the within case which has been ongoing for over four years, with good progress and optimism that a successful resolution is in sight. The Monitors submit that the Court should not risk disrupting the progress and potentially delaying resolution by compelling the participation of a new stakeholder at this late stage. They stress that this is particularly so where the Court-Appointed Mediator has not exercised his discretion or judgment to include the FTH Stakeholders or made any recommendations in this regard to this Court. The Monitors also point out that several parties have expressed serious concerns about the length of time the Mediation is taking and introducing a new stakeholder will almost certainly exacerbate those concerns.

[73] Last, the Monitors submit that even if leave is denied, the HSF will still retain the ability to participate in these proceedings as a social stakeholder in many meaningful ways as this Court has previously recognized the value of social stakeholders. It should not, however, be permitted to seek special treatment at this late stage by forcing the FTH Stakeholders into the Mediation and asking this Court to second guess the discretion and judgment of the Court-Appointed Mediator.

[74] The fact that the HSF speculates that it is better to insert the FTH Stakeholders now than have them appear at a sanction hearing is not only speculative, but does not form part of the test for obtaining leave to bring this motion. There is simply no evidence before the Court to support an order including the FTH Stakeholders.

[75] Based on the foregoing, the Monitors submit that the HSF's motion is an impermissible attempt to alter the *status quo* where there has been no change in circumstances, the HSF has not moved promptly and that the proposed variance would prejudice the progress of the CCAA Proceedings.

Analysis

[76] In considering whether leave ought to be granted, as noted, I have accepted the four-part test urged upon me by the Monitors which I reiterate below:

(i) whether the HSF is proceeding in good faith by bringing this motion;

(ii) whether the HSF has acted with the requisite due diligence in doing so;

(iii) whether there has been a change in circumstances that would necessitate the variance to existing orders; and

(iv) whether the proposed variance would not prejudice the progress of the CCAA Proceedings.

[77] For the reasons that follow I accept the arguments put forth by the Monitors.

[78] I begin by noting that there is no question that the HSF satisfies part (i) of the aforementioned test. The HSF has been acting in good faith in seeking the representation order.

It is a well-established not-for-profit charity. The HSF is also a leader in disease prevention which includes activities at preventing harm caused by smoking.

[79] Second, insofar as the requirement of due diligence is concerned, while I am not being critical of the HSF, I cannot conclude that they have acted with due diligence in the circumstances of this case and particularly the well-known, ongoing Mediation. As I have indicated, the Mediation has been proceeding for over four years. The HSF did have the ability to bring its motion sooner, which I have compared to the CCS motion, of which the HSF was well aware.

[80] Third, I accept that there has not been a change of circumstances.

[81] In this regard, the definition of TRW Claimants is broad enough to include the FTH Stakeholders which is evidenced in the December Decision in which I specifically appoint Wagners on behalf of the TRW Claimants to include individuals that are not currently represented, scattered across the country and do not have the ability or resources to advance this claim in these complex CCAA Proceedings. This would include, as defined in the representation order, individuals who assert or may be entitled to assert claims with respect to a broad range of alleged wrongs generally relating to tobacco-related personal harm. I pause here to note that when I delivered my December Decision and approved the resulting order, I was clearly of the view that the definition of TRW Claimants was to include future claims. This was reflected in my December Decision that specifically included unascertained and unasserted claims, as set out in paragraph 30 of that decision and reproduced above at paragraph 68. This definition captures claims by the FTH Stakeholders.

[82] Additionally, in any event, I accept the Monitors' submissions that even if the FTH Stakeholders are not captured within the definition of the TRW Claimants, their interests are adequately represented in the Mediation.

[83] Further, insofar as any potential conflict of interest is concerned, even if I was to consider it at the leave stage, there is no evidentiary basis to advance this submission. Unquestionably, Wagners, on behalf of the TRW Claimants, will represent a number of different constituencies. Neither Wagners nor the Court-appointed Mediator or the Monitors have identified any conflicts about which I should be concerned.

[84] Mr. Marquese deposes at para. 8 of his affidavit that "I understand that as a result of the nature of the claims being addressed in these proceedings, that a likely component of any Proposed Plan would be the establishment of a fund that will be used to make future payments for public or social purposes or programs in lieu of the ability to make payments directly to claimants." He generally goes on to further depose that, based on his understanding how the fund is established, governed and used will be a critical component in ensuring that the rights and interests of FTH Stakeholders are adequately addressed and that all parties participating in the CCAA Proceedings and Mediation are in conflict with FTH Stakeholders.

[85] Mr. Marquese does not cite any basis for his understanding, which almost entirely undermines his purported evidence. Further, I do not know how he could have such insight into the confidential Mediation in which the HSF is not a party. Nothing to date has been brought forward to this Court to support Mr. Marquese's understanding or belief. Based on my own

knowledge of the ongoing Mediation and Mr. Marquese's understandable lack of insight, I do not accept that the FTH Stakeholders operate in a conflict with other stakeholders and particularly do not act in conflict with the TRW Claimants.

[86] I am further of the view that my decision does not run contrary to the provisions of s. 19(1) of the *CCAA*. I accept the Monitors' submissions above and the claims of the FTH Stakeholders, to the extent they may exist, are no different in nature than other unascertained and unasserted claims of any TRW Claimants.

[87] Fourth, insofar as the issue of prejudice is concerned, as I have indicated, the Mediation appears to be reaching its latter stages after four years. Substantial progress has been made. This has been confirmed by both the Court-appointed Mediator and the Monitors. A resolution is in sight.

[88] I am very hesitant to introduce new participants at this late stage, which will, in my view, almost certainly complicate matters in circumstances where the Monitors and Court-appointed Mediator have not identified any concerns. In this regard I am satisfied that the ultimate order sought by the HSF would likely prejudice the progress of the CCAA Proceedings.

[89] In reaching this conclusion, I emphasize that the HSF retains its ability to participate in the CCAA Proceedings as a social stakeholder and if difficulties arise with respect to what the HSF has identified as the FTH Stakeholders, the matter may return to the Court.

[90] I conclude by noting two things. First, once again, I have tremendous faith in the Court-Appointed Mediator to address any concerns or conflicts as alleged by the HSF and bring them to the Court if, in fact, they exist. Second, even if I was to accept the test for leave proposed by the HSF and consider the *Canwest* factors, I would come to the same conclusion for the reasons above.

DISPOSITION

[91] The HSF's motion for leave to bring a motion seeking to have Tyr appointed as representative counsel to the FTH Stakeholders is dismissed.

McEwen J.

Date: June 23, 2023

CITATION: In the Matter of a Plan of Compromise or Arrangement of JTI-Macdonald, Imperial Tobacco and Rothmans, 2023 ONSC 2347
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-CL and CV-19-616779-00CL
DATE: 20230623

ONTARIO
SUPERIOR COURT OF JUSTICE

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 JTI-Macdonald Corp.

AND

In the Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

AND

In the Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.

REASONS FOR DECISION

McEwen J.

Released: June 23, 2023

CITATION: Jaguar Mining Inc. (Re), 2014 ONSC 494
COURT FILE NO.: CV-13-10383-00CL
DATE: 20140116

See paras. 1, 33, 48, 50

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 JAGUAR MINING INC., Applicant

BEFORE: **MORAWETZ R.S.J.**

COUNSEL: **Tony Reyes and Evan Cobb, for the Applicant, Jaguar Mining Inc.**

Robert J. Chadwick and Caroline Descours, for the Ad Hoc Committee of Noteholders

Joseph Bellissimo, for Global Resource Fund, Secured Lender

Jeremy Dacks, for FTI Consulting Canada Inc., Proposed Monitor

Robin B. Schwill, for the Special Committee of the Board of Directors

HEARD & ENDORSED: **DECEMBER 23, 2013**

REASONS: **JANUARY 16, 2014**

ENDORSEMENT

[1] On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. ("Jaguar") and made the following three endorsements:

1. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be

confirmed on comeback motion. Sealing Order of confidential exhibits granted.

2. Meeting Order granted in form submitted.

3. Claims Procedure Order granted in form submitted.

[2] These are my reasons.

[3] Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

[4] Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

[5] Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over $268 million of debt and new liquidity upon exit of approximately $50 million.

[6] Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

[7] The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

[8] The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

[9] Jaguar is a corporation existing under the *Business Corporations Act*, R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

[10] Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

[11] Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineração Ltda. ("MCT"), Mineração Serras do Oeste Ltda. ("MSOL") and Mineração Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

[12] The Subsidiaries' assets include properties in the development stage and in the production stage.

[13] Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

[14] Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

[15] In aggregate, Jaguar has issued a principal amount of $268.5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

[16] Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

[17] Jaguar is also the borrower under a fully drawn $30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

[18] Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

[19] Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

[20] The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

[21] Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

[22] Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately $169.3 million.

[23] Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over $317 million and a net loss of over $82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately $40 million.

[24] I accept that Jaguar faces a liquidity crisis and is insolvent.

[25] Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

[26] Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

[27] Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that, because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

[28] Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of $5 million (a $500,000 first-ranking charge (the "Primary Administration Charge") and a $4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

[29] Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

[30] Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of $150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

[31] Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

[32] Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

[33] In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

[34] Each of the Claims Procedure Order and Meeting Order include a comeback provision.

[35] Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of $5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

[36] I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

[37] I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

[38] I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

[39] In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

[40] The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partners Limited (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Calpine Canada Energy Limited (Re)*, 2006 ABQB 153, 19 C.B.R. (5th) 187; *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500, 3 C.B.R. (6th) 150.

[41] The authority to grant the court-ordered Administration Charge and Director's Charge is contained in ss. 11.51 and 11.52 of the CCAA.

[42] In granting the Administration Charge, I am satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate; and

(iii) the charges should extend to all of the proposed beneficiaries.

[43] In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

(a) the size and complexity of the business being restructured; and

(b) whether there is an unwarranted duplication of roles.

See *Canwest Publishing Inc. (Re)*, 2010 ONSC 222, 63 C.B.R. (5th) 115.

[44] In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

[45] With respect to the Director's Charge, the court must be satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;

(ii) the amount is appropriate;

(iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and

(iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

[46] A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

[47] Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I find it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

[48] In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

[49] Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

[50] In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

MORAWETZ R.S.J.

Date: January 16, 2014

See para. 7

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022 ONSC 3698
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220623

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	*Jeremy Dacks, Shawn Irving, Marc Wasserman* and *Michael De Lellis*, for the Applicants, the Just Energy Group
	)	
– and –	)	Allyson Smith, U.S. Counsel to the Just Energy Group
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC,	)	*Ryan Jacobs, Alan Merskey, Jane Dietrich* and John M. Picone, Canadian Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC.,	)	*David Botter, Sarah Schultz* and *Abid Quereshi*, US Counsel to LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, and OC II LVS XIV LP in their capacity as the DIP Lenders
8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY	)	*Heather Meredith, James Gage and Natasha Rambaran*, Canadian Counsel to the Agent and the Credit Facility Lenders
INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON	)	*Jeff Larry, Max Starnino* and *Danielle Glatt*, Counsel to US Counsel for Fira Donin and Inna Golovan, in their capacity as proposed class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; Counsel to US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG	)	*Steven Wittels* and *Susan Russell*, US Counsel for the Respondent Fira Donin and Inna Golovan, in their capacity as proposed

MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.	)	class representatives in *Donin et al. v. Just Energy Group Inc. et al.*; US Counsel for Trevor Jordet, in his capacity as proposed class representative in *Jordet v. Just Energy Solutions Inc.*
Applicants	)	*David Rosenfeld and James Harnum*, for Haidar Omarali in his capacity as Representative Plaintiff in *Omarali v. Just Energy*
– and –	)	*Howard Gorman, Ryan Manns and Aaron Stephenson*, for Shell Energy North American (Canada) Inc. and Shell Energy North America (US)
MORGAN STANLEY CAPITAL GROUP INC.	)	*Mike Weinczok*, for Computershare Trust Company of Canada
Respondents	)	*Jessica MacKinnon*, for Macquarie Energy LLC and Macquarie Energy Canada Ltd.
	)	*Bevan Brooksbank*, for Chubb Insurance Co of Canada
	)	*Jason Wadden*, for Dundon Advisers LLC
	)	*Pat Corney*, for the Ontario Energy Board
	)	*Virginia Gauthier*, for NextEra Energy Marketing, LLC
	)	*Harvey Chaiton*, for Pariveda Solutions, Inc.
	)	*Alexandra McCawley*, for FortisBC Energy Inc.
	)	*Chris Burr*, for Energy Earth, LLC
	)	*Robert Thornton, Rebecca Kennedy, Rachel Nicholson* and *Puya Fesharaki*, for FTI Consulting Canada Inc., as Monitor

) *John F. Higgins* and *Emily Nasir*, U.S.
) Counsel to FTI Consulting Canada Inc., as
) Monitor
)
) **HEARD:** June 7, 2022

ENDORSEMENT

MCEWEN J.

[1] On June 10, 2022 I released a brief endorsement setting out certain orders and requesting supplementary written submissions (the "written submissions") concerning the appropriateness of the terms of the proposed differential consideration being offered to unsecured creditors in the Plan. I specifically asked that submissions address the rationale for providing New Common Shares to the unsecured Term Loan Lenders and cash consideration to the General Unsecured Creditor Class.

[2] This endorsement deals with those written submissions.

[3] Having read the written submissions I accept the Applicants' submissions, which are supported by the DIP Lender, that the appropriateness of the terms of the proposed differential compensation ought to be dealt with at the Sanction Hearing.

[4] A material condition precedent to the proposed Plan is that Just Energy cease to be a reporting issuer under the *U.S. Exchange Act* after it emerges from CCAA. In order to do so, Just Energy must meet certain mandatory requirements to cease being a reporting issuer. The current structure of the Plan contemplates that only the Term Loan Lenders receive the New Common Shares. If there is also a distribution to the General Unsecured Creditors Class, the Applicants and DIP Lender submit that these requirements would be impossible to meet.

[5] They also submit that it is also not possible to give the Term Loan Lenders cash instead of New Common Shares because there is insufficient cash available.

[6] It also bears noting that experts retained by the Applicants and U.S. Class Counsel have delivered conflicting reports as to fairness of the proposed differential consideration. To date there have been no cross-examinations of the experts.

[7] As noted in my previous decision, the threshold for granting a Meetings Order is rather low. Given the complicated nature of the proposed differential consideration and the conflicting experts' reports, it is preferrable to wait until the Sanction Hearing to determine the fairness of this

portion of the Plan. Accordingly, I do not accept the Litigation Claimants' submission that is clear that the Plan cannot be sanctioned and is doomed to fail.

McEwen, J.

Released: June 23, 2022

CITATION: Just Energy v. Morgan Stanley et. al., 2022 ONSC 3698
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20220623

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSALE ENERGY CORPORATION, JUST ENERGY FINANCE CANDA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC , HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLS, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. and JUST ENERGY (FINANCE) HUNGARY ZRT.

Applicants

ENDORSEMENT

Released: June 23, 2022 McEwen J.

CITATION: Laurentian University of Sudbury, 2021 ONSC 3885
COURT FILE NO.: CV-21-00656040-00CL
DATE: 2021-05-31

SUPERIOR COURT OF JUSTICE - ONTARIO

See paras. 31, 32

RE: 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 LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc

Vern W. DaRe, for the DIP Lender

Aryo Shalviri and Jules Monteyne, for the Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for the Toronto Dominion Bank

George Benchetrit, for the Bank of Montreal

Peter J. Osborne, for the Board of Governors

Joseph Bellissimo and Natalie Levine, for Huntington University

Andrew Hatnay, Demetrios Yiokaris, for Thorneloe University

Alex MacFarlane and Lydia Wakulowsky, for Northern Ontario School of Medicine

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association

Guneev Bhinder, for the Canada Foundation for Innovation

André Claude, for the University of Sudbury

Tracey Henry, for Laurentian University Staff Union (LUSU)

Charlie Sinclair, Counsel for Laurentian University Faculty Association (LUFA)

HEARD: May 28, 2021

ENDORSEMENT

[1] Laurentian University ("Laurentian" or the "Applicant") brings this motion seeking the following two orders:

(a) an Order appointing Mr. Louis (Lou) Pagnutti as Chief Redevelopment Officer ("CRO") of Laurentian and approving the terms of his engagement; and

(b) an Order approving the claims process proposed by the Applicant and the Monitor to identify the universe of potential claims that may exist against the Applicant, in order to allow the Applicant and the Monitor to address such claims in contemplation and formulation of a Plan of Compromise or Arrangement (the "Plan").

[2] The Applicant also requests an amendment to para. 36 of the Amended and Restated Initial Order to increase the maximum amount of fees and disbursements of the Board of Governors' (the "Board") independent counsel ("Board Counsel") that is permitted to be paid by the Applicant from $250,000, plus HST, to a maximum amount of $500,000, plus HST.

[3] The evidentiary basis for the requested relief is set out in the affidavit of Dr. Robert Haché, sworn May 21, 2021, and in the Fourth Report of the Monitor dated May 27, 2021.

Appointment of CRO

[4] The Applicant is of the view that the appointment of the CRO will minimize the disruption to the operations of the Applicant. The CRO will provide strategic guidance in assisting with the Applicant's restructuring and will also support the Applicant's senior leadership team, including the President and Vice-Chancellor.

[5] The Applicant is of the view that the CRO will provide a fresh perspective and assist the Applicant in moving to a financially sustainable and successful future.

[6] A proposed engagement letter indicates that the compensation to the CRO is at an hourly rate of $650 per hour (up to a maximum of 80 hours each month). There is no additional "success fee" component to the CRO's compensation.

[7] The Monitor has reviewed the proposed fees and disbursements set out in the CRO Engagement Letter and believes them to be fair and reasonable in the circumstances.

[8] The proposed appointment of the CRO is supported by the Laurentian University Faculty Association, Laurentian University Staff Union, the Board and the DIP Lender.

[9] The Monitor is also in support of the appointment of Mr. Pagnutti.

[10] The appointment of Mr. Pagnutti was opposed by University of Sudbury ("U Sudbury"). Counsel to U Sudbury indicated that there was a degree of disappointment that his client was not consulted with respect to the appointment of the CRO. He suggested that there should be further consultations and an opportunity provided to consider other individuals for the position, taking into account the bilingual and tricultural nature of Laurentian.

[11] I am not persuaded by the arguments put forth by U Sudbury. The Notice of Disclaimer with respect to U Sudbury is now final. In effect, U Sudbury is not part of the going forward plan of Laurentian. Consequently, the participation of U Sudbury in Phase 2 of the restructuring will be severely limited. The support for the appointment of Mr. Pagnutti is widespread and, in my view, this appointment should take effect as soon as possible.

[12] I am satisfied that the arrangements set out in the CRO Engagement Letter are fair and reasonable in the circumstances and an Order will issue appointing Mr. Pagnutti as CRO of Laurentian and approving the terms of his engagement.

Increase of Fees to Board Counsel

[13] The request to increase the maximum amount of fees and disbursements of Board Counsel is not opposed. I accept that Board Counsel has been busy throughout the CCAA proceeding to address and advise on issues relevant to the Board. As the proposed claims process commences, it is expected that the Board will continue to require the advice of Board Counsel, necessitating an increase of the fees incurred by Board Counsel.

[14] In my view, it is appropriate that para. 36 of the Amended and Restated Initial Order be amended to increase the maximum amount of fees and disbursements of Board Counsel that is permitted to be paid by the Applicant from $250,000, plus HST, to a maximum amount of $500,000.

Claims Process

[15] The Applicant seeks approval to undertake a process to identify, determine and resolve certain claims of its creditors (the "Claims Process"). The Claims Process will be conducted in order to identify and determine for voting and/or distribution purposes the potential universe of claims that may exist against Laurentian, to allow Laurentian to deal with such claims and formulate a Plan.

[16] The Applicant contends that the proposal is a fair, efficient, and reasonable process for the determination and resolution of all claims against the Applicant and its Directors and Officers.

[17] The Claims Process has been prepared by the Applicant, in consultation with the Monitor.

[18] The Monitor supports the proposed Claims Process Order.

[19] The DIP Lender, LUFA and LUSU are supportive of the Claims Process Order.

[20] In the Fourth Report, the Monitor states that the Applicant and the Monitor provided a draft of the Claims Process Order to the Toronto Dominion Bank, ("TD Bank"), Royal Bank of Canada and Bank of Montreal (collectively, the "Pre-filing Lenders"). The Pre-Filing Lenders are collectively owed in the range of $130 million.

[21] The Monitor also reports that the Applicant and the Monitor have engaged in multiple discussions with the Pre-filing Lenders in respect of the Claims Process and that the Monitor has agreed to provide weekly updates to the Pre-filing Lenders with respect to claims received and the status of the Monitor's review of claims.

[22] TD Bank has proposed an amendment to the Claims Process Order. TD Bank proposes that the Monitor shall consult with the Pre-filing Lenders and any other stakeholders as the Monitor deems appropriate (the "Consultation Parties") with respect to each claim in excess of $5 million which the Monitor proposes to accept and to provide the Consultation Parties with not less than 10 days' prior written notice of the intent to accept such claim. Any Consultation Party who objects to the acceptance of such claim by the Monitor may then apply to the court within 10 days for a review of the proposed acceptance.

[23] The Monitor has noted a number of areas of concern with respect to the TD Bank proposal:

(a) The proposed amendment will lead to confusion.

(b) The proposal effectively removes the role of a Claims Officer for any claim over $5 million. If any Consultation Party opposes the Monitor's acceptance of a claim over $5 million, the result is that the claim will be directly referred to the court for determination rather than a Claims Officer. The result will be increased litigation and increased cost versus the expeditious summary process that is typical in a CCAA claims process.

(c) The proposal eliminates the ability of the Monitor to negotiate and settle claims in the ordinary course.

(d) If the settlement of a claim is opposed and the Monitor's assessment of the claim is required to be justified in court, the Monitor will either have to disclose its assessment of its strengths and weaknesses of the claim and the litigation risk associated with the claim or a cumbersome process will need to be developed where the Monitor can share its assessment with the court under seal.

(e) The Monitor is not in a position to determine which stakeholders should be Consultation Parties.

(f) In the event that a material number of claims over $5 million are opposed by any one of the Consultation Parties, the process to obtain a determination

of such claims could result in significant delay to the resolution of such claims.

(g) The above factors are likely to make the Claims Process more expensive and inefficient.

[24] TD Bank supports the making of a Claims Process Order at this time but submits that, in the circumstances, the process should contemplate disclosure and consultation by the Monitor with the Pre-filing Lenders.

[25] TD Bank submits that Laurentian and the Monitor have acknowledged that material claims will be submitted, some of which claims are unliquidated and/or contingent and may be subject to a bona fide dispute - both with respect to liability and quantum. The consensual resolution of such claims will bear directly on the likelihood of success of any Plan.

[26] TD Bank further submits that its proposed change is reasonable and appropriate in the circumstances and will create a fair and transparent process which furthers the remedial objectives of the CCAA. Further, this proposal does not give a consent or veto right to any creditor with respect to acceptance or compromise of any claim.

[27] Based upon information available to TD Bank at the time its factum was issued, the total quantum of claims is unknown but can reasonably be expected to include: (a) the claims of the Pre-filing Lenders; (b) claims of current and former employees; (c) claims of the federated universities arising from the termination and disclaimer of their agreements with Laurentian; (d) potential claims arising from the pension-related claim; and (e) claims of other creditors with pre-filing and restructuring claims.

[28] TD Bank anticipates many of these claims will be for significant amounts, will be complex, and will engage multiple legal and valuation issues. The acceptance or settlement of these claims will bear directly on the entitlements of the creditors under and in respect of any Plan.

[29] TD Bank submits that the transparency and consultation that it seeks to import into the Claims Process will enhance the likelihood of a viable Plan.

Analysis

[30] The broad remedial objectives of the CCAA are to facilitate a restructuring rather than a liquidation of assets. The objective of a restructuring will most likely be achieved where stakeholders are treated as advantageously and fairly as the circumstances permit (see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at paras. 15-19, 56-66 and 70 ("*Century Services*")).

[31] A claims process is an essential component of any plan and it is necessary and appropriate that the claims process furthers the remedial objective of the CCAA (*Timminco Limited, Re*, 2014 ONSC 3393 at para. 41).

[32] A claims process order must be carefully drafted so as to ensure that the process by which claims are determined is both fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims (*Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 at para. 38 ("*Steels*")).

[33] TD Bank submits that its proposal is consistent with the entitlements of creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") to review proofs of claim filed by others and to seek an order from the court expunging or reducing a proof of claim accepted by a trustee. TD Bank points out that such entitlements are available to creditors under the BIA in both bankruptcy and commercial proposal proceedings and to the extent possible, aspects of insolvency law that are common to the BIA and CCAA should be harmonized. The examples provided by TD Bank are BIA, ss. 26, 37, 66, 126 and 135(5); see also *Century Services* at para. 24.

[34] TD Bank references the following cases as examples where the disclosure and involvement of certain parties has been incorporated into the claims process. These cases are *Crystallex International Corp., Re*, 2012 ONSC 6812; *Target Canada Co*. (11 June 2015), Toronto, CV-15-10832-00CL (Ont. S.C.) at para. 30; *Carillion Canada Holdings Inc.* (6 July 2018), Toronto, CV-18-590812-00CL (Ont. S.C.); and *Steels* at para. 13.

[35] TD Bank acknowledges there are no set rules in the CCAA which govern the Claims Process. I agree with this statement.

[36] The facts underlining each of the cases relied upon by TD Bank needs to be taken into account. *Crystallex* had been a bitterly fought proceeding extending nearly 10 years. *Target Canada* was a liquidation proceeding from the outset. *Carillion* was also a liquidating CCAA process, as was *Steels.* Suffice to say, there are considerable differences in how a supervising judge will approach a liquidating CCAA in contrast to a CCAA proceeding leading to an operational restructuring. For this reason, the cases referred to by TD Bank are of limited assistance.

[37] In an operational restructuring, it is necessary to consider the timelines. From the outset, Laurentian has proceeded on the basis that it intends to remain in operation. Laurentian has stressed that it is essential that these proceedings be completed as soon as possible. The proceedings cannot be completed without the Claims Process being finalized. I am concerned that the TD Bank proposals could delay the Claims Process from being completed on a timely basis.

[38] The proposal to establish Consultation Parties is problematic. Under the TD Bank proposal, the Pre-filing Lenders are involved in the consultation process as are such other stakeholders as the Monitor deems appropriate. The TD Bank proposal affects claims in excess of $5 million. In the context of this proceeding, a $5 million claim is a significant claim. I am hard-pressed to think of a situation where such a claimant would not be deemed an appropriate Consultation Party. I am given to understand that there might be in the range of 15 or so claims over $5 million. If each claimant or a substantial majority of these claimants is deemed to be a Consultation Party, the sheer size of the group would impede its mandate and progress. The process will cease to be efficient and effective in resolving issues.

[39] I am mindful of the submission made by counsel to TD Bank that it is important to move quickly – but not to rush. This requires a balancing of competing interests, to ensure that the process remains fair to all.

[40] I have been persuaded that the Pre-filing Lenders should have some involvement in this process. However, the TD Bank proposal runs the risk of being convoluted and cumbersome to the extent that the Claims Process may not be completed on a timely basis. A middle ground must be found.

[41] The fact that there are no set rules to govern the claims process leads, in some cases, to a bespoke claims process. This situation calls for a bespoke process.

[42] Counsel to TD Bank made reference to the claim process in the BIA. One such provision, which was not referenced in argument, is set out in s. 30(1)(i) of the BIA:

> **Powers exercisable by a trustee with permission of inspectors**
> **30 (1)** The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> (i) compromise any claim made by or against the estate.

[43] This section has two components. The first relates to the involvement of inspectors. The role of an inspector in the BIA is defined in ss. 116-120. The second relates to the compromise of claims against the estate. The trustee may, with the permission of the inspectors, compromise such claims.

[44] It is also noteworthy to reference BIA s. 119(2):

> **Decisions of inspectors subject to review by court**
> **119 (2)** The decisions and actions of the inspectors are subject to review by the court at the instance of the trustee or any interested person and the court may revoke or vary any act or decision of the inspectors and it may give such directions, permission or authority as it deems proper in substitution thereof or may refer any matter back to the inspectors for reconsideration.

[45] In my view, the concerns expressed by TD Bank can be addressed by incorporating certain provisions similar to those dealing with inspectors in the BIA and modifying same to address the circumstances of this case.

[46] An inspector can play a critical role. In *Re Bryant Isard & Co*. (1923), 4 C.B.R. 41 at para. 24 (Ont. S.C.), Fisher J. summed up the position of inspectors in these words: "Inspectors stand in a fiduciary relation to the general body of creditors and should perform their duties impartially and in the interests of the creditors who appoint them. They should see that the trustee acts in accordance with the *Bankruptcy Act*, and if it is brought to their notice he has not done so, they should discipline him and, if necessary, take steps to have him removed."

[47] In these circumstances, I have concluded that the Claims Process procedure proposed by the Applicant should be modified so as to provide for the appointment of up to four "inspectors". Two of the inspectors are to be representatives of the Pre-filing Lenders with the remaining two "inspectors" being drawn from the group of creditors who file claims in excess of $5 million (a "Material Claim"). The selection of the inspectors is to be made by the Monitor, in consultation with the Applicant, the Pre-filing Lenders and the known creditors with Material Claims

[48] The Monitor shall inform the "Inspector Group" that they are to act in the best interests of all creditors and that they stand in a fiduciary relationship to all creditors and should perform their duties impartially.

[49] Compensation for the "Inspector Group" is to be calculated using the structure provided for in R. 135 of the Bankruptcy and Insolvency General Rules.

[50] The Claims Process provision is to be modified so as to provide that the Monitor shall consult with the "Inspector Group" in respect of the acceptance or settlement of Material Claims. The Monitor is authorized to compromise any Material Claim – provided it has received permission from three members of the "Inspector Group".

[51] In the event that the Monitor does not receive authorization to compromise the material claim, the Monitor or any member of the "Inspector" group may apply to court within 10 days for review of the proposed acceptance.

[52] The foregoing process is intended to ensure that the concerns of the Pre-filing Lenders are addressed, without unduly paralyzing the Claims Process that has been put forth by the Applicant with the support of the Monitor.

[53] The Applicant and the Monitor are directed to modify the Claims Process Order to take into account these reasons. The modifications are solely to affect the assessment of Material Claims. The other aspects of the Claims Process proposed by the Applicant are approved. If more detailed directions are required, a case conference may be scheduled.

Chief Justice G.B. Morawetz

Date: May 31, 2021

See para. 27

Alberta Court of Queen's Bench
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.
Date: 1988-12-22

J.J. Marshall, Q.C., and J.A. Legge, for Norcen Energy Resources Limited and Prairie Oil Royalties Company, Ltd.

E.D. Tavender, Q.C., D. Lloyd, R. Wigham and R.C. Dixon, for Oak-wood Petroleums Ltd.

B. Tait and B.D. Newton, for Bank of Montreal.

B. O'Leary, M.R. Russo, A. Pettie and A.Z. Breitman, for Sceptre Resources Limited.

L. Robinson, for Royal Bank of Canada.

P.T. McCarthy and T. Warner, for HongKong Bank of Canada.

R. Gregory and P. Jull, for Bank America, Canada.

R.C. Pittman and B.J. Roth, for Esso Resources.

W. Corbett, for Canadian Co-operative Society and Saskatchewan Co-operative Society.

T.L. Czechowskyj, for National Bank.

J.G. Hanley and H.J.R. Clarke, for A.B.C. noteholders.

V.P. Lalonde and L.R. Duncan, for Innovex Equities Corporation.

I. Kerr, for Alberta Securities.

G.K. Randall, Q.C., for Director C.B.C.A.

(Calgary No. 8801-14453)

December 22, 1988.

[1] FORSYTH J.:– On 12th December 1988 Oak-wood Petroleums Limited ("Oakwood") filed with the court a plan of arrangement ("the plan") made pursuant to the Companies' Creditors Arrangement Act (Canada), R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36] ("C.C.A.A."), as amended, ss. 185 and 185.1 [now ss. 191 and 192] of the Canada Business Corporations Act, S.C. 1974-75-76 [now R.S.C. 1985, c. C-44] as amended, and s. 186 of the Business Corporations Act (Alberta), S.A. 1981, c. B-15, as amended.

[2] On 16th December 1988 Oakwood brought an application before me for an order which would, inter alia, approve the classification of creditors and shareholders proposed in the plan. I would note that the classifications requested are made pursuant to ss. 4, 5 and 6 of the C.C.A.A. for the purpose of holding a vote within each class to approve the plan.

[3] Since my concern primarily is with the secured creditors of Oak-wood, I shall set out, in part, the sections of the C.C.A.A. relevant to the court's authority with respect to compromises with secured creditors:

> 5. Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may … order a meeting of such creditors or class of creditors …
>
> 6. Where a majority in numbers representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings … held pursuant to sections 4 and 5 … agree to any compromise or arrangement … [it] may be sanctioned by the court, and if so sanctioned is binding on all the creditors …

[4] The plan filed with the court envisions five separate classes of creditors and shareholders. They are as follows:

(i) The secured creditors;

(ii) The unsecured creditors;

(iii) The preferred shareholders of Oakwood;

(iv) The common shareholders and holders of class A non-voting shares of Oakwood;

(v) The shareholders of New York Oils Ltd.

[5] With the exception of the proposed class comprising the secured creditors of Oakwood, there has been for the moment no objection to the proposed groupings. I add here that shareholders of course have not yet had notice of the proposal with respect to voting percentages and classes with respect to their particular interests. With that caveat, and leaving aside the proposed single class of secured creditors, I am satisfied that the other classes suggested are appropriate and they are approved.

[6] I turn now to the proposed one class of secured creditors. The membership of and proposed scheme of voting within the secured creditors class is dependent upon the value of each creditor's security as determined by Sceptre Resources Ltd. ("Sceptre"), the purchaser under the plan.

[7] As a result of those valuations, the membership of that class was determined to include: the Bank of Montreal, the A.B.C. noteholders, the Royal Bank of Canada, the National Bank of Canada and the HongKong Bank of Canada and the Bank of America Canada. Within the class, each secured creditor will receive one vote for each dollar of

"security value". The valuations made by Sceptre represent what it considers to be a fair value for the securities.

[8] Any dispute over the amount of money each creditor is to receive for its security will be determined at a subsequent fairness hearing where approval of the plan will be sought. Further, it should be noted that all counsel have agreed that, on the facts of this case, any errors made in the valuations would not result in any significant shift of voting power within the proposed class so as to alter the outcome of any vote. Therefore, the valuations made by Sceptre do not appear to be a major issue before me at this time insofar as voting is concerned.

[9] The issue with which I am concerned arises from the objection raised by two of Oakwood's secured creditors, namely, HongKong Bank and Bank of America Canada, that they are grouped together with the other secured creditors. They have brought applications before me seeking leave to realize upon their security or, in the alternative, to be constituted a separate and exclusive class of creditors and to be entitled to vote as such at any meeting convened pursuant to the plan.

[10] The very narrow issue which I must address concerns the propriety of classifying all the secured creditors of the company into one group. Counsel for Oakwood and Sceptre have attempted to justify their classifications by reference to the "commonality of interests test" described in *Sovereign Life Assur. Co. v. Dodd,* [1892] 2 Q.B. 573 (C.A.). That test received the approval of the Alberta Court of Appeal in *Savage v. Amoco Acquisition Co.* (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 87 A.R. 321, where Kerans J.A., on behalf of the court, stated [pp. 264-65]:

> We agree that the basic rule for the creation of groups for the consideration of fundamental corporate changes was expressed by Lord Esher in *Sovereign Life Assur. Co. v. Dodd,* [supra] when he said, speaking about creditors:
>
> "… if we find a different state of facts existing among different creditors which may differently affect their minds and their judgments, they must be divided into different classes."

[11] In the case of *Sovereign Life Assur. Co.,* Bowen L.J. went on to state at p. 583 that the class:

> … must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

[12] Counsel also made reference to two other "tests" which they argued must be complied with – the "minority veto test" and the "bona fide lack of oppression test". The former, it is argued, holds that the classes must not be so numerous as to give a veto

power to an otherwise insignificant minority. In support of this test, they cite my judgment in *Amoco Can. Petroleum Co. v. Dome Petroleum Ltd.,* Calgary No. 8701-20108, 28th January 1988 (not yet reported).

[13] I would restrict my comments on the applicability of this test to the fact that, in the *Amoco* case, I was dealing with "a very small minority group of [shareholders] near the bottom of the chain of priorities". Such is not the case here.

[14] In support of the "bona fide lack of oppression test", counsel cite *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.,* [1891] 1 Ch. 213 (C.A.), where Lindley L.J. stated at p. 239:

> The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bona fide,* and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent …

[15] Whether this test is properly considered at this stage, that is, whether the issue is the constitution of a membership of a class, is not necessary for me to decide as there have been no allegations by the HongKong Bank or Bank of America as to a lack of bona fides.

[16] What I am left with, then, is the application to the facts of this case of the "commonality of interests test" while keeping in mind that the proposed plan of arrangement arises under the C.C.A.A.

[17] Sceptre and Oakwood have argued that the secured creditors' interests are sufficiently common that they can be grouped together as one class. That class is comprised of six institutional lenders (I would note that the A.B.C noteholders are actually a group of ten lenders) who have each taken first charges as security on assets upon which they have the right to realize in order to recover their claims. The same method of valuation was applied to each secured claim in order to determine the security value under the plan.

[18] On the other hand, HongKong Bank and Bank of America have argued that their interests are distinguishable from the secured creditors class as a whole and from other secured creditors on an individuals basis. While they have identified a number of individually distinguishing features of their interests vis-à-vis those of other secured parties (which I will address later), they have put forth the proposition that since each creditor has taken separate security on different assets, the necessary commonality of interests is not

present. The rationale offered is that the different assets may give rise to a different state of facts which could alter the creditors' view as to the propriety of participating in the plan. For example, it was suggested that the relative ease of marketability of a distinct asset as opposed to the other assets granted as security could lead that secured creditor to choose to disapprove of the proposed plan. Similarly, the realization potential of assets may also lead to distinctions in the interests of the secured creditors and consequently bear upon their desire to participate in the plan.

[19] In support of this proposition, the HongKong Bank and Bank of America draw from comments made by Ronald N. Robertson, Q.C. in a publication entitled "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association – Ontario Continuing Legal Education, 5th April 1983, at p. 15, and by Stanley E. Edwards in an earlier article, "Reorganizations under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 603. Both authors gave credence to this "identity of interest" proposition that secured creditors should not be members of the same class "unless their security is on the same or substantially the same property and in equal priority". They also made reference to a case decided under c. 11 of the Bankruptcy Code of the United States of America which, while not applying that proposition in that given set of facts, accepted it as a "general rule". That authority is *Re Palisades-on-the-Desplaines; Seidel v. Palisades-on-the-Desplaines,* 89 F. 2d. 214 at 217-18 (1937, Ill.).

[20] Basically, in putting forth that proposition, the HongKong Bank and Bank of America are asserting that they have made advances to Oakwood on the strength of certain security which they identified as sufficient and desirable security and which they alone have the right to realize upon. Of course, the logical extension of that argument is that in the facts of this case each secured creditor must itself comprise a class of creditors. While counsel for the HongKong Bank and Bank of America suggested it was not necessary to do so in this case, as they are the only secured creditors opposed to the classification put forth, in principle such would have to be the case if I were to accept their proposition.

[21] To put the issue in another light, what I must decide is whether the holding of distinct security by each creditor necessitates a separate class of creditor for each, or whether notwithstanding this factor that they each share, nevertheless this factor does not override the grouping into one class of creditors. In my opinion, this decision cannot be made without considering the underlying purpose of the C.C.A.A.

[22] In *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,* Calgary No. 8801-14453, 17th November 1988 [now reported 63 Alta. L.R. (2d) 361], after canvassing the few authorities on point, I concluded that the purpose of the C.C.A.A. is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations. In referring to the case authority *Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que.,* [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75, I stated at pp. 24 and 25 [pp. 375-76]:

> It was held in that case that the Act was valid as relating to bankruptcy and insolvency rather than property and civil rights. At p. 664, Cannon J. held:
>
> "Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, 'bankruptcy' proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as 'insolvency proceedings' *with the object of preventing a declaration of bankruptcy and the sale of these assets.* If the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part, provisions for the setdement of the liabilities of the insolvent are an essential element of any insolvency legislation …"

[23] I went on to note:

> *The C.C.A.A. is an Act designed to continue, rather than liquidate companies* … The critical part of the decision is that federal legislation pertaining to assisting in the continuing operation of companies is constitutionally valid. In effect the Supreme Court of Canada has given the term "insolvency" a broad meaning in the constitutional sense by bringing within that term *an Act designed to promote the continuation of an insolvent company.* [emphasis added]

[24] In this regard, I would make extensive reference to the article by Mr. Robertson, Q.C., where, in discussing the classification of creditors under the C.C.A.A. and after stating the proposition referred to by counsel for the HongKong Bank and Bank of America, he states at p. 16 in his article:

> An initial, almost instinctive, response that differences in claims and property subject to security automatically means segregation into different classes does not necessarily make economic or legal sense in the context of an act such as the C.C.A.A.

[25] And later at pp. 19 and 20, in commenting on the article by Mr. Edwards, he states:

> However, if the trend of Edwards' suggestions that secured creditors can only be classed together when they held security of the same priority, that perhaps classes should be sub-divided into further groups according to wheth-er or not a member of the class also holds some other security or form of interest in the debtor company, *the multiplicity of discrete classes or subclasses classes might be so compounded as to defeat the object of the act.* As Edwards himself says, the subdivision of voting

groups and the counting of angels on the heads of pins must top somewhere and some forms of differences must surely be disregarded.

[26] In summarizing his discussion, he states on pp. 20-21:

> From the foregoing one can perceive at least two potentially conflicting approaches to the issue of classification. On the one hand there is the concept that members of a class ought to have the same "interest" in the company, ought to be only creditors entitled to look to the same "source" or "fund" for payment, and ought to encompass all of the creditors who do have such an identity of legal rights. *On the other hand, there is recognition that the legislative intent is to facilitate reorganization, that excessive fragmentation of classes may be counter-productive and that some degree of difference between claims should not preclude creditors being put in the same class.*
>
> *It is fundamental to any imposed plan or reorganization that strict legal rights are going to be altered and that such alteration may be imposed against the will of at least some creditors.* When one considers the complexity and magnitude of contemporary large business organizations, and the potential consequences of their failure it may be that the courts will be compelled to focus less on whether there is any identity of legal rights and rather focus on whether or not those constituting the class are persons, to use Lord Esher's phrase, "whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest" …
>
> If the plan of reorganization is such that the creditors' particular priorities and securities are preserved, especially in the event of ultimate failure, *it may be that the courts will, for example in an apt case decide that creditors who have basically made the same kinds of loans against the same kind of security, even though on different terms and against different particular secured assets, do have a sufficient similarity of interest to warrant being put into one class and being made subject to the will of the required majority of that class.* [emphasis added]

[27] These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the "identity of interest" proposition as a starting point in the classification of creditors necessarily results in a "multiplicity of discrete classes" which would make any reorganization difficult, if not impossible, to achieve.

[28] In the result, given that this planned reorganization arises under the C.C.A.A., I must reject the arguments put forth by the HongKong Bank and the Bank of America, that since they hold separate security over different assets, they must therefore be classified as a separate class of creditors.

[29] I turn now to the other factors which the HongKong Bank and Bank of America submit distinguishes them on individual bases from other creditors of Oakwood. The

HongKong Bank and Bank of America argue that the values used by Sceptre are significantly understated. With respect to the Bank of Montreal, it is alleged that that bank actually holds security valued close to, if not in excess of, the outstanding amount of its loans when compared to the HongKong Bank and Bank of America whose security, those banks allege, is approximately equal to the amount of its loans. It is submitted that a plan which understates the value of assets results in the oversecured party being more inclined to support a plan under which they will receive, without the difficulties of realization, close to full payments of their loans.

[30] The problem with this argument is that it is a throwback to the "identity of interest" proposition. Differing security positions and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender, with the possible exception of the A.B.C. noteholders who could be lumped with the HongKong Bank or Bank of America, as their percentage realization under the proposed plan is approximately equal to that of the HongKong Bank and Bank of America.

[31] Further, the HongKong Bank and Bank of America also submit that since the Royal Bank and National Bank of Canada are so much more undersecured on their loans, they too have a distinct interest in participating in the plan which is not shared by themselves. The sum total of their submissions would seem to be that, since oversecured and undersecured lenders have a greater incentive to participate, it is only those lenders, such as themselves with just the right amount of security, that do not share that common interest. Frankly, it appears to me that these arguments are drawn from the fact that they are the only secured creditors of Oakwood who would prefer to retain their right to realize upon their security, as opposed to participating in the plan. I do not wish to suggest that they should be chided for taking such a position, but surely expressed approval or disapproval of the plan is not a valid reason to create different classes of creditors. Further, as I have already clearly stated, the C.C.A.A. can validly be used to alter or remove the rights of creditors.

[32] Finally, I wish to address the argument that, since Sceptre has made arrangements with the Royal Bank of Canada relating to the purchase of Oakwood, it has an interest not shared by the other secured creditors. The Royal Bank's position as a principal lender in the reorganization is separate from its status as a secured creditor of Oakwood and arises from a separate business decision. In the absence of any allegation that the Royal Bank will not act bona fide in considering the benefit of the plan of the

secured creditors as a class, the HongKong Bank and Bank of America cannot be heard to criticize the Royal Bank's presence in the same class.

[33] In light of my conclusions, the result is that I approve the proposed classification of secured creditors into one class.

[34] There is one further comment I wish to make with respect to the valuations made by Sceptre for the purposes of the vote calculations. I assume that Sceptre will be relying on those valuations at any fairness hearing, assuming this matter proceeds. I would simply observe that the onus is of course on Sceptre to establish that the valuations relied on and set forth in their plan in fact represent fair value under all the circumstances.

[35] It has been obvious during the course of the hearing of this phase of the application that at least two of the secured creditors, to whom reference has been made, are not satisfied that that is the case, and in the event evidence is led by them in an effort to establish that the values proposed do not represent the fair value, the onus will be on Sceptre and Oakwood to establish the contrary. Underlying my comments above are of course the court's concern of ensuring that approval of any plan proposed does not result in unfair confiscation of the property of any secured creditors. In that regard, the underlying value of the assets of each individual secured creditor on the facts of this case would appear to be of prime importance.

Application granted.

See para. 90

Most Negative Treatment: Not followed
Most Recent Not followed: Norm's Hauling Ltd., Re | 1991 CarswellSask 38, 6 C.B.R. (3d) 16, 91 Sask. R. 210, [1991] 3 W.W.R. 23, [1991] S.J. No. 53, 25 A.C.W.S. (3d) 57 | (Sask. Q.B., Jan 28, 1991)

1990 CarswellOnt 139
Ontario Court of Appeal

Nova Metal Products Inc. v. Comiskey (Trustee of)

1990 CarswellOnt 139, 1 C.B.R. (3d) 101, 1 O.R. (3d) 289, 23 A.C.W.S. (3d) 1192, 41 O.A.C. 282

ELAN CORPORATION et al. v. COMISKEY (TRUSTEE OF) et al.

Finlayson, Krever and Doherty JJ.A.

Heard: October 30 and 31, 1990
Judgment: November 2, 1990
Docket: Doc. Nos. CA 684/90 and CA 685/90

Counsel: *F.J.C. Newbould*, Q.C., and *G.B. Morawetz*, for appellant The Bank of Nova Scotia.
John Little, for respondents Elan Corporation and Nova Metal Products Inc.
Michael B. Rotsztain, for RoyNat Inc.
Kim Twohig and *Mel Olanow*, for Ontario Development Corp.
K.P. McElcheran, for monitor Ernst & Young.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Table of Authorities
Cases considered:
Per Finlayson J.A. (Krever J.A. concurring)
Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *applied*
Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35 (S.C.), aff'd (16 September 1988), Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A. (B.C. C.A.) — *considered*
Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*
NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *considered*
Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.) — *applied*
Wellington Building Corp., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.) — *applied*
Per Doherty J.A. (dissenting in part)
Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *considered*
Avery Construction Co., Re, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) — *referred to*
Hongkong Bank of Canada v. Chef Ready Foods Ltd., [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.) — *considered*
Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (1989), 102 A.R. 161 (Q.B.) — *referred to*

Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd., 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) — *referred to*
Metals & Alloys Co., Re (16 February 1990), Houlden J.A. (Ont. C.A.) [unreported] — *considered*
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*
Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*
Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193 (S.C.) — *referred to*
Reference re Residential Tenancies Act (Ontario), [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 — *referred to*
Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) — *considered*
United Maritime Fishermen Co-op., Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), rev'd (1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253 (C.A.) — *considered*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 —

s. 178, as am. R.S.C. 1985 (3d Supp.), c. 25, s. 26

Companies' Creditors Arrangement Act, S.C. 1932-33, c. 36 —

s. 3, en. as s. 2A, S.C. 1952-53, c. 3, s. 2

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 3

s. 4

s. 5

s. 6

s. 6(a)

s. 11

s. 14(2)

Courts of Justice Act, 1984, S.O. 1984, c. 11 —

s. 144(1)

Interpretation Act, R.S.C. 1985, c. I-21 —

s. 12

Municipal Act, R.S.O. 1980, c. 302 —

s. 369

APPEAL from order of Hoolihan J. dated September 11, 1990, allowing application under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

***FINLAYSON J.A. (KREVER J.A.* concurring) (orally):**

1 This is an appeal by the Bank of Nova Scotia (the "bank") from orders made by Mr. Justice Hoolihan [(11 September 1990), Doc. Nos. Toronto RE 1993/90 and RE 1994/90 (Ont. Gen. Div.)] as hereinafter described. The Bank of Nova Scotia was the lender to two related companies, namely, Elan Corporation ("Elan") and Nova Metal Products Inc. ("Nova"), which commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), for the purposes of having a plan of arrangement put to a meeting of secured creditors of those companies.

2 The orders appealed from are:

(i) An order of September 11, 1990, which directed a meeting of the secured creditors of Elan and Nova to consider the plan of arrangement filed, or other suitable plan. The order further provided that for 3 days until September 14, 1990, the bank be prevented from acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova, and that Elan and Nova could spend the accounts receivable assigned to the bank that would be received.

(ii) An order dated September 14, 1990, extending the terms of the order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990. This order continued the stay against the bank and the power of Elan and Nova to spend the accounts receivable assigned to the bank. Further orders dated September 27, 1990, and October 18, 1990, have extended the stay, and the power of Elan and Nova to spend the accounts receivable that have been assigned to the bank. The date of the meetings of creditors has been extended to November 9, 1990. The application to sanction the plan of arrangement must be heard by November 14, 1990.

(iii) An order dated October 18, 1990, directing that there be two classes of secured creditors for the purposes of voting at the meeting of secured creditors. The first class is to be comprised of the bank, RoyNat Inc. ("RoyNat"), the Ontario Development Corporation ("O.D.C."), the city of Chatham and the village of Glencoe. The second class is to be comprised of persons related to Elan and Nova that acquired debentures to enable the companies to apply under the CCAA.

3 There is very little dispute about the facts in this matter, but the chronology of events is important and I am setting it out in some detail.

4 The bank has been the banker to Elan and Nova. At the time of the application in August 1990, it was owed approximately $1,900,000. With interest and costs, including receivers' fees, it is now owed in excess of $2,300,000. It has a first registered charge on the accounts receivable and inventory of Elan and Nova, and a second registered charge on the land, buildings and equipment. It also has security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1, as am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26. The terms of credit between the bank and Elan as set out in a commitment agreement provide that Elan and Nova may not encumber their assets without the consent of the bank.

5 RoyNat is also a secured creditor of Elan and Nova, and it is owed approximately $12 million. It holds a second registered charge on the accounts receivable and inventory of Elan and Nova, and a first registered charge on the land, buildings and equipment. The bank and RoyNat entered into a priority agreement to define with certainty the priority which each holds over the assets of Elan and Nova.

6 The O.D.C. guaranteed payment of $500,000 to RoyNat for that amount lent by RoyNat to Elan. The O.D.C. holds debenture security from Elan and secure the guarantee which it gave to RoyNat. That security ranks third to the bank and RoyNat. The O.D.C. has not been called upon by RoyNat to pay under its guarantee. O.D.C. has not lent any money directly to Elan or Nova.

7 Elan owes approximately $77,000 to the City of Chatham for unpaid municipal taxes. Nova owes approximately $18,000 to the Village of Glencoe for unpaid municipal taxes. Both municipalities have a lien on the real property of the respective companies in priority to every claim except the Crown under s. 369 of the *Municipal Act*, R.S.O. 1980, c. 302.

8 On May 8, 1990, the bank demanded payment of all outstanding loans owing by Elan and Nova to be made by June 1, 1990. Extensions of time were granted and negotiations directed to the settlement of the debt took place thereafter. On August 27, 1990, the bank appointed Coopers & Lybrand Limited as receiver and manager of the assets of Elan and Nova, and as agent

under the bank's security to realize upon the security. Elan and Nova refused to allow the receiver and manager to have access to their premises, on the basis that insufficient notice had been provided by the bank before demanding payment.

9 Later on August 27, 1990, the bank brought a motion in an action against Elan and Nova (Court File No. 54033/90) for an order granting possession of the premises of Elan and Nova to Coopers & Lybrand. On the evening of August 27, 1990, at approximately 9 p.m., Mr. Justice Saunders made an order adjourning the motion on certain conditions. The order authorized Coopers & Lybrand access to the premises to monitor Elan's business, and permitted Elan to remain in possession and carry on its business in the ordinary course. The bank was restrained in the order, until the motion could be heard, from selling inventory, land, equipment or buildings or from notifying account debtors to collect receivables, but was not restrained from applying accounts receivable that were collected against outstanding bank loans.

10 On Wednesday, August 29, 1990, Elan and Nova each issued a debenture for $10,000 to a friend of the principals of the companies, Joseph Comiskey, through his brother Michael Comiskey as trustee, pursuant to a trust deed executed the same day. The terms were not commercial and it does not appear that repayment was expected. It is conceded by counsel for Elan that the sole purpose of issuing the debentures was to qualify as a "debtor company" within the meaning of s. 3 of the CCAA. Section 3 reads as follows:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

11 The debentures conveyed the personal property of Elan and Nova as security to Michael Comiskey as trustee. No consent was obtained from the bank as required by the loan agreements, nor was any consent obtained from the receiver. Cheques for $10,000 each, representing the loans secured in the debentures, were given to Elan and Nova on Wednesday, August 29, 1990, but not deposited until 6 days later on September 4, 1990, after an interim order had been made by Mr. Justice Farley in favour of Elan and Nova staying the bank from taking proceedings.

12 On August 30, 1990 Elan and Nova applied under s. 5 of the CCAA for an order directing a meeting of secured creditors to vote on a plan of arrangement. Section 5 provides:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

13 The application was heard by Farley J. on Friday, August 31, 1990, at 8 a.m. Farley J. dismissed the application on the grounds that the CCAA required that there be more than one debenture issued by each company. Later on the same say, August 31, 1990, Elan and Nova each issued two debentures for $500 to the wife of the principal of Elan through her sister as trustee. The debentures provided for payment of interest to commence on August 31, 1992. Cheques for $500 were delivered that day to the companies but not deposited in the bank account until September 4, 1990. These debentures conveyed the personal property in the assets of Elan and Nova to the trustee as security. Once again it is conceded that the debentures were issued for the sole purpose of meeting the requirements of s. 3 of the CCAA. No consent was obtained from the bank as required by the loan terms, nor was any consent obtained from the receiver.

14 On August 31, 1990, following the creation of the trust deeds and the issuance of the debentures, Elan and Nova commenced new applications under the CCAA which were heard late in the day by Farley J. He adjourned the applications to September 10, 1990, on certain terms, including a stay preventing the bank from acting on its security and allowing Elan to spend up to $321,000 from accounts receivable collected by it.

15 The plan of arrangement filed with the application provided that Elan and Nova would carry on business for 3 months, that secured creditors would not be paid and could take no action on their security for 3 months, and that the accounts receivable of Elan and Nova assigned to the bank could be utilized by Elan and Nova for purposes of its day-to-day operations. No compromise of any sort was proposed.

16 On September 11, 1990, Hoolihan J. ordered that a meeting of the secured creditors of Elan and Nova be held no later than October 22, 1990, to consider the plan of arrangement that had been filed, or other suitable plan. He ordered that the plan of arrangement be presented to the secured creditors no later than September 27, 1990. He made further orders effective for 3 days until September 14, 1990, including orders:

(i) that the companies could spend the accounts receivable assigned to the bank that would be collected in accordance with a cash flow forecast filed with the Court providing for $1,387,000 to be spent by September 30, 1990; and

(ii) a stay of proceedings against the bank acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova.

17 On September 14, 1990, Hoolihan J. extended the terms of his order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990 for final approval. This order continued the power of Elan and Nova to spend up to $1,387,000 of the accounts receivable assigned to the bank in accordance with the projected cash flow to September 30, 1990, and to spend a further amount to October 24, 1990, in accordance with a cash flow to be approved by Hoolihan J. prior to October 1, 1990. Further orders dated September 27 and October 18 have extended the power to spend the accounts receivable to November 14, 1990.

18 On September 14, 1990, the bank requested Hoolihan J. to restrict his order so that Elan and Nova could use the accounts receivable assigned to the bank only so long as they continued to operate within the borrowing guidelines contained in the terms of the loan agreements with the bank. These guidelines require a certain ratio to exist between bank loans and the book value of the accounts receivable and inventory assigned to the bank, and are designed in normal circumstances to ensure that there is sufficient value in the security assigned to the bank. Hoolihan J. refused to make the order.

19 On October 18, 1990, Hoolihan J. ordered that the composition of the classes of secured creditors for the purposes of voting at the meeting of secured creditors shall be as follows:

(a) The bank, RoyNat, O.D.C., the City of Chatham and the Village of Glencoe shall comprise one class.

(b) The parties related to the principal of Elan that acquired their debentures to enable the companies to apply under the CCAA shall comprise a second class.

20 On October 18, 1990, at the request of counsel for Elan and Nova, Hoolihan J. further ordered that the date for the meeting of creditors of Elan and Nova be extended to November 9, 1990, in order to allow a new plan of arrangement to be sent to all creditors, including unsecured creditors of those companies. Elan and Nova now plan to offer a plan of compromise or arrangement to the unsecured creditors of Elan and Nova as well as to the secured creditors.

21 There are five issues in this appeal.

(1) Are the debentures issued by Elan and Nova for the purpose of permitting the companies to qualify as applicants under the CCAA debentures within the meaning of s. 3 of the CCAA?

(2) Did the issue of the debentures contravene the provisions of the loan agreements between Elan and Nova and the bank? If so, what are the consequences for CCAA purposes?

(3) Did Elan and Nova have the power to issue the debentures and make application under the CCAA after the bank had appointed a receiver and after the order of Saunders J.?

(4) Did Hoolihan J. have the power under s. 11 of the CCAA to make the interim orders that he made with respect to the accounts receivable?

(5) Was Hoolihan J. correct in ordering that the bank vote on the proposed plan of arrangement in a class with RoyNat and the other secured creditors?

22 It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies, Elan and Nova, are entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. Having said that, it does not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA that the Court should not consider the equities in this case as they relate to these companies and to one of its principal secured creditors, the bank.

23 The issues before Hoolihan J. and this Court were argued on a technical basis. Hoolihan J. did not give effect to the argument that the debentures described above were a "sham" and could not be used for the purposes of asserting jurisdiction. Unfortunately, he did not address any of the other arguments presented to him on the threshold issue of the availability of the CCAA. He appears to have acted on the premise that if the CCAA can be made available, it should be utilized.

24 If Hoolihan J. did exercise any discretion overall, it is not reflected in his reasons. I believe, therefore, that we are in a position to look at the uncontested chronology of these proceedings and exercise our own discretion. To me, the significant date is August 27, 1990 when the bank appointed Coopers & Lybrand Limited as receiver and manager of the undertaking, property and assets mortgaged and charged under the demand debenture and of the collateral under the general security agreement, both dated June 20, 1979. On the same date, it appointed the same company as receiver and manager for Nova under a general security agreement dated December 5, 1988. The effect of this appointment is to divest the companies and their boards of directors of their power to deal with the property comprised in the appointment: Raymond Walton, *Kerr on the Law and Practice as to Receivers*, 16th ed. (London: Sweet & Maxwell, 1983), p. 292. Neither Elan nor Nova had the power to create further indebtedness, and thus to interfere with the ability of the receiver to manage the two companies: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.).

25 Counsel for the debtor companies submitted that the management powers of the receiver were stripped from the receiver by Saunders J. in his interim order, when he allowed the receiver access to the companies' properties but would not permit it to realize on the security of the bank until further order. He pointed out that the order also provided that the companies were entitled to remain in possession and "to carry on business in the ordinary course" until further order.

26 I do not agree with counsel's submission covering the effect of the order. It certainly restricted what the receiver could do on an interim basis, but it imposed restrictions on the companies as well. The issue of these disputed debentures in support of an application for relief as insolvent companies under the CCAA does not comply with the order of Saunders J. This is not carrying on business in the ordinary course. The residual power to take all of these initiatives for relief under the CCAA remained with the receiver, and if trust deeds were to be issued, an order of the Court in Action 54033/90 was required permitting their issuance and registration.

27 There is another feature which, in my opinion, affects the exercise of discretion, and that is the probability of the meeting achieving some measure of success. Hoolihan J. considered the calling of the meeting at one hearing, as he was asked to do, and determined the respective classes of creditors at another. This latter classification is necessary because of the provisions of s. 6(a) of the CCAA, which reads as follows:

6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company.

28 If both matters had been considered at the same time, as in my view they should have been, and if what I regard as a proper classification of the creditors had taken place, I think it is obvious that the meeting would not be a productive one. It was improper, in my opinion, to create one class of creditors made up of all the secured creditors save the so-called "sham" creditors. There is no true community of interest among them, and the motivation of Elan and Nova in striving to create a single class is clearly designed to avoid the classification of the bank as a separate class.

29 It is apparent that the only secured creditors with a significant interest in the proceeding under the CCAA are the bank and RoyNat. The two municipalities have total claims for arrears of taxes of less than $100,000. They have first priority in the lands of the companies. They are in no jeopardy whatsoever. The O.D.C. has a potential liability in that it can be called upon by RoyNat under its guarantee to a maximum of $500,000, and this will trigger default under its debentures with the companies, but its interests lie with RoyNat.

30 As to RoyNat, it is the largest creditor with a debt of some $12 million. It will dominate any class it is in because, under s. 6 of the CCAA, the majority in a class must represent three-quarters in value of that class. It will always have a veto by reason of the size of its claim, but requires at least one creditor to vote for it to give it a majority in number (I am ignoring the municipalities). It needs the O.D.C.

31 I do not base my opinion solely on commercial self-interest, but also on the differences in legal interest. The bank has first priority on the receivables referred to as the "quick assets", and RoyNat ranks second in priority. RoyNat has first priority on the buildings and realty, the "fixed assets", and the bank has second priority.

32 It is in the commercial interests of the bank, with its smaller claim and more readily realizable assets, to collect and retain the accounts receivable. It is in the commercial interests of RoyNat to preserve the cash flow of the business and sell the enterprise as a going concern. It can only do that by overriding the prior claim of the bank to these receivables. If it can vote with the O.D.C. in the same class as the bank, it can achieve that goal and extinguish the prior claim of the bank to realize on the receivables. This it can do, despite having acknowledged its legal relationship to the bank in the priority agreement signed by the two. I can think of no reason why the legal interest of the bank as the holder of the first security on the receivables should be overridden by RoyNat as holder of the second security.

33 The classic statement on classes of creditors is that of Lord Esher M.R. in *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.), at pp. 579-580 [Q.B.]:

> The Act [*Joint Stock Companies Arrangement Act, 1870*] says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes — classes which the Act of Parliament recognises, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

34 The *Sovereign Life* case was quoted with approval by Kingstone J. in *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.), at p. 659 [O.R.]. He also quoted another English authority at p. 658:

> In *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.*, [1891] 1 Ch. 213, a scheme and arrangement under the Joint Stock Companies Arrangement Act (1870), was submitted to the Court for approval. Lord Justice Bowen, at p. 243, says:
>
> > Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that

> class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

35 Kingstone J. set aside a meeting where three classes of creditors were permitted to vote together. He said at p. 660:

> It is clear that Parliament intended to give the three-fourths majority of any class power to bind that class, but I do not think the Statute should be construed so as to permit holders of subsequent mortgages power to vote and thereby destroy the priority rights and security of a first mortgagee.

36 We have been referred to more modern cases, including two decisions of Trainor J. of the British Columbia Supreme Court, both entitled *Re Northland Properties Ltd.* One case is reported in (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35, and the other in the same volume at p. 175 [C.B.R.]. Trainor J. was upheld on appeal on both judgments. The first judgment of the British Columbia Court of Appeal is unreported (16 September, 1988) [Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A.]. The judgment in the second appeal is reported at 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122.

37 In the first *Northland* case, Trainor J. held that the difference in the terms of parties to and priority of different bonds meant that they should be placed in separate classes. He relied upon *Re Wellington Building Corp.*, supra. In the second *Northland* case, he dealt with 15 mortgagees who were equal in priority but held different parcels of land as security. Trainor J. held that their relative security positions were the same, notwithstanding that the mortgages were for the most part secured by charges against separate properties. The nature of the debt was the same, the nature of the security was the same, the remedies for default were the same, and in all cases they were corporate loans by sophisticated lenders. In specifically accepting the reasoning of Trainor J., the Court of Appeal held that the concern of the various mortgagees as to the quality of their individual securities was "a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both" (p. 203).

38 In *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), the Court stressed that a class should be made up of persons "'whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'" (p. 8 [of C.B.R.]).

39 My assessment of these secured creditors is that the bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the Court declining to exercise its discretion in favour of the debtor companies.

40 For all the reasons given above, the application under the CCAA should have been dismissed. I do not think that I have to give definitive answers to the individual issues numbered (1) and (2). They can be addressed in a later case, where the answers could be dispositive of an application under the CCAA. The answer to (3) is that the combined effect of the receivership and the order of Saunders J. disentitled the companies to issue the debentures and bring the application under the CCAA. It is not necessary to answer issue (4), and the answer to (5) is no.

41 Accordingly, I would allow the appeal, set aside the three orders of Hoolihan J., and, in their place, issue an order dismissing the application under the CCAA. The bank should receive its costs of this appeal, the applications for leave to appeal, and the proceedings before Farley and Hoolihan JJ., to be paid by Elan, Nova and RoyNat.

42 Ernst & Young were appointed monitor in the order of Hoolihan J. dated September 14, 1990, to monitor the operations of Elan and Nova and give effect to and supervise the terms and conditions of the stay of proceedings in accordance with Appendix "C" appended to the order. The monitor should be entitled to be paid for all services performed to date, including whatever is necessary to complete its reports for past work, as called for in Appendix "C".

DOHERTY J.A. **(dissenting in part):**

I Background

43 On November 2, 1990, this Court allowed the appeal brought by the Bank of Nova Scotia (the "bank") and vacated several orders made by Hoolihan J. Finlayson J.A. delivered oral reasons on behalf of the majority. At the same time, I delivered brief oral reasons dissenting in part from the conclusion reached by the majority and undertook to provide further written reasons. These are those reasons.

44 The events relevant to the disposition of this appeal are set out in some detail in the oral reasons of Finlayson J.A. I will not repeat that chronology, but will refer to certain additional background facts before turning to the legal issues.

45 Elan Corporation ("Elan") owns the shares of Nova Metal Products Inc. ("Nova Inc."). Both companies have been actively involved in the manufacture of automobile parts for a number of years. As of March 1990, the companies had total annual sales of about $30 million, and employed some 220 people in plants located in Chatham and Glencoe, Ontario. The operation of these companies no doubt plays a significant role in the economy of these two small communities.

46 In the 4 years prior to 1989, the companies had operated at a profit ranging from $287,000 (1987) to $1,500,000 (1986). In 1989, several factors, including large capital expenditures and a downturn in the market, combined to produce an operational loss of about $1,333,000. It is anticipated that the loss for the year ending June 30, 1990, will be about $2.3 million. As of August 1, 1990, the companies continued in full operation, and those in control anticipated that the financial picture would improve significantly later in 1990, when the companies would be busy filling several contracts which had been obtained earlier in 1990.

47 The bank has provided credit to the companies for several years. In January 1989, the bank extended an operating line of credit to the companies. The line of credit was by way of a demand loan that was secured in the manner described by Finlayson J.A. Beginning in May 1989, and from time to time after that, the companies were in default under the terms of the loan advanced by the bank. On each occasion, the bank and the companies managed to work out some agreement so that the bank continued as lender and the companies continued to operate their plants.

48 Late in 1989, the companies arranged for a $500,000 operating loan from RoyNat Inc. It was hoped that this loan, combined with the operating line of $2.5 million from the bank, would permit the company to weather its fiscal storm. In March 1990, the bank took the position that the companies were in breach of certain requirements under their loan agreements, and warned that if the difficulties were not rectified the bank would not continue as the company's lender. Mr. Patrick Johnson, the president of both companies, attempted to respond to these concerns in a detailed letter to the bank dated March 15, 1990. The response did not placate the bank. In May 1990, the bank called its loan and made a demand for immediate payment. Mr. Spencer, for the bank, wrote: "We consider your financial condition continues to be critical and we are not prepared to delay further making formal demand." He went on to indicate that, subject to further deterioration in the companies' fiscal position, the bank was prepared to delay acting on its security until June 1, 1990.

49 As of May 1990, Mr. Johnson, to the bank's knowledge, was actively seeking alternative funding to replace the bank. At the same time, he was trying to convince the union which represented the workers employed at both plants to assist in a co-operative effort to keep the plants operational during the hard times. The union had agreed to discuss amendment of the collective bargaining agreement to facilitate the continued operation of the companies.

50 The June 1, 1990 deadline set by the bank passed without incident. Mr. Johnson continued to search for new financing. A potential lender was introduced to Mr. Spencer of the bank on August 13, 1990, and it appeared that the bank, through Mr. Spencer, was favourably impressed with this potential lender. However, on August 27, 1990, the bank decided to take action to protect its position. Coopers & Lybrand was appointed by the bank as receiver-manager under the terms of the security agreements with the companies. The companies denied the receiver access to their plants. The bank then moved before the Honourable Mr. Justice E. Saunders for an order giving the receiver possession of the premises occupied by the companies. On August 27, 1990, after hearing argument from counsel for the bank and the companies, Mr. Justice Saunders refused to install the receivers and made the following interim order:

1. THIS COURT ORDERS that the receiver be allowed access to the property to monitor the operations of the defendants but shall not take steps to realize on the security of The Bank of Nova Scotia until further Order of the Court.

2. THIS COURT ORDERS that the defendants shall be entitled to remain in possession and to carry on business in the ordinary course until further Order of this Court.

3. THIS COURT ORDERS that until further order the Bank of Nova Scotia shall not take steps to notify account debtors of the defendants for the purpose of collecting outstanding accounts receivable. This Order does not restrict The Bank of Nova Scotia from dealing with accounts receivable of the defendants received by it.

4. THIS COURT ORDERS that the motion is otherwise adjourned to a date to be fixed.

51 The notice of motion placed before Saunders J. by the bank referred to "an intended action" by the bank. It does not appear that the bank took any further steps in connection with this "intended action."

52 Having resisted the bank's efforts to assume control of the affairs of the companies on August 27, 1990, and realizing that their operations could cease within a matter of days, the companies turned to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act"), in an effort to hold the bank at bay while attempting to reorganize their finances. Finlayson J.A. has described the companies' efforts to qualify under that Act, the two appearances before the Honourable Mr. Justice Farley on August 31, 1990, and the appearances before the Honourable Mr. Justice Hoolihan in September and October 1990, which resulted in the orders challenged on this appeal.

II The Issues

53 The dispute between the bank and the companies when this application came before Hoolihan J. was a straightforward one. The bank had determined that its best interests would be served by the immediate execution of the rights it had under its various agreements with the companies. The bank's best interest was not met by the continued operation of the companies as going concerns. The companies and their other two substantial secured creditors considered that their interests required that the companies continue to operate, at least for a period which would enable the companies to place a plan of reorganization before its creditors.

54 All parties were pursuing what they perceived to be their commercial interests. To the bank, these interests entailed the "death" of the companies as operating entities. To the companies, these interests required "life support" for the companies through the provisions of the Act to permit a "last ditch" effort to save the companies and keep them in operation.

55 The issues raised on this appeal can be summarized as follows:

(i) Did Hoolihan J. err in holding that the companies were entitled to invoke the Act?

(ii) Did Hoolihan J. err in exercising his discretion in directing that a meeting of creditors should be held under the Act?

(iii) Did Hoolihan J. err in directing that the bank and RoyNat Inc. should be placed in the same class of creditors for the purposes of the Act?

(iv) Did Hoolihan J. err in the terms of the interim orders he made pending the meeting of creditors and the submission to the court of a plan of reorganization?

III The Purpose and Scheme of the Act

56 Before turning to these issues, it is necessary to understand the purpose of the Act, and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression (S.C. 1932-33, c. 36). The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations. The reorganization contemplated required the cooperation of the debtor companies'

creditors and shareholders: *Re Avery Construction Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.); Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at pp. 592-593; David H. Goldman, "Reorganizations Under the Companies' Creditors Arrangement Act (Canada)" (1985) 55 C.B.R. (N.S.) 36, at pp. 37-39.

57 The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy- or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

58 The purpose of the Act was artfully put by Gibbs J.A., speaking for the British Columbia Court of Appeal, in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, an unreported judgment released October 29, 1990 [Doc. No. Vancouver CA12944, Carrothers, Cumming and Gibbs JJ.A., now reported [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84], at pp. 11 and 6 [unreported, pp. 91 and 88 B.C.L.R.]. In referring to the purpose for which the Act was initially proclaimed, he said:

> Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A. ['the Act'], to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

59 In an earlier passage, His Lordship had said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.

60 Gibbs J.A. also observed (at p. 13) that the Act was designed to serve a "broad constituency of investors, creditors and employees." Because of that "broad constituency", the Court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at p. 593.

61 The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 14 [unreported, p. 92 B.C.L.R.].

62 The Act is available to all insolvent companies, provided the requirements of s. 3 of the Act are met. That section provides:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

63 A debtor company, or a creditor of that company, invokes the Act by way of summary application to the Court under s. 4 or s. 5 of the Act. For present purposes, s. 5 is the relevant section:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

64 Section 5 does not require that the Court direct a meeting of creditors to consider a proposed plan. The Court's power to do so is discretionary. There will no doubt be cases where no order will be made, even though the debtor company qualifies under s. 3 of the Act.

65 If the Court determines that a meeting should be called, the creditors must be placed into classes for the purpose of that meeting. The significance of this classification process is made apparent by s. 6 of the Act:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

66 If the plan of reorganization is approved by the creditors as required by s. 6, it must then be presented to the Court. Once again, the Court must exercise a discretion, and determine whether it will ap prove the plan of reorganization. In exercising that discretion, the Court is concerned not only with whether the appropriate majority has approved the plan at a meeting held in accordance with the Act and the order of the Court, but also with whether the plan is a fair and reasonable one: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 at 182-185 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.).

67 If the Court chooses to exercise its discretion in favour of calling a meeting of creditors for the purpose of considering a plan of reorganization, the Act provides that the rights and remedies available to creditors, the debtor company, and others during the period between the making of the initial order and the consideration of the proposed plan may be suspended or otherwise controlled by the Court.

68 Section 11 gives a court wide powers to make any interim orders:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

69 Viewed in its totality, the Act gives the Court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 at p. 165 (Q.B.).

IV Did Hoolihan J. Err in Holding that the Debtor Companies were Entitled to Invoke the Act?

70 The appellant advances three arguments in support of its contention that Elan and Nova Inc. were not entitled to seek relief under the Act. It argues first that the debentures issued by the companies after August 27, 1990, were "shams" and did not fulfil the requirements of s. 3 of the Act. The appellant next contends that the issuing of the debentures by the companies contravened their agreements with the bank, in which they undertook not to further encumber the assets of the companies without the consent of the bank. Lastly, the appellant maintains that once the bank had appointed a receiver-manager over the affairs of the companies on August 27, 1990, the companies had no power to create further indebtedness by way of debentures or to bring an application on behalf of the companies under the Act.

(i) Section 3 and "Instant" Trust Deeds

71 The debentures issued in August 1990, after the bank had moved to install a receiver-manager, were issued solely and expressly for the purpose of meeting the requirements of s. 3 of the Act. Indeed, it took the companies two attempts to meet those requirements. The debentures had no commercial purpose. The transactions did, however, involve true loans in the sense that moneys were advanced and debt was created. Appropriate and valid trust deeds were also issued.

72 In my view, it is inappropriate to refer to these transactions as "shams." They are neither false nor counterfeit, but rather are exactly what they appear to be, transactions made to meet jurisdictional requirements of the Act so as to permit an application for reorganization under the Act. Such transactions are apparently well known to the commercial Bar: B. O'Leary, "A Review of the Companies' Creditors Arrangement Act" (1987) 4 Nat. Insolvency Rev. 38, at p. 39; C. Ham, " 'Instant' Trust Deeds Under the C.C.A.A." (1988) 2 Commercial Insolvency Reporter 25; G.B. Morawetz, "Emerging Trends in the Use of the Companies' Creditors Arrangement Act" (1990) Proceedings, First Annual General Meeting and Conference of the Insolvency Institute of Canada.

73 Mr. Ham writes, at pp. 25 and 30:

> Consequently, some companies have recently sought to bring themselves within the ambit of the C.C.A.A. by creating 'in stant' trust deeds, i.e., trust deeds which are created solely for the purpose of enabling them to take advantage of the C.C.A.A.

74 Applications under the Act involving the use of "instant" trust deeds have been before the Courts on a number of occasions. In no case has any court held that a company cannot gain access to the Act by creating a debt which meets the requirements of s. 3 for the express purpose of qualifying under the Act. In most cases, the use of these "instant" trust deeds has been acknowledged without comment.

75 The decision of Chief Justice Richard in *Re United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), at 55-56 [67 C.B.R.], speaks directly to the use of "instant" trust deeds. The Chief Justice refused to read any words into s. 3 of the Act which would limit the availability of the Act depending on the point at which, or the purpose for which, the debenture or bond and accompanying trust deed were created. He accepted [at p. 56 C.B.R.] the debtor company's argument that the Act:

> does not impose any time restraints on the creation of the conditions as set out in s. 3 of the Act, nor does it contain any prohibition against the creation of the conditions set out in s. 3 for the purpose of obtaining jurisdiction.

76 It should, however, be noted that in *Re United Maritime Fishermen Co-op.*, supra, the debt itself was not created for the purpose of qualifying under the Act. The bond and the trust deed, however, were created for that purpose. The case is therefore factually distinguishable from the case at Bar.

77 The Court of Appeal reversed the ruling of the Chief Justice ((1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253) on the basis that the bonds required by s. 3 of the Act had not been issued when the application was made, so that on a precise reading of the words of s. 3 the company did not qualify. The Court did not go on to consider whether,

had the bonds been properly issued, the company would have been entitled to invoke the Act. Hoyt J.A., for the majority, did, however, observe without comment that the trust deeds had been created specifically for the purpose of bringing an application under the Act.

78 The judgment of MacKinnon J. in *Re Stephanie's Fashions Ltd.*, unreported, Doc. No. Vancouver A893427, released January 24, 1990 (B.C. S.C.) [now reported 1 C.B.R. (3d) 248], is factually on all fours with the present case. In that case, as in this one, it was acknowledged that the sole purpose for creating the debt was to effect compliance with s. 3 of the Act. After considering the judgment of Chief Justice Richard in *Re United Maritime Fishermen Co-op.*, supra, MacKinnon J. held, at p. 251:

> The reason for creating the trust deed is not for the usual purposes of securing a debt but, when one reads it, on its face, it does that. I find that it is a genuine trust deed and not a fraud, and that the petitioners have complied with s. 3 of the statute.

79 *Re Metals & Alloys Co.* (16 February 1990) is a recent example of a case in this jurisdiction in which "instant" trust deeds were successfully used to bring a company within the Act. The company issued debentures for the purpose of permitting the company to qualify under the Act, so as to provide it with an opportunity to prepare and submit a reorganization plan. The company then applied for an order, seeking, inter alia, a declaration that the debtor company was a corporation within the meaning of the Act. Houlden J.A., hearing the matter at first instance, granted the declaration request in an order dated February 16, 1990. No reasons were given. It does not appear that the company's qualifications were challenged before Houlden J.A.; however, the nature of the debentures issued and the purpose for their issue was fully disclosed in the material before him. The requirements of s. 3 of the Act are jurisdictional in nature, and the consent of the parties cannot vest a court with jurisdiction it does not have. One must conclude that Houlden J.A. was satisfied that "instant" trust deeds suffice for the purposes of s. 3 of the Act.

80 A similar conclusion is implicit in the reasons of the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. In that case, a debt of $50, with an accompanying debenture and trust deed, was created specifically to enable the company to make application under the Act. The Court noted that the debt was created solely for that purpose in an effort to forestall an attempt by the bank to liquidate the assets of the debtor company. The Court went on to deal with the merits, and to dismiss an appeal from an order granting a stay pending a reorganization meeting. The Court could not have reached the merits without first concluding that the $50 debt created by the company met the requirements of s. 3 of the Act.

81 The weight of authority is against the appellant. Counsel for the appellant attempts to counter that authority by reference to the remarks of the Minister of Justice when s. 3 was introduced as an amendment to the Act in the 1952-53 sittings of Parliament (House of Commons Debates, 1-2 Eliz. II (1952-53), vol. II, pp. 1268-1269). The interpretation of words found in a statute, by reference to speeches made in Parliament at the time legislation is introduced, has never found favour in our Courts: *Reference Re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 138, at 721 [S.C.R.], 561 [D.L.R.]. Nor, with respect to Mr. Newbould's able argument, do I find the words of the Minister of Justice at the time the present s. 3 was introduced to be particularly illuminating. He indicated that the amendment to the Act left companies with complex financial structures free to resort to the Act, but that it excluded companies which had only unsecured mercantile creditors. The Minister does not comment on the intended effect of the amendment on the myriad situations between those two extremes. This case is one such situation. These debtor companies had complex secured debt structures, but those debts were not, prior to the issuing of the debentures in August 1990, in the form contemplated by s. 3 of the Act. Like Richard C.J.Q.B. in *Re United Maritime Fishermen Co-op.*, supra, at pp. 52-53, I am not persuaded that the comments of the Minister of Justice assist in interpreting s. 3 of the Act in this situation.

82 The words of s. 3 are straightforward. They require that the debtor company have, at the time an application is made, an outstanding debenture or bond issued under a trust deed. No more is needed. Attempts to qualify those words are not only contrary to the wide reading the Act deserves, but can raise intractable problems as to what qualifications or modifications should be read into the Act. Where there is a legitimate debt which fits the criteria set out in s. 3, I see no purpose in denying a debtor company resort to the Act because the debt and the accompanying documentation was created for the specific purpose of bringing the application. It must be remembered that qualification under s. 3 entitles the debtor company to nothing more than

consideration under the Act. Qualification under s. 3 does not mean that relief under the Act will be granted. The circumstances surrounding the creation of the debt needed to meet the s. 3 requirement may well have a bearing on how a court exercises its discretion at various stages of the application, but they do not alone interdict resort to the Act.

83 In holding that "instant" trust deeds can satisfy the requirements of s. 3 of the Act, I should not be taken as concluding that debentures or bonds which are truly shams, in that they do not reflect a transaction which actually occurred and do not create a real debt owed by the company, will suffice. Clearly, they will not. I do not, however, equate the two. One is a tactical device used to gain the potential advantages of the Act. The other is a fraud.

84 Nor does my conclusion that "instant" trust deeds can bring a debtor company within the Act exclude considerations of the good faith of the debtor company in seeking the protection of the Act. A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the Court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the Court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors: see Lawrence J. Crozier, "Good Faith and the Companies' Creditors Arrangement Act" (1989) 15 Can. Bus. L.J. 89.

(ii) Section 3 and the Prior Agreement with the Bank Limiting Creation of New Debt

85 The appellant also argues that the debentures did not meet the requirements of s. 3 of the Act because they were issued in contravention of a security agreement made between the companies and the bank. Assuming that the debentures were issued in contravention of that agreement, I do not understand how that contravention affects the status of the debentures for the purposes of s. 3 of the Act. The bank may well have an action against the debtor company for issuing the debentures, and it may have remedies against the holders of the debentures if they attempted to collect on their debt or enforce their security. Neither possibility, however, negates the existence of the debentures and the related trust deeds. Section 3 does not contemplate an inquiry into the effectiveness or enforceability of the s. 3 debentures, as against other creditors, as a condition precedent to qualification under the Act. Such inquiries may play a role in a judge's determination as to what orders, if any, should be made under the Act.

(iii) Section 3 and the Appointment of a Receiver-Manager

86 The third argument made by the bank relies on its installation of a receiver-manager in both companies prior to the issue of the debentures. I agree with Finlayson J.A. that the placement of a receiver, either by operation of the terms of an agreement or by court order, effectively removes those formerly in control of the company from that position, and vests that control in the receiver-manager: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd without deciding this point (1989), 65 Alta. L.R. (2d) 374 (C.A.). I cannot, however, agree with his interpretation of the order of Saunders J. I read that order as effectively turning the receiver into a monitor with rights of access, but with no authority beyond that. The operation of the business is specifically returned to the companies. The situation created by the order of Saunders J. can usefully be compared to that which existed when the application was made in *Hat Development Ltd.* Forsyth J., at p. 268 C.B.R., states:

> The receiver-manager in this case and indeed in almost all cases is charged by the court with the responsibility of managing the affairs of a corporation. It is true that it is appointed pursuant, in this case, to the existence of secured indebtedness and at the behest of a secured creditor to realize on its security and retire the indebtedness. Nonetheless, this receiver-manager was court-appointed and not by virtue of an instrument. As a court-appointed receiver it owed the obligation and the duty to the court to account from time to time and to come before the court for the purposes of having some of its decisions ratified or for receiving advice and direction. *It is empowered by the court to manage the affairs of the company and it is completely inconsistent with that function to suggest that some residual power lies in the hands of the directors of the*

company to create further indebtedness of the company and thus interfere, however slightly, with the receiver-manager's ability to manage.

[Emphasis added.]

87 After the order of Saunders J., the receiver-manager in this case was not obligated to manage the companies. Indeed, it was forbidden from doing so. The creation of the "instant" trust deeds and the application under the Act did not interfere in any way with any power or authority the receiver-manager had after the order of Saunders J. was made.

88 I also find it somewhat artificial to suggest that the presence of a receiver-manager served to vitiate the orders of Hoolihan J. Unlike many applications under s. 5 of the Act, the proceedings before Hoolihan J. were not ex parte and he was fully aware of the existence of the receiver-manager, the order of Saunders J., and the arguments based on the presence of the receiver-manager. Clearly, Hoolihan J. considered it appropriate to proceed with a plan of reorganization despite the presence of the receiver-manager and the order of Saunders J. Indeed, in his initial order he provided that the order of Saunders J. "remains extant." Hoolihan J. did not, as I do not, see that order as an impediment to the application or the granting of relief under the Act. Had he considered that the receiver-manager was in control of the affairs of the company, he could have varied the order of Saunders J. to permit the applications under the Act to be made by the companies: *Hat Development Ltd.*, at pp. 268-269 C.B.R. It is clear to me that he would have done so had he felt it necessary. If the installation of the receiver-manager is to be viewed as a bar to an application under this Act, and if the orders of Hoolihan J. were otherwise appropriate, I would order that the order of Saunders J. should be varied to permit the creation of the debentures and the trust deeds and the bringing of this application by the companies. I take this power to exist by the combined effect of s. 14(2) of the Act and s. 144(1) of the *Courts of Justice Act*, 1984, S.O. 1984, c. 11.

89 In my opinion, the debentures and "instant" trust deeds created in August 1990 sufficed to bring the company within the requirements of s. 3 of the Act, even if in issuing those debentures the companies breached a prior agreement with the bank. I am also satisfied that, given the terms of the order of Saunders J., the existence of a receiver-manager installed by the bank did not preclude the application under s. 3 of the Act.

V Did Hoolihan J. Err in Exercising his Discretion in Favour of Directing that a Creditors' Meeting be Held to Consider the Proposed Plan of Reorganization?

90 As indicated earlier, the Act provides a number of points at which the Court must exercise its discretion. I am concerned with the initial exercise of discretion contemplated by s. 5 of the Act, by which the Court may order a meeting of creditors for purposes of considering a plan of reorganization. Hoolihan J. exercised that discretion in favour of the debtor companies. The factors relevant to the exercise of that discretion are as variable as the fact situations which may give rise to the application. Finlayson J.A. has concentrated on one such factor, the chance that the plan, if put before a properly constituted meeting of the creditors, could gain the required approval. I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made.

91 On the facts before Hoolihan J., there were several factors which supported the exercise of his discretion in favour of directing a meeting of the creditors. These included the apparent support of two of the three substantial secured creditors, the companies' continued operation, and the prospect (disputed by the bank) that the companies' fortunes would take a turn for the better in the near future, the companies' ongoing efforts — that eventually met with some success — to find alternate financing, and the number of people depending on the operation of the company for their livelihood. There were also a number of factors pointing in the other direction, the most significant of which was the likelihood that a plan of reorganization acceptable to the bank could not be developed.

92 I see the situation which presented itself to Hoolihan J. as capable of a relatively straightforward risk-benefit analysis. If the s. 5 order had been refused by Hoolihan J., it was virtually certain that the operation of the companies would have ceased immediately. There would have been immediate economic and social damage to those who worked at the plants, and those who depended on those who worked at the plants for their well-being. This kind of damage cannot be ignored, especially when it occurs in small communities like those in which these plants are located. A refusal to grant the application would also have put the investments of the various creditors, with the exception of the bank, at substantial risk. Finally, there would have been obvious financial damage to the owner of the companies. Balanced against these costs inherent in refusing the order would be the benefit to the bank, which would then have been in a position to realize on its security in accordance with its agreements with the companies.

93 The granting of the s. 5 order was not without its costs. It has denied the bank the rights it had bargained for as part of its agreement to lend substantial amounts of money to the companies. Further, according to the bank, the order has put the bank at risk of having its loans become undersecured because of the diminishing value of the accounts receivable and inventory which it holds as security and because of the ever-increasing size of the companies' debt to the bank. These costs must be measured against the potential benefit to all concerned if a successful plan of reorganization could be developed and implemented.

94 As I see it, the key to this analysis rests in the measurement of the risk to the bank inherent in the granting of the s. 5 order. If there was a real risk that the loan made by the bank would become undersecured during the operative period of the s. 5 order, I would be inclined to hold that the bank should not have that risk forced on it by the Court. However, I am unable to see that the bank is in any real jeopardy. The value of the security held by the bank appears to be well in excess of the size of its loan on the initial application. In his affidavit, Mr. Gibbons of Coopers & Lybrand asserted that the companies had overstated their cash flow projections, that the value of the inventory could diminish if customers of the companies looked to alternate sources for their product, and that the value of the accounts receivable could decrease if customers began to claim set-offs against those receivables. On the record before me, these appear to be no more than speculative possibilities. The bank has had access to all of the companies' financial data on an ongoing basis since the order of Hoolihan J. was made almost 2 months ago. Nothing was placed before this Court to suggest that any of the possibilities described above had come to pass.

95 Even allowing for some overestimation by the companies of the value of the security held by the bank, it would appear that the bank holds security valued at approximately $4 million for a loan that was, as of the hearing of this appeal, about $2.3 million. The order of Hoolihan J. was to terminate no later than November 14, 1990. I am not satisfied that the bank ran any real risk of having the amount of the loan exceed the value of the security by that date. It is also worth noting that the order under appeal provided that any party could apply to terminate the order at any point prior to November 14. This provision provided further protection for the bank in the event that it wished to make the case that its loan was at risk because of the deteriorating value of its security.

96 Even though the chances of a successful reorganization were not good, I am satisfied that the benefits flowing from the making of the s. 5 order exceeded the risk inherent in that order. In my view, Hoolihan J. properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the Act.

VI Did Hoolihan J. Err in Directing that the Bank and RoyNat Inc. Should be Placed in the Same Class for the Purposes of the Act?

97 I agree with Finlayson J.A. that the bank and RoyNat Inc., the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the Act. Their interests are not only different, they are opposed. The classification scheme created by Hoolihan J. effectively denied the bank any control over any plan of reorganization.

98 To accord with the principles found in the cases cited by Finlayson J.A., the secured creditors should have been grouped as follows:

— Class 1 — The City of Chatham and the Village of Glencoe

— Class 2 — The Bank of Nova Scotia

— Class 3 — RoyNat Inc., Ontario Development Corporation, and those holding debentures issued by the company on August 29 and 31, 1990.

VII Did Hoolihan J. Err in Making the Interim Orders He Made?

99 Hoolihan J. made a number of orders designed to control the conduct of all of the parties, pending the creditors' meeting and the placing of a plan of reorganization before the Court. The first order was made on September 11, 1990, and was to expire on or before October 24, 1990. Subsequent orders varied the terms of the initial order somewhat, and extended its effective date until November 14, 1990.

100 These orders imposed the following conditions pending the meeting:

(a) all proceedings with respect to the debtor companies should be stayed, including any action by the bank to realize on its security;

(b) the bank could not reduce its loan by applying incoming receipts to those debts;

(c) the bank was to be the sole banker for the companies;

(d) the companies could carry on business in the normal course, subject to certain very specific restrictions;

(e) a licensed trustee was to be appointed to monitor the business operations of the companies and to report to the creditors on a regular basis; and

(f) any party could apply to terminate the interim orders, and the orders would be terminated automatically if the companies defaulted on any of the obligations imposed on them by the interim orders.

101 The orders placed significant restrictions on the bank for a 2-month period, but balanced those restrictions with provisions limiting the debtor companies' activities, and giving the bank ongoing access to up-to-date financial information concerning the companies. The bank was also at liberty to return to the Court to request any variation in the interim orders which changes in financial circumstances might merit.

102 These orders were made under the wide authority granted to the court by s. 11 of the Act. L.W. Houlden and C.H. Morawetz, in *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), at pp. 2-102 to 2-103, describe the purpose of the section:

The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and it creditors. This aim is facilitated by s. 11 of the Act, which enables the court to restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit.

103 A similar sentiment appears in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. Gibbs J.A., in discussing the scope of s. 11, said at p. 7 [unreported, pp. 88-89 B.C.L.R.]:

When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

104 Similar views of the scope of the power to make interim orders covering the period when reorganization is being attempted are found in *Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) at 114-118 [C.B.R.]; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) at 12-15 [C.B.R.]; *Quintette Coal Ltd. v. Nippon Steel Corp.*, an unreported judgment of Thackray J., released June 18, 1990 [since reported (1990), 47 B.C.L.R. (2d) 193 (S.C.)], at pp. 5-9 [pp. 196-198 B.C.L.R.]; and B. O'Leary, "A Review of the Companies' Creditors Arrangement Act," at p. 41.

105 The interim orders made by Hoolihan J. are all within the wide authority created by s. 11 of the Act. The orders were crafted to give the company the opportunity to continue in operation, pending its attempt to reorganize, while at the same time providing safeguards to the creditors, including the bank, during that same period. I find no error in the interim relief granted by Hoolihan J.

VIII Conclusion

106 In the result, I would allow the appeal in part, vacate the order of Hoolihan J. of October 18, 1990, insofar as it purports to settle the class of creditors for the purpose of the Act, and I would substitute an order establishing the three classes referred to in Part VI of these reasons. I would not disturb any of the other orders made by Hoolihan J.

Appeal allowed.

End of Document

Court File No. CV-19-00614629-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	WEDNESDAY THE 24th
	)	
REGIONAL SENIOR JUSTICE MORAWETZ	)	DAY OF APRIL, 2019

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 PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

(the "**Applicants**")

ORDER
(CLAIMS PROCEDURE ORDER)

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day at 330 University Avenue, Toronto, Ontario by way of Court Call.

ON READING the Notice of Motion of the Applicants, the affidavit of Adrian Frankum sworn April 17, 2019 and the third report of FTI Consulting Canada Inc. ("**FTI**") in its capacity as monitor of the Applicants and Payless ShoeSource Canada LP (collectively, the "**Payless Canada Entities**") dated April 18, 2019, and on hearing the submissions of counsel for the Payless Canada Entities, FTI in its capacity as court-appointed monitor ("**Monitor**"), and such other parties as were present by Court Call, no one else appearing although duly served as appears from the affidavit of service of Taschina Ashmeade sworn April 18, 2019 filed;

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time and method for service and notice of this Motion is hereby abridged and validated and this Motion is properly returnable today without further service or notice thereof.

2. **THIS COURT ORDERS** that, for the purposes of this Order (the "**Claims Procedure Order**"), in addition to terms defined elsewhere herein, the following terms shall have the following meanings:

(a) "**Additional WEPPA Claim**" has the meaning set forth in paragraph 23 of this Claims Procedure Order;

(b) "**Affiliate**" means, in relation to a party, a body corporate;

(i) which is directly or indirectly controlled by such party; or

(ii) which directly or indirectly controls such party; or

(iii) which is, directly or indirectly, controlled by a body corporate that also, directly or indirectly controls such party.

For the purpose of this definition, "**control**" of a body corporate means the direct or indirect power to direct, administer and dictate policies or management of such body corporate, it being understood and agreed that control of a body corporate can be exercised without direct or indirect ownership of fifty percent (50%) or more of its voting shares, provided always that the ownership of the right to exercise fifty percent (50%) or more of the voting rights of a given body corporate shall be deemed to be effective control hereunder. For the avoidance of doubt, the joint venture partners of the U.S. Debtors shall not be "Affiliates" for purposes of this Order;

(c) "**Amended Claim Statement**" has the meaning set forth in paragraph 21 of this Claims Procedure Order

(d) "**Assessments**" means Claims of Her Majesty the Queen in Right of Canada or of any province or territory or municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of reassessment,

notice of objection, notice of appeal, audit, investigation, demand or similar request from any taxation authority;

(e) "**Business Day**" means a day, other than a Saturday, Sunday or statutory holiday, on which banks are generally open for business in Toronto, Ontario;

(f) "**CCAA Proceedings**" means these proceedings in respect of the Payless Canada Entities pursuant to the CCAA;

(g) "**Chapter 11 Claims Procedure**" means the claims process approved by the U.S. Bankruptcy Court pursuant to an order granted April 23, 2019 to be conducted within the U.S. Proceedings in respect of the U.S. Debtors other than the Payless Canada Entities;

(h) "**Chapter 11 Proof of Claim**" means a proof of claim against any of the Payless Canada Entities filed in the Chapter 11 Claims Procedure;

(i) "**Claim**" means:

(i) any right or claim of any Person against any of the Payless Canada Entities, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind of any of the Payless Canada Entities in existence on the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, unknown, by guarantee, by surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessment and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts that existed prior to the Filing Date and any other claims that would have been claims provable in bankruptcy had such Payless Canada Entity become bankrupt on the Filing Date, including for greater certainty any Equity Claim and any claim against any of the Payless Canada Entities for indemnification by any Director or Officer in respect of a Director/Officer

Claim (but excluding any such claim for indemnification that is covered by the Directors' Charge (as defined in the Initial Order)), in each case, where such monies remain unpaid as of the date hereof (each, a "**Prefiling Claim**", and collectively, the "**Prefiling Claims**");

(ii) any right or claim of any Person against any of the Payless Canada Entities in connection with any indebtedness, liability or obligation of any kind whatsoever owed by any of the Payless Canada Entities to such Person arising out of (A) the restructuring, disclaimer, resiliation, termination or breach by any of the Payless Canada Entities on or after the Filing Date of any contract, lease or other agreement or arrangement whether written or oral or (B) the termination of employment with any of the Payless Canada Entities on or after the Filing Date, whether arising by contract, under statute or otherwise (each, a "**Restructuring Period Claim**", and collectively, the "**Restructuring Period Claims**"); and

(iii) any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessment and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer (each a "**Director/Officer Claim**", and collectively, the "**Director/Officer Claims**"),

including any Claim arising through subrogation against any Payless Canada Entity or Director or Officer, provided however, that in any case "Claim" shall not include an Excluded Claim;

(j) "**Claim Document Package**" means a document package that contains a copy of the Instruction Letter, the Notice to Claimants, a Claim Statement and Notice of Dispute of Claim Statement (in respect of a document package delivered to a Listed Claimant), a Proof of Claim (in respect of a document package delivered to a Claimant other than a Listed Claimant), and such other materials as the Monitor and the Payless Canada Entities may consider appropriate or desirable;

(k) "**Claim Statement**" means a General Claim Statement, Employee Claim Statement or Landlord Claim Statement, substantially in the form attached hereto as Schedule "D-1", Schedule "D-2" or Schedule "D-3", as applicable;

(l) "**Claimant**" means any Person having or asserting a Claim;

(m) "**Claims Bar Date**" means 11:59 p.m. (Central Time) on June 7, 2019, or such later date as may be ordered by the Court;

(n) "**Claims Procedure**" means the procedures outlined in this Claims Procedure Order in connection with the solicitation and assertion of Claims against any of the Payless Canada Entities or the Directors or Officers or any of them, as amended or supplemented by further order of the Court;

(o) "**Court**" means the Ontario Superior Court of Justice (Commercial List);

(p) "**D&O Indemnity Claim**" means any existing or future right of any Director or Officer against any of the Payless Canada Entities which arose or arises as a result of a Listed Claim or any Person filing a Proof of Claim in respect of such Director or Officer for which such Director or Officer is entitled to be indemnified by the Payless Canada Entities;

(q) "**Directors**" means all current and former directors (or their estates) of any of the Payless Canada Entities, in such capacity, or persons who may be deemed to be or have been, whether by statute, operation of law or otherwise, Directors, and "**Director**" means any one of them;

(r) "**Employee Claim Statement**" means an Employee Claim Statement substantially in the form attached hereto as Schedule "D-2";

(s) "**Equity Claim**" has the meaning set forth in Section 2(1) of the CCAA;

(t) "**Excluded Claim**" means:

(i) any Claim secured by any of the Charges (as that term is defined in the Initial Order);

(ii) any Claim of a U.S. Debtor or other Affiliate of the U.S. Debtors; and

(iii) and for greater certainty, shall include any Excluded Claim arising through subrogation;

(u) "**Filing Date**" means February 19, 2019;

(v) "**General Claim Statement**" means a General Claim substantially in the form attached hereto as Schedule "D-1";

(w) "**Initial Order**" means the Initial Order under the CCAA dated February 19, 2019, as amended, restated or varied from time to time;

(x) "**Instruction Letter**" means the instruction letter to Claimants, in substantially the form attached as Schedule "A" hereto, regarding completion by Claimants of the Proof of Claim and the Notice of Dispute of Claim Statement;

(y) "**Landlord Claim Statement**" means a Landlord Claim Statement substantially in the form attached hereto as Schedule "D-3";

(z) "**Listed Claim**" has the meaning set forth in paragraph 18 of this Claims Procedure Order or on Schedule D-1, Scheduled D-2 or Schedule D-3 hereto, as applicable;

(aa) "**Listed Claimants**" means a Claimants to whom a General Claim Statement, Employee Claim Statement or a Landlord Claim Statement is delivered pursuant to paragraph 18 of this Claims Procedure Order;

(bb) "**Known Claimants**" means with respect to any of the Payless Canada Entities, or the Directors or Officers or any of them:

(i) those Claimants that the books and records of any of the Payless Canada Entities disclose were owed monies by any of the Payless Canada Entities as of the Filing Date, where such monies remain unpaid in full or in part as of the date hereof;

(ii) any Person who commenced a legal proceeding against any of the Payless Canada Entities or one or more Directors or Officers in respect of a Claim, which legal proceeding was commenced and served prior to the Filing Date;

(iii) any Person who has filed a Chapter 11 Proof of Claim as of the date of this Claims Procedure Order; and

(iv) any other Claimant of whom the Payless Canada Entities have knowledge as at the date of this Claims Procedure Order and for whom the Payless Canada Entities have a current address or other contact information;

(cc) "**Meeting**" means a meeting of the Claimants of the Payless Canada Entities called for the purpose of considering and voting in respect of a Plan, if any;

(dd) "**Monitor**" has the meaning set out in the recitals hereto;

(ee) "**Monitor's Website**" means the website maintained by the Monitor at http://cfcanada.fticonsulting.com/paylesscanada/ ;

(ff) "**Notice of Dispute of Claim Statement**" means a notice in substantially the form attached hereto as Schedule "E";

(gg) "**Notice to Claimants**" means the notice to Claimants for publication in substantially the form attached as Schedule "B" hereto;

(hh) "**Officers**" means all current and former officers (or their estates) of any of the Payless Canada Entities, in such capacity, or persons who may be deemed to be or have been, whether by statute, operation of law or otherwise, Officers and "**Officer**" means any one of them;

(ii) "**Payless Canada Entities**" means Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., and Payless ShoeSource Canada LP and each a "**Payless Canada Entity**";

(jj) "**Person**" means any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government or agency or instrumentality thereof, or any other corporate, executive, legislative, judicial,

regulatory or administrative entity howsoever designated or constituted, including, without limitation, any present or former shareholder, supplier, customer, employee, agent, client, contractor, lender, lessor, landlord, sub-landlord, tenant, sub-tenant, licensor, licensee, partner or advisor;

(kk) "**Plan**" means any plan of compromise or arrangement or plan of reorganization filed by or in respect of any or all of the Payless Canada Entities, as may be amended, supplemented or restated from time to time in accordance with the terms thereof;

(ll) "**Prime Clerk**" means Prime Clerk LLC, the U.S. Debtors' notice and claims agent in the U.S. Proceedings;

(mm) "**Proof of Claim**" means a proof of claim form in substantially the form attached hereto as Schedule "C";

(nn) "**Restructuring Period Claims Bar Date**" means, in respect of a Restructuring Period Claim, 11:59 p.m. (Central Time) on the date that is the later of (i) the Claims Bar Date and (ii) thirty (30) days after the date on which the Monitor sends a Claim Document Package with respect to a Restructuring Period Claim to a Claimant;

(oo) "**Service List**" means the service list maintained by the Monitor in respect of these CCAA Proceedings;

(pp) "**U.S. Bankruptcy Court**" means the United States Bankruptcy Court for the Eastern District of Missouri;

(qq) "**U.S. Debtors**" means Payless Holdings LLC; Payless Intermediate Holdings LLC; WBG-PSS Holdings LLC; Payless Inc.; Payless Finance, Inc.; Collective Brands Services, Inc.; PSS Delaware Company 4, Inc.; Shoe Sourcing, Inc.; Payless ShoeSource, Inc.; Eastborough, Inc.; Payless Purchasing Services, Inc.; Payless ShoeSource Merchandising, Inc.; Payless Gold Value CO, Inc.; Payless ShoeSource Distribution, Inc.; Payless ShoeSource Worldwide, Inc.; Payless NYC, Inc.; Payless ShoeSource of Puerto Rico, Inc.; Payless Collective GP, LLC; Collective Licensing, L.P.; Collective Licensing International LLC; Clinch, LLC; Collective Brands Franchising Services, LLC; Payless International Franchising, LLC; PSS Canada, Inc.; Payless ShoeSource Canada Inc.; Payless ShoeSource

Canada GP Inc.; and Payless ShoeSource Canada LP and such other entities as are or may be debtors for purposes of the U.S. Proceedings;

(rr) "**U.S. Proceedings**" means the proceedings commenced on February 18, 2019 by the U.S. Debtors under chapter 11 of title 11 of the United States Code in the U.S. Bankruptcy Court; and

(ss) "**WEPPA**" means the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1.

GENERAL PROVISIONS

3. **THIS COURT ORDERS** that all references to time herein shall mean Toronto time and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein.

4. **THIS COURT ORDERS** that all references to the word "including" shall mean "including without limitation".

5. **THIS COURT ORDERS** that all references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

6. **THIS COURT ORDERS** that the Claims Procedure and the forms of Notice to Claimants, Instruction Letter, Proof of Claim, General Claim Statement, Employee Claim Statement, Landlord Claim Statement, and Notice of Dispute of Claim Statement are hereby approved and, if applicable, arrangements shall be made for French language translations of such forms. Notwithstanding the foregoing, the Payless Canada Entities with the consent of the Monitor may, from time to time, make non-substantive changes to the forms as the Payless Canada Entities may consider necessary or desirable.

7. **THIS COURT ORDERS** that the Payless Canada Entities and the Monitor are hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and may waive strict compliance with the requirements of this Claims Procedure Order as to completion, execution and submission of such forms and to request any further documentation from a Claimant that the Payless Canada Entities or the Monitor may require.

8. **THIS COURT ORDERS** that all Claims shall be denominated in Canadian dollars. Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of

Canada daily average exchange rate on the Filing Date, which for United States dollar is USD 1.328:CAD 1.

9. **THIS COURT ORDERS** that there shall be no presumption of validity or deeming of the amount due in respect of amounts claimed in any Assessment.

10. **THIS COURT ORDERS** that copies of all forms delivered hereunder, as applicable, shall be maintained by the Monitor. The Monitor shall promptly provide copies of all Proofs of Claim and Notices of Dispute of Claim Statement received by the Monitor in connection with the Claims Procedure to counsel for the Payless Canada Entities, Cassels Brock & Blackwell LLP, by email to Taschina Ashmeade (tashmeade@casselsbrock.com).

ROLE OF THE MONITOR

11. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, the Initial Order and any other orders of the Court in the CCAA Proceedings, shall assist the Payless Canada Entities in the administration of the Claims Procedure provided for herein and is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this Claims Procedure Order.

12. **THIS COURT ORDERS** that the Monitor shall (i) have all protections afforded to it by the CCAA, this Claims Procedure Order, the Initial Order, any other Orders of the Court in the CCAA Proceedings and other applicable law in connection with its activities in respect of this Claims Procedure Order, including the stay of proceedings in its favour provided pursuant to the Initial Order; and (ii) incur no liability or obligation as a result of carrying out the provisions of this Claims Procedure Order, including in respect of its exercise of discretion as to the completion, execution or time of delivery of any documents to be delivered hereunder, other than in respect of gross negligence or wilful misconduct.

13. **THIS COURT ORDERS** that the Payless Canada Entities, the Officers, the Directors and their respective employees, agents and representatives and any other Person given notice of this Claims Procedure Order shall fully cooperate with the Monitor in the exercise of its powers and the discharge of its duties and obligations under this Claims Procedure Order.

NOTICE TO CLAIMANTS

14. **THIS COURT ORDERS** that:

(a) the Monitor shall, not later than five (5) Business Days following the granting of the Claims Procedure Order, deliver on behalf of the Payless Canada Entities to each of the Known Claimants a copy of the Claim Document Package;

(b) the Monitor shall cause to be published on or before May 1, 2019, the Notice to Claimants in the following newspapers: (i) *The Globe and Mail* (National Edition); and (ii) *Le Devoir*;

(c) the Monitor shall post a copy of this Claims Procedure Order, the Applicants' Motion Record in respect of this Claims Procedure Order, and the Claim Document Package on the Monitor's Website;

(d) the Monitor shall deliver as soon as reasonably possible following receipt of a request therefor, a copy of the Claim Document Package to any Person claiming to be a Claimant and requesting such material in writing; and

(e) any notices of disclaimer or resiliation delivered to Claimants by the Payless Canada Entities or the Monitor after the date of this Order shall be accompanied by a Claim Document Package and upon becoming aware of any other circumstance giving rise to a Restructuring Period Claim, the Monitor shall send a Claim Document Package to the Claimant or may direct the Claimant to the documents posted on the Monitor's Website in respect of such Restructuring Period Claim.

15. **THIS COURT ORDERS** that the Monitor shall be entitled to rely on the accuracy and completeness of the information obtained from the books and records of the Payless Canada Entities regarding the Known Claimants. For greater certainty, the Monitor shall have no liability in respect of the information provided to it or otherwise obtained by it regarding the Known Claimants and shall not be required to conduct any independent inquiry and investigation with respect to that information.

PROOFS OF CLAIM

16. **THIS COURT ORDERS** that subject to paragraphs 18 to 22 below, to be effective, every Claimant asserting a Claim against any of the Payless Canada Entities or the Directors or Officers or any of them shall set out its aggregate Claim in a Proof of Claim, including supporting documentation, and deliver that Proof of Claim to the Monitor so that it is actually

received by the Monitor by no later than the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable.

17. **THIS COURT ORDERS** that if a Chapter 11 Proof of Claim is inadvertently filed in respect of any of the Payless Canada Entities and such Chapter 11 Proof of Claim would have been timely filed in accordance with the Chapter 11 Claims Procedure if such procedure applied to it, such Chapter 11 Proof of Claim will be deemed to be a Proof of Claim that has been timely delivered to the Monitor in accordance with the Claims Procedure. If in respect of any of the Payless Canada Entities (i) a Claimant has delivered a Proof of Claim to the Monitor in accordance with the Claims Procedure and has also filed a Chapter 11 Proof of Claim, the Proof of Claim delivered in accordance with the Claims Procedure shall govern, and (ii) a Claim Statement has been delivered to a Claimant and such Claimant has also filed a Chapter 11 Proof of Claim, the Claim Statement and the procedures related thereto specified in paragraphs 18 to 22 shall govern.

CLAIM STATEMENT

18. **THIS COURT ORDERS** that the Payless Canada Entities may elect, in consultation with the Monitor, to deliver a Claim Statement to Known Claimants by requesting that the Monitor include such Claim Statement in the Claim Document Package delivered to such Known Claimant pursuant to paragraph 14. Such Claim Statement shall be in substantially the form attached hereto as Schedule "D-1", Schedule "D-2", or Schedule "D-3" as applicable, and shall specify the classification, amount and nature of such Known Claimant's Claim as determined by the Payless Canada Entities, in consultation with the Monitor, based on the books and records of the Payless Canada Entities (the "**Listed Claim**").

19. **THIS COURT ORDERS** that any Claimant who does not dispute the classification, amount or nature of the Listed Claim set forth in the Claim Statement delivered to such Claimant is not required to take any further action and the Claim of such Claimant shall, subject to paragraph 21, be deemed to be the Listed Claim.

20. **THIS COURT ORDERS** that any Claimant who wishes to dispute the classification, amount and/or nature of the Listed Claim set forth in the Claim Statement delivered to such Claimant or to assert an additional Claim in relation to the Payless Canada Entities other than the Listed Claim shall be required to deliver a Notice of Dispute of Claim Statement to the

Monitor so that it is actually received by the Monitor by no later than the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable.

21. **THIS COURT ORDERS** that if, after the date on which a Claim Statement is initially delivered to a Claimant, the Payless Canada Entities, in consultation with the Monitor, determines that it is appropriate to change the classification, amount or nature of the Listed Claim set forth in such Claim Statement, the Monitor shall cause an amended Claim Statement (an "**Amended Claim Statement**") to be delivered to such Claimant, which Amended Claim Statement and the revised Listed Claim specified therein shall thereafter supersede any previous Claim Statement delivered to such Claimant. If the Claimant wishes to dispute the classification, amount and/or nature of the Listed Claim set forth in the Amended Claim Statement, such Claimant shall be required to deliver a Notice of Dispute of Claim Statement so that it is actually received by the Monitor on or before the later of (i) the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, and (ii) thirty (30) days after the date on which the Amended Claim Statement is delivered to the Claimant.

22. **THIS COURT ORDERS** that any Claimant that does not deliver a Notice of Dispute of Claim Statement in respect of a Claim Statement or an Amended Claim Statement, if applicable, pursuant to paragraphs 20 and 21, as applicable, shall be forever barred from disputing the classification, amount and/or nature of the Listed Claim set forth in the Claim Statement or Amended Claim Statement, as applicable, and any Claim of a different classification or nature or in excess of the amount specified in the Claim Statement or Amended Claim Statement, as applicable, shall be forever barred and extinguished.

23. **THIS COURT ORDERS** that, notwithstanding anything contained in this Order and given that the Payless Canada Entities are not subject to a bankruptcy or receivership proceeding at this time, any Claimant that does not deliver a Notice of Dispute of Claim Statement in connection with an Employee Claim Statement, shall not be barred from claiming additional amounts from Her Majesty in right of Canada or the Minister of National Revenue in respect of his or her entitlement to any future amounts claimable under WEPPA (an "**Additional WEPPA Claim**") should WEPPA apply, provided that in no circumstances shall any Person other than Her Majesty in right of Canada or the Minister of National Revenue have any liability whatsoever for any Additional WEPPA Claim.

D&O INDEMNITY CLAIMS

24. **THIS COURT ORDERS** that to the extent that any Director/Officer Claim is filed in accordance with this Claims Procedure or a Listed Claim includes a Director/Officer Claim, a corresponding D&O Indemnity Claim shall be deemed to have been timely filed in respect of each of each Director/Officer Claim. For the avoidance of doubt, Directors and Officers shall not be required take any action or to file Proof of Claim in respect of such D&O Indemnity Claim.

CLAIMS BARRED

25. **THIS COURT ORDERS** that, subject to paragraphs 18 to 22, any Person that does not deliver a Proof of Claim in respect of a Claim in the manner required by this Claims Procedure Order so that it is actually received by the Monitor on or before the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable:

(a) shall not be entitled to attend or vote at a Meeting in respect of such Claim;

(b) shall not be entitled to receive any distribution in respect of such Claim pursuant to a Plan or otherwise;

(c) shall not be entitled to any further notice in the CCAA Proceedings (unless it has otherwise sought to be included on the Service List); and

(d) shall be and is hereby forever barred from making or enforcing such Claim against the Payless Canada Entities, or the Directors or Officers or any of them, and such Claim shall be and is hereby extinguished without any further act or notification.

For greater certainty, this paragraph shall not apply to Excluded Claims and the rights of any Person (including the Payless Canada Entities) with respect to Excluded Claims are expressly reserved.

SET-OFF

26. **THIS COURT ORDERS** that nothing in this Claims Procedure Order shall affect any right of set-off that any of the Payless Canada Entities may have against any Person.

TRANSFER OF CLAIMS

27. **THIS COURT ORDERS** that if the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor the Payless Canada Entities shall be obligated to give notice or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until written notice of such transfer or assignment, together with evidence satisfactory to the Monitor, in its sole discretion, of such transfer or assignment, has been received by the Monitor and the Monitor has provided written confirmation acknowledging the transfer or assignment of such Claim, and thereafter such transferee or assignee shall for the purposes hereof constitute the "Claimant" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Claims Procedure Order prior to receiving written confirmation by the Monitor acknowledging such assignment or transfer. After the Monitor has delivered a written confirmation acknowledging the notice of the transfer or assignment of a Claim, the Payless Canada Entities and the Monitor shall thereafter be required only to deal with the transferee or assignee and not the original holder of the Claim. A transferee or assignee of a Claim takes the Claim subject to any defences and rights of set-off to which the Payless Canada Entities may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to the Payless Canada Entities. Reference to transfer in this Claims Procedure Order includes a transfer or assignment whether absolute or intended as security.

28. **THIS COURT ORDERS** that if a Claimant or any subsequent holder of a Claim, who in any such case has previously been acknowledged by the Monitor as the holder of the Claim, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person, such transfers or assignments shall not create separate Claims and such Claims shall continue to constitute and be dealt with as a single Claim notwithstanding such transfers or assignments. The Payless Canada Entities and the Monitor shall not, in each case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and to otherwise deal with such Claim only as a whole and then only to and with the Person last holding such Claim, provided such Claimant may, by notice in writing delivered to the Monitor, direct that subsequent dealings in respect of such Claim, but only as a whole, shall be dealt with by a specified Person and in such event, such Person shall be bound

by any notices given or steps taken in respect of such Claim with such Claimant or in accordance with the provisions of this Claims Procedure Order.

DETERMINATION OF CLAIMS

29. **THIS COURT ORDERS** that, except as contemplated by paragraphs 19 and 22, the applicable procedures for reviewing and determining Claims, if any, shall be established by further Order of the Court.

SERVICE AND NOTICE

30. **THIS COURT ORDERS** that the Payless Canada Entities and the Monitor may, unless otherwise specified by this Claims Procedure Order, serve and deliver or cause to be served and delivered the Claim Document Package, any letters, notices or other documents to Claimants or any other interested Person by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or email to such Persons or their counsel (including counsel of record in any ongoing litigation) at the physical or electronic address, as applicable, last shown on the books and records of the Payless Canada Entities or set out in such Claimant's Proof of Claim or Notice of Dispute of Claim Statement, if one has been filed. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Canada, and the fifth Business Day after mailing internationally; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by facsimile transmission or email by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

31. **THIS COURT ORDERS** that any notice or communication required to be provided or delivered by a Claimant to the Monitor under this Claims Procedure Order shall be in writing in substantially the form, if any, provided for in this Claims Procedure Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery or email addressed to:

FTI Consulting Canada Inc. as Monitor of the Payless Canada Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8

E-mail: paylesscanada@fticonsulting.com

Any such notice or communication delivered by a Claimant shall be deemed to be received upon actual receipt thereof before 5:00 p.m. on a Business Day or if delivered outside of normal business hours, the next Business Day.

32. **THIS COURT ORDERS** that the posting of materials on the Monitor's Website pursuant to paragraph 14(c), the publication of the Notice to Claimants and the mailing of the Claim Document Packages as set out in this Claims Procedure Order shall constitute good and sufficient notice to Claimants of the Claims Bar Date, the Restructuring Period Claims Bar Date and the other deadlines and procedures set forth herein, and that no other form of notice or service need be given or made on any Person, and no other document or material need be served on any Person in respect of the claims procedure described herein.

33. **THIS COURT ORDERS** that in the event that this Claims Procedure Order is subsequently amended by further Order of the Court, the Payless Canada Entities shall serve notice of such amendment on the Service List in these proceedings and the Monitor shall post such further Order on the Monitor's Website and such posting shall constitute adequate notice to all Persons of such amendment.

GENERAL

34. **THIS COURT ORDERS** that notwithstanding any other provisions of this Claims Procedure Order, the solicitation by the Monitor or the Payless Canada Entities of Proofs of Claim, the delivery of Claim Document Packages to Known Claimants, and the filing by any Person of any Proof of Claim or Notice of Dispute of Claim Statement shall not, for that reason only, grant any Person any standing in the CCAA Proceedings or rights under a Plan.

35. **THIS COURT ORDERS** that nothing in this Claims Procedure Order shall prejudice the rights and remedies of any Directors or Officers or other Persons under the Directors' Charge or any applicable insurance policy or prevent or bar any Person from seeking recourse against or payment from the Payless Canada Entities' insurance and any Director's or Officer's liability insurance policy or policies that exist to protect or indemnify the Directors or Officers or other Persons, whether such recourse or payment is sought directly by the Person asserting a Claim from the insurer or derivatively through the Director or Officer or the Payless Canada Entities; provided, however, that nothing in this Claims Procedure Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Claims Procedure Order limit, remove, modify or alter any defence to such Claim available to the insurer pursuant

to the provisions of any insurance policy or at law; and further provided that any Claim or portion thereof for which the Person receives payment directly from, or confirmation that the Person is covered by, the Payless Canada Entities' insurance or any Director's or Officer's liability insurance or other liability insurance policy or policies that exist to protect or indemnify the Directors or Officers or other Persons shall not be recoverable as against the Payless Canada Entities or Director or Officer, as applicable.

36. **THIS COURT ORDERS** that nothing in this Claims Procedure Order shall constitute or be deemed to constitute an allocation or assignment of Claims into particular classes for the purpose of the Plan and, for greater certainty, the treatment of Claims, or any other claims and the classification of creditors for voting and distribution purposes, shall be subject to the terms of a Plan or further Order of this Court.

37. **THIS COURT ORDERS** that the Payless Canada Entities or the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Claims Procedure Order or for advice and directions concerning the discharge of their respective powers and duties under this Claims Procedure Order or the interpretation or application of this Claims Procedure Order.

38. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or outside Canada to give effect to this Claims Procedure Order and to assist the Payless Canada Entities, the Monitor and their respective agents in carrying out the terms of this Claims Procedure Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Payless Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Claims Procedure Order, to grant representative status to the Payless ShoeSource Canada Inc. in any foreign proceeding, or to assist the Payless Canada Entities and the Monitor and their respective agents in carrying out the terms of this Claims Procedure Order.

39. **THIS COURT ORDERS** that this Claims Procedure Order and all of its provisions are effective as of 12:01 a.m. Toronto Time on the date of this Claims Procedure Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

APR 24 2019

PER / PAR:

SCHEDULE "A"

INSTRUCTION LETTER FOR THE CLAIMS PROCEDURE

Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., and Payless ShoeSource Canada LP (the "Payless Canada Entities") and/or their Directors or Officers

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A. CLAIMS PROCEDURE

By Order of the Ontario Superior Court of Justice (Commercial List) made April 24, 2019 (the "**Claims Procedure Order**"), the Court-appointed Monitor of the Payless Canada Entities, FTI Consulting Canada Inc. (in such capacity, the "**Monitor**"), has been authorized to assist the Payless Canada Entities in conducting a claims procedure (the "**Claims Procedure**") with respect to claims against the Payless Canada Entities and their present or former Directors and Officers ("**Directors/Officers**") in accordance with the terms of the Claims Procedure Order.

A similar claims process has also been established by the U.S. Bankruptcy Court with respect to the U.S. Debtors other than the Payless Canada Entities (the "**Chapter 11 Claims Procedure**"). The Order of the U.S. Bankruptcy Court granted in respect of the Chapter 11 Claims Procedure provides that it does not apply to the Payless Canada Entities or claims against the Payless Canada Entities, other than certain limited matters relating to notice and coordination. The Claims Procedure Order governs all claims against the Payless Canada Entities.

Unless otherwise defined, all capitalized terms used herein shall have the meanings given to those terms in the Claims Procedure Order.

The Claims Procedure Order, the Claim Document Package, additional Proofs of Claim and related materials may be accessed from the Monitor's Website at http://cfcanada.fticonsulting.com/paylesscanada/.

This letter provides instructions for responding to or completing the Proof of Claim or a Notice of Dispute of Claim Statement. Reference should be made to the Claims Procedure Order for a complete description of the Claims Procedure.

The Claims Procedure is intended for any Person with any Claims of any kind or nature whatsoever against the Payless Canada Entities or the Directors/Officers of the Payless Canada Entities, whether liquidated, unliquidated, contingent or otherwise. Please review the enclosed material for the complete definitions of "Claim", "Prefiling Claim", "Restructuring Period Claim" and "Director/Officer Claim" to which the Claims Procedure applies.

All notices and enquiries with respect to the Claims Procedure should be addressed to:

FTI Consulting Canada Inc. as Monitor of the Payless Canada Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8
Phone: 416 649 8096
Toll Free: 1 855 718 5255

Fax: 416 649 8101
E-mail: paylesscanada@fticonsulting.com

B. FOR CLAIMANTS SUBMITTING A PROOF OF CLAIM

Unless you are a Listed Claimant (as defined below), if you believe that you have a Claim against the Payless Canada Entities or the Directors or Officers of any of the Payless Canada Entities, you must file a Proof of Claim with the Monitor.

If a Chapter 11 Proof of Claim relating to the Payless Canada Entities is inadvertently filed in accordance with the Chapter 11 Claims Procedure (including by the claims bar dates specified therein) as if such procedure otherwise applied to the Payless Canada Entities, the Chapter 11 Proof of Claim will be deemed to have been filed with the Monitor in accordance with the Claims Procedure. If both a Proof of Claim and Chapter 11 Proof of Claim are timely filed, the Proof of Claim delivered in accordance with the Claims Procedure shall govern.

All **Proofs of Claim for Prefiling Claims** (i.e., Claims against the Payless Canada Entities arising prior to the Filing Date) and all **Director/Officer Claims** must be received by the Monitor **before 11:59 p.m. (Central Time) on June 7, 2019** (the "**Claims Bar Date**").

All **Proofs of Claim for Restructuring Period Claims** (i.e. Claims against the Payless Canada Entities arising on or after the Filing Date) must be received by the Monitor **before 11:59 p.m. (Central Time)** on the date that is **the later of (i) the Claims Bar Date and (ii) thirty (30) days after the date on which the Monitor sends a Claim Document Package with respect to a Restructuring Period Claim** (the "**Restructuring Period Claims Bar Date**").

PROOFS OF CLAIM MUST BE RECEIVED BY THE CLAIMS BAR DATE OR RESTRUCTURING PERIOD CLAIMS BAR DATE, AS APPLICABLE, OR THE APPLICABLE CLAIM WILL BE FOREVER BARRED AND EXTINGUISHED. If you are required to file a Proof of Claim pursuant to the Claims Procedure but do not file a Proof of Claim in respect of a Claim by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, you shall not be entitled to vote at any Meeting regarding a Plan or participate in any distribution under a Plan or otherwise in respect of such Claims.

All Claims denominated in foreign currency shall be converted to Canadian dollars at the Bank of Canada daily average exchange rate on the date of the Initial Order.

Additional Proof of Claim forms can be obtained by contacting the Monitor at the telephone numbers and address indicated above and providing particulars as to your name, address and facsimile number or email mail address. Additional Proofs of Claim and related materials may be accessed from the Monitor's Website at http://cfcanada.fticonsulting.com/paylesscanada/.

C. FOR CLAIMANTS WHO RECEIVE A CLAIM STATEMENT

Certain Known Claimants of the Payless Canada Entities (each a "**Listed Claimant**") will receive a Claim Statement from the Monitor specifying the classification, amount and nature of such Claimant's Claim as determined by the Payless Canada Entities, in consultation with the Monitor, based on the books and records of the Payless Canada Entities (the "**Listed Claim**").

If you receive a Claim Statement and you do not dispute the classification, amount or nature of the Listed Claim, you are not required to take any further action or to file a Proof of Claim with the Monitor in the Claims Procedure Order.

If you wish to dispute the classification, amount and/or nature of the Listed Claim set forth in the Claim Statement or to assert an additional Claim in relation to the Payless Canada Entities other than the Listed Claim, you are required to deliver a Notice of Dispute of Claim Statement to the Monitor so that it is actually received by the Monitor by no later than the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable.

If a completed Notice of Dispute of Claim Statement in respect of a Listed Claim is not received by the Monitor by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, the Claimant shall be forever barred from disputing the classification, amount or nature of the Listed Claim and any Claim of a different classification or nature or in excess of the amount specified in the Listed Claim shall be forever barred and extinguished. **IF A NOTICE OF DISPUTE OF CLAIM STATEMENT IS NOT RECEIVED BY THE MONITOR WITHIN THE PRESCRIBED TIME PERIOD, THE CLAIM AS SET OUT IN THE CLAIM STATEMENT WILL BE DEEMED TO BE THE CLAIM OF THE CLAIMANT AND WILL BE FINAL AND BINDING ON THE CLAIMANT FOR ALL PURPOSES.**

DATED at Toronto, Ontario this _____ day of _____, 2019.

FTI Consulting Canada Inc.,
solely in its capacity as Monitor of
the Payless Canada Entities, and not
in its personal capacity.

SCHEDULE "B"

NOTICE TO CLAIMANTS

Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., and Payless ShoeSource Canada LP (the "Payless Canada Entities") and/or their Directors or Officers

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RE: NOTICE OF CLAIMS PROCEDURE AND CLAIMS BAR DATE

This notice is being published pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) dated April 24, 2019 (the "**Claims Procedure Order**") in proceedings in respect of the Payless Canada Entities pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The Court has ordered that the Court-appointed Monitor of the Payless Canada Entities, FTI Consulting Canada Inc. (in such capacity, the "**Monitor**"), assist the Payless Canada Entities with conducting a claims procedure (the "**Claims Procedure**") with respect to claims against the Payless Canada Entities and their present and former Directors and Officers ("**Directors/Officers**"). The Monitor is required to send Claim Document Packages to the Payless Canada Entities' Known Claimants. All capitalized terms herein shall have the meanings given to those terms in the Claims Procedure Order.

The Claims Procedure Order, the Claim Document Package, additional Proofs of Claim and related materials may be accessed from the Monitor's Website at http://cfcanada.fticonsulting.com/paylesscanada/.

A. Submission of Proof of Claim

With the exception of Listed Claimants (as defined below), all persons wishing to assert a Claim against the Payless Canada Entities or the Directors/Officers must file a Proof of Claim with the Monitor.

THE CLAIMS BAR DATE is 11:59 p.m. (Central Time) on June 7, 2019. Proofs of Claim in respect of Prefiling Claims and Director/Officer Claims must be completed and filed with the Monitor on or before the Claims Bar Date.

THE RESTRUCTURING PERIOD CLAIMS BAR DATE is 11:59 p.m. (Central Time) on the date that is the later of (i) the Claims Bar Date and (ii) thirty (30) days after the date on which the Monitor sends a Claim Document Package with respect to a Restructuring Period Claim (the **"Restructuring Period Claims Bar Date"**). Proofs of Claim in respect of Restructuring Period Claims must be completed and filed with the Monitor on or before the Restructuring Period Claims Bar Date.

PROOFS OF CLAIM MUST BE RECEIVED BY THE MONITOR BY THE CLAIMS BAR DATE OR RESTRUCTURING PERIOD CLAIMS BAR DATE, AS APPLICABLE, OR THE CLAIM WILL BE FOREVER BARRED AND EXTINGUISHED. If you are required to file a Proof of Claim pursuant to the Claims Procedure but do not file a Proof of Claim in respect of a Claim by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, you shall not

be entitled to vote at any Meeting regarding a Plan or participate in any distribution under a Plan, if any, or otherwise in respect of such Claims.

Reference should be made to the enclosed material for the complete definitions of "Claim", "Prefiling Claim", "Restructuring Period Claim" and "Director/Officer Claim" to which the Claims Procedure applies.

B. Listed Claimants Receiving a Claim Statement

Certain Known Claimants of the Payless Canada Entities (each a "**Listed Claimant**") will receive a Claim Statement from the Monitor specifying the classification, amount and nature of such party's Claim as determined by the Payless Canada Entities, in consultation with the Monitor, based on the books and records of the Payless Canada Entities (the "**Listed Claim**").

If you receive a Claim Statement and you do not dispute the classification, amount or nature of the Listed Claim, you are not required to take any further action or to file a Proof of Claim with the Monitor in the Claims Procedure Order.

If you wish to dispute the classification, amount and/or nature of the Listed Claim set forth in the Claim Statement or to assert an additional Claim in relation to any of the Payless Canada Entities other than the Listed Claim, you are required to deliver a Notice of Dispute of Claim Statement to the Monitor so that it is received by the Monitor by no later than the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable.

If a completed Notice of Dispute of Claim Statement in respect of a Listed Claim is not received by the Monitor by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, the Claimant shall be forever barred from disputing the classification, amount or nature of the Listed Claim and any Claim of a different classification or nature or in excess of the amount specified in the Listed Claim shall be forever barred and extinguished. **IF A NOTICE OF DISPUTE OF CLAIM STATEMENT IS NOT RECEIVED BY THE MONITOR WITHIN THE PRESCRIBED TIME PERIOD, THE CLAIM AS SET OUT IN THE CLAIM STATEMENT WILL BE DEEMED TO BE THE CLAIM OF THE CLAIMANT AND WILL BE FINAL AND BINDING ON THE CLAIMANT FOR ALL PURPOSES.**

C. Monitor Contact Information

The Monitor can be contacted at the following address to request a Claim Document Package or for any other notices or enquiries with respect to the Claims Procedure:

FTI Consulting Canada Inc. as Monitor of the Payless Canada Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8
Phone: 416 649 8096
Toll Free: 1 855 718 5255
Fax: 416 649 8101
E-mail: paylesscanada@fticonsulting.com

DATED at Toronto, Ontario this _____ day of , _____ 2019.

FTI Consulting Canada Inc.,
solely in its capacity as Monitor of

the Payless Canada Entities, and not in its personal capacity.

SCHEDULE "C"

PROOF OF CLAIM

Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., and Payless ShoeSource Canada LP (the "Payless Canada Entities") and/or their Directors or Officers

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Please read carefully the enclosed Instruction Letter for completing this Proof of Claim. All capitalized terms not defined herein have the meanings given to such terms in the Claims Procedure Order dated April 24, 2019.

I. PARTICULARS OF CLAIMANT:

1. 1. Full Legal Name of Claimant:

   _____ (the "**Claimant**")

2. Full Mailing Address of the Claimant:

   _____

   _____

   _____

3. Telephone Number: _____

4. E-Mail Address: _____

5. Facsimile Number: _____

6. Attention *(Contact Person)*: _____

7. Have you acquired this Claim by assignment?

   Yes: ❑ No: ❑ *(if yes, attach documents evidencing assignment)*

   If Yes, Full Legal Name of Original Claimant(s):

II. PROOF OF CLAIM:

1. I, _____
   (name of Claimant or Representative of the Claimant), of _____

   _____ do hereby certify:
   (city and province)

(a) that I *[check (√) one]*

☐ am the Claimant; OR

☐ am _____ (state position or title) of

_____;
(name of Claimant)

(b) that I have knowledge of all the circumstances connected with the Claim referred to below;

(c) that one or more of the Payless Canada Entities and/or the Directors/Officers of the Payless Canada Entities were and still are indebted to the Claimant as follows:[1]

Debtor	Prefiling Claim Amount	Secured, Priority Unsecured, or Unsecured	Value of Security, if any:
Payless ShoeSource Canada Inc.			
Payless ShoeSource Canada GP Inc.			
Payless ShoeSource Canada LP			
Directors and Officers of the Payless Canada Entities _____ *(insert names above)*			

Debtor	Restructuring Period Claim Amount	Secured, Priority Unsecured, or Unsecured	Value of Security, if any:
Payless ShoeSource Canada Inc.			
Payless ShoeSource Canada GP Inc.			
Payless ShoeSource Canada LP			
Directors and Officers of the Payless Canada Entities _____ *(insert names above)*			

[1] (Claims in a foreign currency are to be converted to Canadian Dollars at the Bank of Canada daily average exchange rate for February 19, 2019. The Canadian Dollar/U.S. Dollar daily average exchange rate on that date was CAD$1/ USD$1.323.)

III. PARTICULARS OF CLAIM

The particulars of the undersigned's total Claim (including Prefiling Claims, Restructuring Period Claims and Director/Officer Claims) are attached.

(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed. Include the relevant store location and number if applicable. If a Claim is made against any Directors or Officers, specify the applicable Directors or Officers and the legal basis for the Claim against them.)

IV. FILING OF CLAIM

For **Prefiling Claims and all Director/Officer Claims**, this Proof of Claim must be received by the Monitor **before 11:59 p.m. (Central Time) on June 7, 2019** (the "**Claims Bar Date**").

For **Restructuring Period Claims**, this Proof of Claim must be received by the Monitor **before 11:59 p.m. (Central Time) on the date that is the later of: (i) the Claims Bar Date and (ii) thirty (30) days after the date on which the Monitor sends a Claim Document Package with respect to a Restructuring Period Claim** (the "**Restructuring Period Claims Bar Date**").

In both cases, completed forms must be delivered by prepaid ordinary mail, courier, personal delivery or electronic transmission at the following address:

FTI Consulting Canada Inc. as Monitor of the Payless Canada Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8
Phone: 416 649 8096
Toll Free: 1 855 718 5255
Fax: 416 649 8101

E-mail: paylesscanada@fticonsulting.com

Failure to file your Proof of Claim as directed by the Claims Bar Date or Restructuring Period Claims Bar Date, as applicable, will result in your Claim being extinguished and barred and in you being prevented from making or enforcing a Claim against the applicable Payless Canada Entities or Director/Officer, as applicable.

Dated at _____ this _____ day of _____, 2019.

_____

Signature of Claimant

SCHEDULE "D-1"

GENERAL CLAIM STATEMENT

(for Prefiling Claims and Restructuring Period Claims)

Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., and Payless ShoeSource Canada LP (the "Payless Canada Entities") and/or their Directors or Officers

Claim Reference Number:	[Insert Claim Reference Number]
Store Number (if applicable):	[Insert Store Number, if applicable]
To:	[Insert Name of Known Claimant] (the "**Claimant**")
	[Insert Address of Known Claimant]

This General Claim Statement is delivered to the Claimant, as a Known Claimant of one or more of the Payless Canada Entities and/or their Directors or Officers as noted below, pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) dated April 24, 2019 (the "**Claims Procedure Order**") in proceedings in respect of the Payless Canada Entities pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). Pursuant to the Claims Procedure Order, the Court-appointed Monitor of the Payless Canada Entities, FTI Consulting Canada Inc. (in such capacity, the "**Monitor**"), has been directed to assist the Payless Canada Entities in conducting a claims procedure (the "**Claims Procedure**") with respect to claims against the Payless Canada Entities and their present or former Directors and Officers in accordance with the terms of the Claims Procedure Order. Unless otherwise defined, all capitalized terms used herein have the meanings given to those terms in the Claims Procedure Order.

According to the books, records and other relevant information in the possession of the Payless Canada Entities, the Claim of the Claimant is set out in the table below (the "**Listed Claim**"):

Debtor(s)	Classification of Claim	Amount of Claim[1],[2]	Nature of Claim
[name of Payless Canada Entity or Director/Officer]	[Prefiling Claim / Restructuring Period Claim]	[Insert amount of Claim]	[Unsecured Claim / Unsecured Priority Claim / Secured Claim]

[1] Amount is in Canadian dollars. Claims in a foreign currency have been converted to Canadian dollars at the Bank of Canada daily average exchange rate for February 19, 2019. The Canadian dollar/U.S. dollar daily average exchange rate for that date was CAD$1/ USD$1.323.

[2] If applicable, additional information with respect to the Listed Claim is provided in a schedule to this Claim Statement.

If the Listed Claim accurately reflects the Claim that the Claimant has in respect of such Payless Canada Entity(ies) (or any Director/Officer Claim), you are not required to take any further action or to file a Proof of Claim with the Monitor in the Claims Procedure Order.

If the Claimant wishes to dispute the classification, amount and/or nature of the Listed Claim or to assert an additional Claim against any of the Payless Canada Entities or the Directors or Officers other than the Listed Claim (including any Restructuring Period Claim), the Claimant must complete the enclosed Notice of Dispute of Claim Statement and deliver it to the Monitor such that it is received by the Monitor by no later than **11:59 p.m. (Central Time)** on June 7, 2019 (the "**Claims Bar Date**") or, solely in respect of a Restructuring Period Claim, by **11:59 p.m. (Central Time)** on the day that is the later of (i) the Claims Bar Date, and (ii) thirty (30) days after the date on which the Monitor delivered the Claim Document Package to the Claimant (the **"Restructuring Period Claims Bar Date**").

If a completed Notice of Dispute of Claim Statement in respect of the Listed Claim is not received by the Monitor by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, the Claimant shall be forever barred from disputing the classification, amount or nature of the Listed Claim and any Claim of a different classification or nature or in excess of the amount specified in the Listed Claim shall be forever barred and extinguished. **IF A NOTICE OF DISPUTE OF CLAIM STATEMENT IS NOT RECEIVED BY THE MONITOR WITHIN THE PRESCRIBED TIME PERIOD, THE CLAIM AS SET OUT IN THE GENERAL CLAIM STATEMENT WILL BE DEEMED TO BE THE CLAIM OF THE CLAIMANT AND WILL BE FINAL AND BINDING ON THE CLAIMANT FOR ALL PURPOSES.**

Claimants requiring further information or Claim documentation, or who wish to submit a Notice of Dispute of Claim Statement, may contact the Monitor at the following address:

FTI Consulting Canada Inc. as Monitor of the Payless Canada Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8
Phone: 416 649 8096
Toll Free: 1 855 718 5255
Fax: 416 649 8101

E-mail: paylesscanada@fticonsulting.com

Dated at _____ this _____ day of _____, 2019.

FTI Consulting Canada Inc.,
solely in its capacity as Monitor of
the Payless Canada Entities, and not
in its personal capacity

SCHEDULE "D-2"

EMPLOYEE CLAIM STATEMENT

(for Prefiling Claims and Restructuring Period Claims)

Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., and Payless ShoeSource Canada LP (the "Payless Canada Entities") and/or their Directors or Officers

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Claim Reference Number:	[Insert Claim Reference Number]
Store Number (if applicable):	[Insert Store Number, if applicable]
To:	[Insert Name of Known Claimant] (the "**Claimant**")
	[Insert Address of Known Claimant]

This Employee Claim Statement is delivered to the Claimant, as a Known Claimant of one or more of the Payless Canada Entities and/or their Directors or Officers as noted below, pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) dated April 24, 2019 (the "**Claims Procedure Order**") in proceedings in respect of the Payless Canada Entities pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). Pursuant to the Claims Procedure Order, the Court-appointed Monitor of the Payless Canada Entities, FTI Consulting Canada Inc. (in such capacity, the "**Monitor**"), has been directed to assist the Payless Canada Entities in conducting a claims procedure (the "**Claims Procedure**") with respect to claims against the Payless Canada Entities and their present or former Directors and Officers in accordance with the terms of the Claims Procedure Order. Unless otherwise defined, all capitalized terms used herein have the meanings given to those terms in the Claims Procedure Order.

According to the books, records and other relevant information in the possession of the Payless Canada Entities, the Claim of the Claimant is set out in the table below (the "**Listed Claim**"):

Debtor(s)	**Classification of Claim**	**Amount of Claim[1],[2]**	**Nature of Claim**
[name of Payless Canada Entity or Director/Officer]	[Prefiling Claim / Restructuring Period Claim]	[Insert amount of Claim]	[Unsecured Claim / Unsecured Priority Claim / Secured Claim]

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[1] Amount is in Canadian dollars. Claims in a foreign currency have been converted to Canadian dollars at the Bank of Canada daily average exchange rate for February 19, 2019. The Canadian doliar/U.S. dollar daily average exchange rate for that date was CAD$1/ USD$1.323.

[2] If applicable, additional information with respect to the Listed Claim is provided in a schedule to this Claim Statement.

If the Listed Claim accurately reflects the Claim that the Claimant has in respect of such Payless Canada Entity(ies) (or any Director/Officer Claim), you are not required to take any further action or to file a Proof of Claim with the Monitor in the Claims Procedure Order.

Please note that the Listed Claim is calculated based on your statutory entitlement to termination and severance pay.

If the Claimant wishes to dispute the classification, amount and/or nature of the Listed Claim or to assert an additional Claim (based on common law, contract or otherwise) against any of the Payless Canada Entities or the Directors or Officers other than the Listed Claim, the Claimant must complete the enclosed Notice of Dispute of Claim Statement and deliver it to the Monitor such that it is received by the Monitor by no later than **11:59 p.m. (Central Time)** on June 7, 2019 (the "**Claims Bar Date**") or, solely in respect of a Restructuring Period Claim, by **11:59 p.m. (Central Time)** on the day that is the later of (i) the Claims Bar Date, and (ii) thirty (30) days after the date on which the Monitor delivered the Claim Document Package to the Claimant (the **"Restructuring Period Claims Bar Date**").

If a completed Notice of Dispute of Claim Statement in respect of the Listed Claim is not received by the Monitor by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, the Claimant shall be forever barred from disputing the classification, amount or nature of the Listed Claim and any Claim of a different classification or nature or in excess of the amount specified in the Listed Claim shall be forever barred and extinguished. **IF A NOTICE OF DISPUTE OF CLAIM STATEMENT IS NOT RECEIVED BY THE MONITOR WITHIN THE PRESCRIBED TIME PERIOD, THE CLAIM AS SET OUT IN THE EMPLOYEE CLAIM STATEMENT WILL BE DEEMED TO BE THE CLAIM OF THE CLAIMANT AND WILL BE FINAL AND BINDING ON THE CLAIMANT FOR ALL PURPOSES.**

Claimants requiring further information or Claim documentation, or who wish to submit a Notice of Dispute of Claim Statement, may contact the Monitor at the following address:

FTI Consulting Canada Inc. as Monitor of the Payless Canada Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8
Phone: 416 649 8096
Toll Free: 1 855 718 5255
Fax: 416 649 8101

E-mail: paylesscanada@fticonsulting.com

Dated at _____ this _____ day of _____, 2019.

FTI Consulting Canada Inc.,
solely in its capacity as Monitor of
the Payless Canada Entities, and not
in its personal capacity

SCHEDULE "D-3"

LANDLORD CLAIM STATEMENT

(for Prefiling Claims and Restructuring Period Claims)

Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., and Payless ShoeSource Canada LP (the "Payless Canada Entities") and/or their Directors or Officers

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Claim Reference Number:	[Insert Claim Reference Number]
Store Number (if applicable):	[Insert Store Number, if applicable]
To:	[Insert Name of Known Claimant] (the "**Claimant**") [Insert Address of Known Claimant]

This Landlord Claim Statement is delivered to the Claimant, as a Known Claimant of one or more of the Payless Canada Entities and/or their Directors or Officers as noted below, pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) dated April 24, 2019 (the "**Claims Procedure Order**") in proceedings in respect of the Payless Canada Entities pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). Pursuant to the Claims Procedure Order, the Court-appointed Monitor of the Payless Canada Entities, FTI Consulting Canada Inc. (in such capacity, the "**Monitor**"), has been directed to assist the Payless Canada Entities in conducting a claims procedure (the "**Claims Procedure**") with respect to claims against the Payless Canada Entities and their present or former Directors and Officers in accordance with the terms of the Claims Procedure Order. Unless otherwise defined, all capitalized terms used herein have the meanings given to those terms in the Claims Procedure Order.

According to the books, records and other relevant information in the possession of the Payless Canada Entities, the Claim of the Claimant is set out in the table below (the "**Listed Claim**"):

Debtor(s)	Classification of Claim	Amount of Claim[1],[2]	Nature of Claim
[name of Payless Canada Entity or Director/Officer]	[Prefiling Claim / Restructuring Period Claim]	[Insert amount of Claim]	[Unsecured Claim / Unsecured Priority Claim / Secured Claim]

---

[1] Amount is in Canadian dollars. Claims in a foreign currency have been converted to Canadian dollars at the Bank of Canada daily average exchange rate for February 19, 2019. The Canadian dollar/U.S. dollar daily average exchange rate for that date was CAD$1/ USD$1.323.

[2] If applicable, additional information with respect to the Listed Claim is provided in a schedule to this Claim Statement.

If the Listed Claim accurately reflects the Claim that the Claimant has in respect of such Payless Canada Entity(ies) (or any Director/Officer Claim), you are not required to take any further action or to file a Proof of Claim with the Monitor in the Claims Procedure Order.

Please note that the Listed Claim is only representative of your Prefiling Claim and that the Listed Claim does not list any Restructuring Period Claim you may have. If you have a Restructuring Period Claim, you must file a Notice of Dispute of Claim Statement and include such claim.

If the Claimant wishes to dispute the classification, amount and/or nature of the Listed Claim or to assert an additional Claim against any of the Payless Canada Entities or the Directors or Officers other than the Listed Claim (including any Restructuring Period Claim), the Claimant must complete the enclosed Notice of Dispute of Claim Statement and deliver it to the Monitor such that it is received by the Monitor by no later than **11:59 p.m. (Central Time)** on June 7, 2019 (the "**Claims Bar Date**") or, solely in respect of a Restructuring Period Claim, by **11:59 p.m. (Central Time)** on the day that is the later of (i) the Claims Bar Date, and (ii) thirty (30) days after the date on which the Monitor delivered the Claim Document Package to the Claimant (the **"Restructuring Period Claims Bar Date**").

If a completed Notice of Dispute of Claim Statement in respect of the Listed Claim is not received by the Monitor by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, the Claimant shall be forever barred from disputing the classification, amount or nature of the Listed Claim and any Claim of a different classification or nature or in excess of the amount specified in the Listed Claim shall be forever barred and extinguished. **IF A NOTICE OF DISPUTE OF CLAIM STATEMENT IS NOT RECEIVED BY THE MONITOR WITHIN THE PRESCRIBED TIME PERIOD, THE CLAIM AS SET OUT IN THE LANDLORD CLAIM STATEMENT WILL BE DEEMED TO BE THE CLAIM OF THE CLAIMANT AND WILL BE FINAL AND BINDING ON THE CLAIMANT FOR ALL PURPOSES.**

Claimants requiring further information or Claim documentation, or who wish to submit a Notice of Dispute of Claim Statement, may contact the Monitor at the following address:

FTI Consulting Canada Inc. as Monitor of the Payless Canada Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8
Phone: 416 649 8096
Toll Free: 1 855 718 5255
Fax: 416 649 8101

E-mail: paylesscanada@fticonsulting.com

Dated at _____ this _____ day of _____, 2019.

FTI Consulting Canada Inc.,
solely in its capacity as Monitor of
the Payless Canada Entities, and not
in its personal capacity

SCHEDULE "E"

NOTICE OF DISPUTE OF CLAIM STATEMENT

Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc., and Payless ShoeSource Canada LP (the "Payless Canada Entities") and/or their Directors or Officers

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Capitalized terms not defined herein have the meanings given to them in the Order of the Ontario Superior Court of Justice (Commercial List) dated April 24, 2019 (the "**Claims Procedure Order**") or the Claim Statement.

I. PARTICULARS OF CLAIMANT

Claim Reference Number: [Insert Claim Reference Number listed on Claim Statement] (the "**Claim Statement**").

Full Legal Name of Claimant: _____

Full Mailing Address of Claimant: _____

Telephone Number: _____

Email Address: _____

Attention (Contact Person): _____

Have you acquired this Claim by assignment?

Yes: ❑ No: ❑ *(if yes, attach documents evidencing assignment)*

If Yes, Full Legal Name of Original Claimant(s): _____

II. DISPUTE OF CLAIM SET OUT IN CLAIM STATEMENT

The Claimant hereby disputes the classification, amount and/or nature of the Listed Claim set out in the Claim Statement and asserts the Claim(s) as set out in the following table:

	Classification of Claim	**Amount of Claim**	**Nature of Claim**
Name of Debtor or Director/Officer	[Prefiling Claim / Restructuring Period Claim/Director/Officer Claim]	[Insert amount of Claim]	[Unsecured Claim / Unsecured Priority Claim / Secured Claim]

III. REASONS FOR DISPUTE

Provide full particulars below as to the basis for the Claimant's dispute of the Listed Claim as set out in the Claim Statement and provide supporting documentation. This includes, without limitation, amounts, description of transaction(s) or agreement(s) giving rise to the Claim, the date and number of all invoices and supporting documentation, and particulars of all credits, discounts, rebates and similar items claimed. The particulars provided must support the value of the Claim as stated by the Claimant in the table above.

Dated this _____ day of _____, 2019.

_____

Signature of Claimant or its Authorized Signatory

This Notice of Dispute of Claim Statement MUST be delivered to the Monitor at the below address such that it is received by the Monitor by no later than **11:59 p.m. (Central Time)** on **June 7, 2019** (the "**Claims Bar Date**") or, solely in respect of a Restructuring Period Claim, by **11:59 p.m. (Central Time)** on the day that is the later of (i) the Claims Bar Date, and (ii) thirty (30) days after the date on which the Monitor delivered the Claim Document Package to the Claimant (the "**Restructuring Period Claims Bar Date**"):

FTI Consulting Canada Inc. as Monitor of the Payless Canada Entities
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario M5K 1G8
Phone: 416 649 8096
Toll Free: 1 855 718 5255

Fax: 416 649 8101

E-mail: paylesscanada@fticonsulting.com

If a completed Notice of Dispute of Claim Statement in respect of the Listed Claim is not received by the Monitor by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, the Claimant shall be forever barred from disputing the classification, amount or nature of the Listed Claim and any Claim of a different classification or nature or in excess of the amount specified in the Listed Claim shall be forever barred and extinguished. **IF A NOTICE OF DISPUTE OF CLAIM STATEMENT IS NOT RECEIVED BY THE MONITOR WITHIN THE PRESCRIBED TIME PERIOD, THE CLAIM AS SET OUT IN THE CLAIM STATEMENT WILL BE DEEMED TO BE THE CLAIM OF THE CLAIMANT AND WILL BE FINAL AND BINDING ON THE CLAIMANT FOR ALL PURPOSES.**

Court File No. CV-19-00614629-00CL

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 PAYLESS SHOESOURCE CANADA INC. AND PAYLESS SHOESOURCE CANADA GP INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

ORDER
(CLAIMS PROCEDURE ORDER)

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
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Lawyers for Payless ShoeSource Canada Inc., Payless ShoeSource Canada GP Inc. and Payless ShoeSource Canada LP

See paras. 21, 26, 32

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1845

Date: 20201126
Docket: S200586
Registry: Vancouver

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of the *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment
(Claims Process / Meeting Orders / Break Up Fee)

Counsel for the Petitioner:	J.R. Sandrelli T. Jeffries
Counsel for the Monitor PricewaterhouseCoopers Inc.:	V.L. Tickle
Counsel for Primacorp Ventures Inc.:	P. Rubin G. Umbach
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Halladay Education Group:	D. Lawrenson

Counsel for Capilano University:	K. Mak
Counsel for Confidential Party (Development Partner #1):	G. Barr R. McKenna
Counsel for Quest University Faculty Union:	J. Sanders
Counsel for Bank of Montreal:	S.A. Poisson
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 3, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 3, 2020
Place and Date of Written Reasons:	Vancouver, B.C. November 26, 2020

INTRODUCTION

[1] The petitioner, Quest University Canada ("Quest"), seeks a number of orders on this application, all steps toward what it considers will be a successful restructuring of its affairs under the *Companies' Creditors Arrangement Act,* R.S.C. 1985 c. C-36 (the "*CCAA*").

[2] Quest seeks: a Claims Process Order, to identify and determine claims against it; a Meeting Order, to allow Quest to present a plan of arrangement to its creditors; and, a Transaction Approval and Vesting Order ("TAVO") to approve the proposed purchase and sale transaction between it and Primacorp Ventures Inc. ("Primacorp").

[3] There is minor opposition to the granting of the Claims Process Order and Meeting Order.

[4] There is substantial opposition to the granting of the TAVO. To allow the opposing parties further time to develop their materials, the Court adjourned that aspect of the application to November 12–13, 2020. In the meantime, however, Quest seeks approval of its agreement to pay Primacorp a Break Up Fee and that the Court grant a Break Up Fee Charge to secure those amounts. Various parties oppose this relief.

[5] At the conclusion of this hearing, I granted the Claims Process Order and the Meeting Order. I also approved Quest's agreement to pay the Break Up Fee and granted the Break Up Fee Charge. These are my reasons for those orders.

BACKGROUND FACTS

[6] On January 16, 2020, these proceedings began with the granting of the Initial Order.

[7] Quest's restructuring has been unique in many respects. Quest is a not-for-profit post-secondary educational institution, a status that bears on its options in this proceeding. Quest has never really been self-sustaining financially; rather, it has

historically relied on donations, secured loans and land sales to supplement its revenue.

[8] Quest's asset holdings are complex. The campus, which includes the main buildings and residences, is located in Squamish, BC. Initially, Quest held substantial development lands that surrounded the campus lands; however, over the years, Quest sold some of those lands to generate revenue. Even so, a significant amount of development land remains.

[9] Given Quest's history, its debt structure is also complex. There are many secured creditors, including Vanchorverve Foundation and Capilano University ("CapU"), with the latter holding a right of first refusal over certain lands. In addition, I approved Quest obtaining secured interim financing to assist its refinancing efforts in these *CCAA* proceedings: *Quest University Canada (Re)*, 2020 BCSC 318 and *Quest University Canada (Re)*, 2020 BCSC 860.

[10] Quest also has complex financial agreements concerning four residence buildings on the campus, as discussed in *Quest University Canada (Re)*, 2020 BCSC 921 (the "Rent Deferral Reasons"). Other agreements entered into by Quest, such as leases and naming rights agreements, potentially affect any disposition of its assets.

[11] Quest has faced numerous challenges in these proceedings in continuing its educational endeavours, particularly arising from the impact of the COVID-19 pandemic beginning in March 2020. Nevertheless, Quest has continued throughout these proceedings to pursue some form of partnership, including an academic partnership that would see a continuation of its education services. Quest has also engaged with various development partners to determine if that option would resolve its financial difficulties, either alone or in conjunction with a transaction with an academic partner.

[12] Quest has been disappointed along the way. In March 2020, a development partner withdrew from the process after submitting a bid. On May 28, 2020, I granted

an order extending the stay until August 10, 2020, to allow Quest to pursue an agreement with the party identified as “Academic Partner”. Unfortunately, a transaction with the Academic Partner did not materialize by June 2020: Rent Deferral Reasons at paras. 20–22.

[13] On August 7, 2020, I granted an order extending the stay to December 24, 2020 to allow Quest to pursue another transaction over that time, while also offering an uninterrupted fall term to its students. Over this last extension period, Quest has chosen to enter into a transaction with Primacorp.

[14] It is a condition precedent of the Primacorp transaction that the Court grant the TAVO and that Quest obtain creditor and this Court’s approval of a plan of arrangement. Other conditions precedent also arise. Quest is required to disclaim subleases held by Southern Star Developments Ltd. (“Southern Star”). Quest has already delivered those disclaimers. As a result, Southern Star is opposing the granting of the TAVO and challenging the disclaimers, with both matters to be addressed at the later hearing. Other conditions precedent relate to various agreements and charges and litigation claims relating to Quest’s assets, including its lands.

[15] Having reached this stage in the sales process, Quest now seeks the Claims Process Order and the Meeting Order, and will shortly seek the TAVO, as the first steps toward a conclusion to these proceedings. Quest takes the position that the Primacorp transaction maximizes the value of its assets and offers the greatest benefit to its stakeholders.

[16] It is not necessary at this stage to consider the sales process in detail, since that will be relevant to Quest’s later application for the TAVO. Having said that, it is of note that the Monitor, in its Fourth Report dated November 2, 2020, describes that process as “thorough”. In that Report, the Monitor also supports the Primacorp transaction as the one most beneficial to Quest’s creditors.

[17] Writ large, the Primacorp transaction, or more accurately described as a series of transactions, provides for:

a) Sufficient funds to pay all Quest's secured creditors' claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest's unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[18] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They include, as defined in the Monitor's Fourth Report, the Primacorp Purchase and Sale Agreement (the "Primacorp PSA"), the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms include that Primacorp will:

a) Purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the Residence Lands, chattels and vehicles;

b) Lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Provide marketing and recruiting expertise and sufficient working capital to allow Quest to continue as a university;

d) Fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under a plan of arrangement. In addition, the Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales; and

e) Provide Quest with a $20 million secured credit facility.

[19] All of the transaction documents are in settled form and the signed documents are in escrow. Primacorp and Quest are working towards a closing date in late December 2020.

CLAIMS PROCESS

[20] The remedial objective of the *CCAA* is to facilitate a restructuring of a debtor company. Section 11 of the *CCAA* imbues the supervising judge with a broad statutory authority to make such orders as are appropriate toward achieving that objective: *Bul River Mineral Corporation (Re),* 2014 BCSC 1732 at para. 29 ("*Bul River* #2").

[21] Establishing a claims process toward determining claims to be advanced under the *CCAA* is a recognized step in proceedings across Canada: *ScoZinc Ltd. (Re)*, 2009 NSSC 136 at para. 23; and *Bul River #2* at paras. 31-32.

[22] In *Timminco Limited (Re),* 2014 ONSC 3393 at paras. 41–44, Regional Senior Justice Morawetz (as he then was) discussed "first principles" from the *CCAA* in relation to claims process orders and the establishment of a claims bar date. He stated:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The *CCAA* is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the *CCAA*, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[23] Quest submits that a claims process is necessary to enable it to implement a plan and close the Primacorp transaction.

[24] Quest indicates that there are five secured creditors holding approximately $30.7 million in debt. Quest estimates that there are 446 unsecured creditors holding

approximately $2 million in debt. If the Court upholds the Southern Star disclaimers, Southern Star will also be entitled to advance a claim against Quest as an unsecured creditor.

[25] Quest developed the proposed claims process with input and support from the Monitor. The features of the proposed claims process are:

a) The claims process will not address claims arising post-filing, save for a Restructuring Claim and amounts secured by *CCAA* Charges;

b) The claims process addresses claims against Governors and Officers in relation to a pre-filing claim or Restructuring Claims;

c) The claims process requires that secured creditors prove their claims;

d) The claims bar date for claims is November 24, 2020; the claims bar date for Restructuring Claims is the later of November 24, 2020 and ten days after the date on which a Creditor receives a Notice of Disclaimer or Resiliation;

e) To facilitate creditor participation in the Claims Process, Quest designed a negative claims process for almost all vendors, students and employees. As such, after receipt of a claims package indicating Quest's determination of the claim, that creditor need only respond if there is disagreement as to the amount of its claim set out in the notice; and

f) Disputes will be handled in the usual fashion, but by the Monitor. After consultation with Quest, the Monitor will deliver any Notices of Revision or Disallowance. Creditors may then deliver a Notice of Dispute to the Monitor. Failing settlement of a dispute, the Monitor may refer the matter to the Court for a determination after a hearing *de novo*.

[26] I agree that the timeline set for the claims process is ambitious. As noted by the Monitor, it is relatively short. However, in my view, the negative claims process in relation to many of the unsecured creditors ameliorates any concerns. In addition, the secured creditors have been aware of these proceedings since the outset; those secured creditors who might have more complicated claims have been actively involved. I can only presume that the secured creditors are well aware of their own claims. The requirement that secured creditors file proof of claims will flush out any issues well ahead of the intended closing of the Primacorp transaction later this year, if approved.

[27] The Quest University Faculty Union (the "Union") was the only party who objected to the granting of the Claims Process Order. In October 2019, the Union was certified as the bargaining agent of Quest employees although no bargaining has yet occurred. The Union indicates that the employees are entitled to compensation in relation to accrued credits. The Union is uncertain as to whether this is a pre- or post-filing claim, with only the former giving rise to the need to file a proof of claim.

[28] I agree with Quest that this uncertainty is not an appropriate basis upon which to delay this relief. Clearly, the Union can engage with Quest toward clarifying this issue as to whether or not the Union needs to file a proof of claim. Under the Primacorp transaction, Quest intends to continue to operate as an entity and will, presumably, retain most, if not all, current employees.

[29] I agree that approval of a claims process is an important step forward allowing Quest to identify and quantify claims against it and members of its Board of Governors and Officers. Whether or not this Court ultimately approves the TAVO, this process will assist in the implementation of any later plan and any distributions to creditors.

THE MEETING ORDER

[30] Quest has developed a plan of compromise and arrangement dated November 1, 2020 (the "Plan"). It is a requirement of the Primacorp transaction that

Quest do so and that Quest seek and obtain approval of the Plan by its creditors and this Court.

[31] The *CCAA* expressly allows the court to order a meeting of the secured and unsecured creditors to consider a plan of arrangement:

> Compromise with unsecured creditors
>
> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> Compromise with secured creditors
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company, or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[32] It is not the role of the Court at this stage to consider or rule on the fairness or reasonableness of the Plan. Rather, I adopt the discussion in *ScoZinc Ltd. (Re),* 2009 NSSC 163 at para. 7; namely, that I should only exercise my discretion to refuse to refer the Plan to the creditors if the plan is doomed to fail at either the creditor or court approval stage.

[33] The Plan provides for one class of creditors for the purposes of voting, namely the Affected Creditor Class. The Plan provides for payment in full of Convenience Creditors (Creditors with Affected Claims that are less than or equal to $1,000). The Plan also allows Affected Creditors with a Proven Claim greater than $1,000 to make a Cash Election to receive $1,000 in satisfaction of their Claim. These latter provisions will significantly affect approximately 250 students who have claims within these limits.

[34] All Convenience Creditors and Cash Election Creditors are deemed to vote in favour of the Plan.

[35] Affected Creditors who are not Convenience Creditors or Cash Election Creditors (the "Remaining Creditors") shall receive fifty cents ($0.50) for every dollar of their Affected Claim, up to a maximum total disbursement of $1.35 million for Convenience Claims, Cash Election Claims and the Affected Claims of Remaining Creditors (the "Maximum Claim Pool"). In the event the Affected Claims exceed the Maximum Claim Pool, Convenience Creditors will receive the lesser of their Affected Claim and $1,000; Cash Election Creditors will receive the sum of $1,000; and, the Remaining Creditors will receive their *pro rata* share of the Maximum Claim Pool after deduction of the amounts payable to Convenience Creditors and Cash Election Creditors.

[36] The Plan is premised on payment in full of all secured creditors to the extent of their claims, upon closing of the Primacorp transaction. The Plan provides for the payment of such amounts owed to Her Majesty in Right of Canada and employees, as required by the *CCAA*.

[37] The Plan will not compromise Unaffected Claims that include: post-filing claims (other than certain Restructuring and Governor/Officer Claims); secured claims; claims secured by *CCAA* Charges; claims against any Governor and Officer that cannot be compromised pursuant to the *CCAA*; and, claims in respect of payments referred to in s. 6 of the *CCAA*.

[38] The Monitor assisted in the development of the Plan and it supports the Plan. The Monitor's Fourth Report indicates that the Monitor considers the Plan fair and reasonable.

[39] The Meeting Order authorizes Quest to convene a meeting on December 2, 2020. Due to the COVID-19 pandemic, the Monitor has arranged to hold the Creditors' Meeting virtually in accordance with the Electronic Meeting Protocol.

[40] Another matter for consideration is whether the Plan has properly established the classes of creditors for voting at the proposed meeting. The Plan provides that all Affected Creditors will be placed into one creditor class at the meeting.

[41] Section 22(1) of the *CCAA* provides:

> A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

[42] Section 22(2) of the *CCAA* lists the factors to be considered when taking into account placing all the creditors in the same class:

> 22(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account
>
> a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> b) the nature and rank of any security in respect of their claims;
>
> c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

[43] The test to determine the classification of creditors is known as the "commonality of interests" test: *Canadian Airlines Corp. (Re),* [2000] A.J. No. 1693 (Q.B) at paras. 17–19.

[44] No stakeholder objects to the classification of the creditors under the Plan.

[45] I agree that the Plan properly classifies the creditors—namely, the Affected Creditors—in one class for voting purposes. They all hold unsecured claims against Quest and they all rank the same in priority. While the Convenience and Cash Election Creditors will be treated slightly differently, practical reasons justify this approach, and they are common in *CCAA* plans: *Nelson Financial Group Ltd. (Re)*, 2011 ONSC 2750 at para. 14 and *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 450 at para. 6.

[46] The classification of the creditors under the Plan is appropriate in the circumstances. I concur with the Monitor that Quest has a reasonable chance of

obtaining approval of the Plan from the creditors and the Court. Quest's Plan meets the low threshold at this stage. The Plan should be put before the creditors, and if approved, before the Court.

THE BREAK UP FEE / CHARGE

[47] The Primacorp PSA executed by Quest requires, as a condition precedent, that Quest obtain court approval of its agreement to pay Primacorp what is defined as a "Break Up Fee". In addition, the Primacorp PSA requires that Quest obtain a court ordered charge (the "Break Up Fee Charge" or "Charge") against Quest's assets to secure the Break Up Fee, ranking only behind the Administration Charge, the Interim Lender's Charge and Directors and Officers Charge ("D&O") (as defined in the Amended and Restated Initial Order ("ARIO")).

[48] The Primacorp PSA provides:

> 10.13 Expense Reimbursement. In consideration of [Primacorp] having expended considerable time and expense in connection with this Agreement and the negotiation thereof, and the identification and quantification of assets to be included in the Purchased Assets, if the transactions do not close . . . [Quest] shall pay to [Primacorp] . . . an amount equal to [Primacorp's] actual out of pocket fees incurred in connection with the transactions contemplated by this Agreement together with the preparation, negotiation and execution of delivert of this Agreement . . . (the "Break Up Fee"). . . .
>
> [Emphasis added.]

[49] The agreed upon Break Up Fee was initially limited to $500,000 to a certain stage of the negotiations. At this point, that limit no longer applies.

[50] Quest's obligation to pay the Break Up Fee is engaged where the Primacorp transaction fails to close as a result of (i) Quest materially breaching the Primacorp PSA; (ii) Quest refusing to work in good faith towards negotiating, execution or delivery of the required closing documents; or (iii) Quest executing and delivering a letter of intent or purchase agreement with another person that is inconsistent with and prevents the completion of the Primacorp transaction.

[51] Quest is not be obligated to pay the Break Up Fee if this Court does not approve the Primacorp transaction in accordance with the application for the TAVO to be heard next week.

[52] Quest submits that the Break Up Fee is commercially reasonable in the circumstances, consistent with other transactions that have been approved in *CCAA* proceedings. Quest's request for approval of the Break Up Fee and Charge is supported by the Monitor.

[53] Section 11 of the *CCAA* allows this Court to exercise its discretion to grant orders as are appropriate toward achieving the broad statutory and policy objectives under the *CCAA*. In *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60, the Court stated:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> [Emphasis added.]

[54] Quest has also referred to s. 11.2 of the *CCAA* that provides the court with specific authority to grant a charge in favour of a person who is lending money to the debtor company. That provision does not apply since Primacorp is not lending Quest any monies; however, I have found the s. 11.2(4) factors to be useful in my analysis.

[55] In "Rights of First Refusal and Options to Purchase in Insolvency Proceedings" (2019) 8 J.I.I.C. 103, the authors Virginie Gauthier, David Sieradzki and Hugo Margoc discussed the rationale for break fees at 125–126:

> It is well established convention in both Canadian and U.S. insolvency proceedings that a party willing to incur the time and expense to perform the level of diligence required to submit an unconditional "stalking horse" offer prior to the commencement of a sale process should be entitled to bid protections. Those bid protections typically include a "break fee" and "expense reimbursement" mechanism. The overriding rationale for these types of bid protections is to compensate the stalking horse bidder for its substantial time and expense to the extent it is ultimately not the successful bidder at the conclusion of the sale process.

[56] As noted by the authors of the above article, numerous Canadian courts have considered break fees or break up fees with or without an accompanying charge. These can arise in *CCAA* proceedings, proposal proceedings, receiverships and foreclosures.

[57] In the *CCAA* context, cases include *Mosaic Group Inc. (Re)*, [2004] O.J. No. 2323 (Ont. Sup. Ct. J.) at para. 16; *Tiger Brand Knitting Co. (Re)*, [2005] O.J. No. 1259 (Ont. Sup. Ct. J.) at paras. 13 and 37 (described as a “stay fee”); *Stelco Inc. (Re)*, [2005] O.J. No. 4733 (Ont. C.A.) at para. 20; *Boutique Euphoria inc. (Re)*, 2007 QCCS 7129 at paras. 63-72; *Nortel Networks Corp. (Re)*, [2009] O.J. No. 3169 (Ont. Sup. Ct. J.) at para. 56 and [2009] O.J. No. 4487 (Ont. Sup. Ct. J.) at para. 10; *Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41 at para. 10 (Ont. Sup. Ct. J.); *Bul River Mineral Corporation (Re),* 2014 BCSC 645 at paras. 110–111; and, *Green Growth Brands Inc. (Re)*, 2020 ONSC 3565 at para. 52.

[58] There is no doubt that some break fees and related charges may be seen as unfairly and unreasonably extracting value from the estate with little or no benefit to the stakeholders. As in many exercises of its discretion under the *CCAA*, the court must be mindful of such concerns. Each situation must be considered in the context of its own unique circumstances, including the present state of affairs faced by the debtor company and its stakeholders.

[59] If a break fee is fair and reasonable in all of the circumstances in the sense that it provides a corresponding or greater benefit to the estate, court approval of such a fee and a related charge may be warranted. Relevant factors that may be

considered by the court when asked to approve a break fee and grant a charge include:

a) Was the agreement reached as a result of arm's length negotiations?;

b) Has the agreement been approved by the debtor company's board or specifically constituted committees who are conducting the sales process?;

c) Is the relief supported by the major creditors?;

d) What may be the effect of such a fee/charge? Will it have a chilling effect on the market, or will it facilitate the sales process?;

e) Is the amount of the fee reasonable? In relation to expenses anticipated to be covered, is the amount reasonable given the bidder's time, resources and risk in the process?;

f) Will the fee and charge enhance the realization of the debtor's assets?;

g) Will the fee and charge enhance the prospects of a viable compromise or arrangement being made in respect of the company?; and

h) Does the monitor support the relief?

[60] The Primacorp transaction is not a true stalking horse bid in the sense that Quest seeks approval of the transaction with the Break Up Fee and with the expectation that Quest will then use that bid to entice other proposals. Quest is seeking approval of the Primacorp transaction now; however, it remains the case that other persons remain interested in Quest's assets and they may later seek approval of another bid.

[61] Quest is pursuing the Primacorp transaction at this time on a tight timeline given Quest's need to achieve a speedy resolution in order to provide assurances to its students and other stakeholders for the 2021 academic school calendar. In

addition, Quest has been facing increasing pressure from its secured creditors to move to a resolution of the matter after almost ten months in this proceeding.

[62] All of the relevant circumstances were considered by the Monitor who has indicated its support of the Break Up Fee and Break Up Fee Charge (the s. 11.2(4)(g) factor). It its Fourth Report, the Monitor states:

> 5.17 . . . Quest's agreement to the Break Up Fee was instrumental in encouraging Primacorp to expend time and expense engaging in extensive discussions with Quest to reach a definitive agreement at a time when no other proposals were forthcoming. Quest benefited from this commitment as it resulted in the Primacorp Agreement as well as the advancement of other potential proposals thereby giving Quest the confidence that Primacorp was the superior partner. The quantum of the Break Fee is calculated on an expense recovery basis and the Monitor considered it to be reasonable in light of the value of the transaction.

[63] I agree with Quest and the Monitor that the Break Up Fee and Charge is appropriate in these circumstances, particularly given the following factors:

a) The Break Up Fee has been approved by Quest's board of directors and Quest's Restructuring Committee, both having integral knowledge of Quest's options at this stage of the proceedings;

b) The Break Up Fee is not akin to a "fee" that one sees in many stalking horse bids, including those approved by Canadian courts, that is driven by the purchase price. Rather, the Break Up Fee is limited to Primacorp's actual out-of-pocket fees incurred in connection with the transaction. It is evident from the materials before the Court that the negotiations leading to the transaction were extensive and that Primacorp has already expended significant resources engaging in that process and doing its necessary due diligence;

c) The Break Up Fee and Break Up Fee Charge is only expected to be material for a short period of time. It will become irrelevant if the Primacorp transaction is approved under the TAVO;

d) The Break Up Fee is only payable if the Transaction does not close due to Quest's breach of its obligations in respect of the transaction or Quest takes steps to pursue a transaction that makes it impossible to close the Primacorp transaction;

e) Quest's management has remained intact throughout the proceedings and the Monitor continues to be of the view that Quest is acting with good faith and due diligence;

f) The major secured creditors Vanchorverve Foundation, and the Interim Lender have been kept apprised of Quest's consideration of its options and, in particular, the Primacorp transaction, which includes the requirement for the Break Up Fee and Charge. They remain supportive of this relief;

g) The Break Up Fee and Charge will enhance Quest's ability to put forward the Plan and obtain creditor approval of the Plan, which will provide for the funds to satisfy Quest's creditors' claims and allow Quest to continue as a viable post-secondary institution;

h) The value of Quest's assets and property is substantial and there is every indication that there is sufficient value to repay all the secured creditor's claims and the Break Up Fee; and

i) No creditor will be materially prejudiced by the Break Up Fee and Charge. The only creditor who registered an objection to this relief was CapU, a secured creditor. CapU submitted that the Court should adjourn this relief and address it at the later application for the TAVO. However, CapU stands to recover its secured loan under this transaction or any alternate transaction. CapU also holds a right of first refusal but has failed to identify any prejudice in that respect arising from this relief referring only vaguely to the possibility of its rights being affected.

[64] The only other person objecting to the approval of the Break Up Fee and Charge was Development Partner #1, who asserted that it was premature to grant that relief. I decline to address these submissions as they come from a potential competing bidder whose future involvement is unclear and who presently has no standing in this proceeding.

CONCLUSION

[65] I grant the relief sought by Quest at this preliminary stage, including granting the Claims Process Order and the Meeting Order. I also approve the Break Up Fee and grant the Break Up Fee Charge.

"Fitzpatrick J."

CITATION: Re TOYS "R" US (CANADA) LTD., 2018 ONSC 609
COURT FILE NO.: CV-17-00582960-00CL
DATE: 20180125

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 TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

BEFORE: F.L. Myers J.

COUNSEL: *Brian F. Empey and Bradley Wiffen,* counsel for the applicant
Jane Dietrich, counsel for Grant Thornton Limited, the Monitor
Linc Rogers, counsel for JPMorgan Chase Bank, NA, DIP Agent
Jesse Mighton, counsel for Crayola Canada
Linda Galessiere, counsel for various landlords
Timothy R. Dunn, counsel for CentreCorp Management Services Limited
Adam Slavens and Jonathan Silver, counsel for LEGO
Sean Zweig, counsel for the Unsecured Creditors Committee of Toys "R" Us Inc. and other debtors in Chapter 11 proceedings before the United States Bankruptcy Court for the Eastern District of Virginia

HEARD: January 25, 2018

ENDORSEMENT

[1] Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee asks the court to extend the time that it remains under protection of the *CCAA* while it attempts to restructure. It also asks the court to approve a draft claims procedure by which the outstanding claims of its creditors can be recognized and quantified.

[2] No significant stakeholder opposed the relief sought and I have granted it accordingly.

[3] I am satisfied that the applicant is acting in good faith and with due diligence in pursuit of its restructuring process to date. These are the findings required for it to be entitled to an extension of time under the statute. The applicant's financial results through the holidays exceeded conservative forecasts. It reports that it has sufficient liquidity to operate in the normal course throughout the proposed extended period without drawing upon its extraordinary financing. The extension of time will allow the applicant to advance a going concern

restructuring process here and in coordination with its affiliates in the US. The Monitor supports the request. Accordingly the request for an extension of the proceedings is granted.

[4] The outcome of a successful restructuring process usually involves the applicant proposing a plan of compromise or arrangement to its creditors. The creditors have the opportunity to vote on whether they agree to the terms of the plan proposed. To approve a plan, the *CCAA* requires a vote of more than 50% of the creditors in number who hold collectively more than two-thirds of the claims measured by dollar value.

[5] In many cases, instead of a plan, the applicant proposes a value-maximizing liquidating transaction. After a liquidation, there will likely be distributions to creditors of the proceeds of liquidation in cash or other property *pari passu* by rank.

[6] In either case, whether a plan or a liquidating transaction is proposed, it is necessary to determine the precise number of creditors and the precise amount of their respective claims, so that the creditors can vote and/or receive distributions accordingly.

[7] In a bankruptcy governed by the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, creditors are required to prove their claims individually by delivering to the trustee in bankruptcy sworn proof of claim forms that are accompanied by supporting invoices and other relevant documentation. The *CCAA*, by contrast, does not set out a specific procedure for creditor claims to be proven and counted.

[8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the *CCAA*. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

[9] The claims processes in bankruptcy do not necessarily fit well in a *CCAA* proceeding. It is very unusual for a large corporation to go bankrupt and require proof of claims to be delivered by every single creditor under the *BIA* statutory claims process. Creditors of large companies can number in the thousands. It can be very time consuming and therefore very expensive for each of thousands of creditors to submit proof of claims and for the debtor or the Monitor to review, track, and deal with each claim individually. Managing claims processes for a large business can therefore be a very substantial undertaking that is often occurring behind the scenes throughout *CCAA* processes.

[10] Yet, experience shows that the vast majority of claims are usually dealt with consensually. At any given time, most large businesses have readily ascertainable payables outstanding that are carefully tracked electronically by the applicant's financial managers. Requiring each creditor to prove the state of its outstanding claims by submitting invoices then is often just a make work project that provides no real incremental value beyond the information available by just looking at a listing of outstanding trade payables on the debtor's financial systems.

[11] Toys "R" Us has submitted a draft form of claims procedure that addresses the unnecessary cost of requiring its thousands of trade creditors to prove their claims individually. It proposes to list creditor claims from the company's books and records and to provide each known creditor with a simple claim statement that sets out the amount of its claim that is already recognized by the company. If a creditor agrees with the amount that the company says it owes, the creditor need do nothing and the scheduled or listed claim will become the final proven claim at the claims bar date.

[12] The draft claims procedure allows creditors who disagree with the amounts set out in their claims statements to file notices of dispute with the Monitor by the claims bar date to engage an individualized review process.

[13] This negative option scheduled claim process will eliminate the need for filing proofs of claim and supporting evidence in the vast majority of cases. It also ensures that known claims are not lost in procedural uncertainty which always causes a certain percentage of creditors to fail to file their claims on a timely basis.

[14] This is certainly not the first case to use a negative option scheduled claims process like the one proposed here. Creative scheduled claims procedures, like this one, that streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money, are encouraged. Each case must be responsive to its own facts and circumstances. What works in one case may be wholly inapt in another. But in all cases it is appropriate to make efforts to increase efficiency, affordability, and certainty as was done here. The overriding concern of the court is to ensure that any claims procedure process is both fair and reasonable. The negative option scheduled claim process proposed in this case meets both touchstones.

[15] Finally, the proposed minor amendment to the cross-border protocol has already been adopted by the US court. The change proposed is not opposed and it is reasonable to keep the terms of both orders consistent.

[16] Order signed accordingly.

F.L. Myers J.

Date: January 25, 2017

SUPREME COURT OF NOVA SCOTIA
Citation: ScoZinc Ltd. (Re), 2009 NSSC 163

See para. 7

Date: 20090501
Docket: Hfx No. 305549
Registry: Halifax

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 ScoZinc Limited

Judge: The Honourable Justice Duncan R. Beveridge

Heard: May 1, 2009, in Halifax, Nova Scotia

Oral Decision: May 1, 2009

Released: May 20, 2009

Counsel: John D. Stringer, Q.C. and Ben Durnford, for the applicant
Robbie MacKeigan, Q.C., for Daniel Rozon
John McFarlane, Q.C. for Kamatsu

By the Court:

[1] ScoZinc brings a motion seeking an order to accomplish three things. The first is for a meeting of the creditors pursuant to ss. 4 and 5 of the *Companies' Creditors Arrangement Act*. The second is a further extension of the stay of proceedings initially ordered by this Court on December 22, 2008 and extended from time to time. The third is approval of notice of this motion being given only to certain defined creditors.

[2] The company has filed an affidavit of William Felderhof referred to as his seventh affidavit, sworn April 28, 2009 and the Monitor has filed its sixth report dated April 30, 2009.

[3] As part of its submissions the company notes that there is nothing in the *CCAA* which requires the Court to give prior preliminary approval of ScoZinc's proposed plan before it is presented to the creditors. It notes that the jurisprudence establishes that this approval is generally desirable prior to calling a meeting of the creditors. Some, but not all of this jurisprudence was reviewed by MacAdam J. in *Re Federal Gypsum* 2007 NSSC 384.

[4] Justice MacAdam in *Re Federal Gypsum* did refer to the two different standards that have been proposed or referred to in cases from Ontario and British Columbia. Some of these cases have expressed the view that the debtor company should establish that the plan has "a reasonable chance" that it would be accepted by the creditors. Other cases have referred to the appropriate test as simply a

determination as to whether or not the proposed plan is one that would be "doomed to failure".

[5] In a different context, Glube C.J.T.D. (as she then was) in *Fairview Industries* (1991), 11 C.B.R. (3d) 43 cautioned that it would be impractical and extremely costly to continue to prepare a plan when "there is no hope that it would be approved".

[6] I think it fair to say that MacAdam J., although not expressly but by necessary implication, preferred the lower standard facing a debtor company in submitting its plan to the Court for a preliminary approval. At para. 12 he wrote:

> [12] In view of the relatively low threshold on the Company in seeking Court approval to have a plan of arrangement submitted to the creditors for a vote, I am satisfied the plan should proceed and the creditors should determine whether they do, or do not accept the plan as finally filed.

[7] In my opinion it should not be up to the Court to second guess the probability of success of a proposed plan of arrangement. Businessmen are free to make their own views known before and ultimately at the creditors' meeting. It seems to me that the Court should only decline to give preliminary approval and refuse to order a meeting if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court.

[8] The Monitor in its sixth report says that the proposed plan is reasonable under the circumstances. This opinion appears to flow from its conclusion that if

the plan is rejected and the company forced into receivership or bankruptcy, unsecured creditors will not recover the amount offered in the plan and it is highly unlikely that the secured creditors will recover the amount offered to them. I see no reason to disagree with the opinion offered by the Monitor.

[9] Given that opinion and in light of the terms that are set out in the proposed plan I am certainly satisfied that the plan is far from one that is doomed to failure. It is one that should be put to the creditors for their consideration. It is therefore appropriate that I exercise the discretion that is set out in ss. 4 and 5 of the *CCAA* and order a meeting of the creditors on the terms set out in the proposed meeting order.

[10] With respect to the extension of the stay of proceedings, as I noted at the outset there had been an initial order of this Court under s.11 of the *CCAA*. This order was granted on December 22, 2008. It was, as required by the statute, limited to a period of 30 days. It has been extended on two previous occasions. It is now due to expire May 22nd, 2009. The meeting of the creditors is scheduled for May 21, 2009. There is a tentative return date scheduled for May 28, 2009 for the Court to consider sanctioning the plan, should it be approved by the creditors.

[11] The test with respect to extending the stay of proceedings has been set out in a number of cases that have considered ss. 11(4) and (6) of the *CCAA*. These were reviewed by me in *Re ScoZinc Ltd.* 2009 NSSC 108. In these circumstances there is no need to review the test and the evidence in support of that test.

[12] In light of my conclusion that the company had met the threshold for ordering a meeting of the creditors under ss. 4 and 5 of the *CCAA* the appropriateness of a further extension permitting the company to return to the Court within a very short period of time following that meeting of the creditors is patently obvious. The extension is therefore granted.

[13] The last issue is the approval of notice of this motion being given only to certain defined creditors. Given the number of creditors that appeared early on in the proceedings it was somewhat impractical to give notice to each of them with the volumes of materials that would be required to be produced and served. With respect to the prior motions it was required that notice be given to all creditors asserting claims against the debtor company in excess of $100,000.00 and all creditors asserting builders liens. In addition all creditors were apprised of these proceedings by way of the mail out to each and every creditor as required by the *CCAA* leading to filing of proofs of claim. The status of the proceedings, including this motion, have been posted on the Monitor's website. I see no reason to depart from the previous practice and this aspect of the motion is also granted.

_____

Beveridge, J.

See para. 38

Editor's Note: Corrigendum released on December 3, 2012. Original judgment has been corrected with text of corrigendum appended.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re),* 2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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

0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.

Petitioner

Corrected Judgment: The text of the judgment was corrected at paragraph 28 where changes were made on December 3, 2012.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:	D.E. Gruber
Counsel for the Monitor, McMillan LLP:	P.J. Reardon
Counsel for S.I.P. Holdings Ltd. and Fama Holdings Ltd.:	D. Hyndman
Counsel for Henry Company Canada Inc. and Stone Industries Inc.:	J. McLean, Q.C.
Place and Date of Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, B.C. October 11, 2012

[1] The question raised on this application is whether certain unsecured creditors should obtain funding within this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceeding for the purpose of investigating the claims of other creditors who are related to the petitioner, 0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd. ("Steels").

Background Facts

[2] Steels was a supplier of construction materials in British Columbia and Alberta. It operated from various leased premises across those provinces. On April 5, 2012, Steels sought protection from its creditors pursuant to the *CCAA*. On that same date, I granted an initial order staying proceedings and granting other ancillary relief. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[3] The ancillary relief included the appointment of Wayne Wood as Chief Restructuring Officer ("CRO") of Steels, since all the directors had resigned. Mr. Wood was the Vice-President, Finance and Administration of Steels. It was intended that he would be assisted in his duties relating to the restructuring to some extent by Steels' financial advisor, Ernst & Young Inc. ("E&Y").

[4] Steels resolved fairly quickly, with the assistance of E&Y and with the concurrence of the Monitor, to commence a sale and investment solicitation process toward selling its assets. On July 30, 2012, I approved a sale of the majority of Steels' assets to Brock White Canada Company, LLC. That sale has now completed and net proceeds of sale, which are discussed in more detail below, are being held for the benefit of unsecured creditors.

[5] In anticipation of a sale of the assets, I approved a Claims Process Order on June 8, 2012.

[6] By the date of the granting of the Claims Process Order, it was apparent that a substantial portion of the claims would be advanced by related parties. In fact, Mr. Wood discussed these claims in his affidavit sworn April 5, 2012 in support of the granting of the Initial Order.

[7] Mr. Wood's evidence indicated that Steels is a wholly owned subsidiary of S.I.P. Holdings Ltd. ("S.I.P. Holdings") and that S.I.P. Holdings is, in turn, a wholly owned subsidiary of Fama Industrial Supplies Ltd., a privately owned company. Mr. Wood's evidence further indicated that S.I.P. Holdings also owns Steels Holdings (BTC) Ltd. ("Holdings BTC"). Mr. Wood attached various financial documentation in respect of claims against Steels by both S.I.P. Holdings and another company, Fama Holdings Ltd. ("Fama Holdings"):

a) S.I.P. Holdings' audited consolidated financial statements for the 12 months ending December 31, 2010. These consolidated financial statements included both Steels and Holdings BTC;

b) Unaudited financial statements for Steels for the 12 months ending December 31, 2011; and

c) Steels' unaudited financial statements for the two months ending February 29, 2012.

[8] Mr. Wood stated that there is a shareholder loan in the amount of approximately $17.3 million owed to Fama Holdings. He stated:

> The Shareholder Loan is owed to Fama Holdings Ltd. ("FHL"). It does not bear interest, and there are no repayment terms. In 2005, Steels consolidated with Gasmaster Industries Ltd. ("Gasmaster") for the purposes of utilizing Gasmaster's tax losses to offset Steels' profits. Gasmaster owed the amount of $17.3 million to FHL. Gasmaster is no longer a division of Steels, having been spun off, but the amount owing from Gasmaster to FHL remains on Steels' books.

[9] Indeed, Note 9 of the consolidated balance sheet in the 2010 audited financial statements (entitled "Related Party Balances and Transactions") does reference an amount owing to Fama Holdings in the amount of approximately $17.3 million as at the end of 2010. The statements refer to Fama Holdings as a "company under common control", although the relationship between Fama Holdings, on the one hand, and S.I.P. Holdings and Steels, on the other, is not apparent.

[10] Similarly, the unaudited financial statements as at December 31, 2011 indicate a "shareholder loan" owing in the amount of approximately $17.3 million.

[11] In his April 5 affidavit, Mr. Wood also referred to a balance due to "affiliated companies" of approximately $7.9 million. With respect to this amount, he stated as follows:

> The balance owing to affiliated companies is due to SIP Holdings. This amount relates to certain proceeds from the sale of the Lands. Some of the Lands were transferred to Steels before the sale, so the amount owing to SIP [Holdings] is in respect of the purchase price paid for the Lands.

[12] Given that the 2010 audited financial statements are consolidated and include both Steels and S.I.P. Holdings, there is no reference in those statements to the amount said to be due to S.I.P. Holdings by Steels. Nevertheless, the unaudited financial statements of Steels as at December 31, 2011 do reference an amount owing to "affiliated companies" of $7,018,037.

[13] Despite the above evidence of Mr. Wood relating to these claims at the outset of this proceeding, there was no question in the minds of Steels, and in particular that of Mr. Wood as the CRO, that issues might be raised with respect to these related party claims. The Claims Process Order, in paragraph 21, provided that filed Proofs of Claim were to be reviewed by Steels with the assistance of both the Monitor and E&Y. The Claims Process Order further provided:

> 25. Any Creditor (a "Disputing Creditor") may apply to this Court to dispute any such accepted Claim by filing a Notice of Application ... Upon receipt of any such filed application, the Petitioner shall provide the Disputing Creditor with any Proof of Claim and other material documents in its possession in respect of the disputed Claim, and paragraphs 26, 27 and 28 of this Order apply.
>
> 26. In the event that the Petitioner, with the assistance of the Monitor, is unable to resolve a dispute regarding any Claim with a Creditor or between two Creditors, the Petitioner shall so notify the Monitor and the Creditor, and either of the Petitioner, Monitor, or Creditor may apply to the Court to resolve the dispute. ...
>
> 27. In the event an application is filed pursuant to paragraphs 25 or 26 of this Order, there shall be a preliminary hearing before the Court to determine

> the procedure for the application and to determine whether the matter will be decided based on the material before the Petitioner or on a *de novo* basis.

[14] This additional procedure by which another creditor could challenge any claim was a matter raised by the Monitor in relation to these third party claims. The Monitor stated in its Third Report dated June 6, 2012, in support of the application for the Claims Process Order, that "any creditor(s) will have the right, possibly at its (their) own cost, to challenge the claims of others":

> ... in order to provide additional stakeholder protection before any distribution is made to creditors ...

[15] Accordingly, the Claims Process Order specifically contemplated a procedure by which other unsecured creditors, who might be affected by the acceptance of the related party claims, were entitled to take steps to independently review those proofs of claim and have the dispute heard by the Court if it could not be resolved otherwise.

[16] In July 2012, S.I.P. Holdings and Fama Holdings filed their Proofs of Claim with Steels.

[17] Fama Holdings' Proof of Claim is in the amount of $13,159,689.25. Few particulars are provided. The amount is said to be derived from the $17.3 million figure from the 2010 audited financial statements (which are attached) less reductions in the amounts of $1,776,634, which is identified as a credit from a portion of the proceeds of sale of real estate owned by S.I.P. Holdings, and $4,101,845. This latter figure is stated to have "occurred as reflected in the financial statements of Steels, as prepared by Steels and accordingly, details of the constitution of the loan repayment are known to Steels". No other documentation is provided in support of this claim.

[18] S.I.P. Holdings' Proof of Claim is in the amount of $5,954,155.75. Documents in support include the 2010 consolidated financial statements (which do not in fact disclose any amount owed to S.I.P. Holdings, as noted above), together with various promissory notes dated January 1, February 1, March 1 and July 1, 2011. As with

the Fama Holdings Proof of Claim, some particulars are also provided. Specifically, the Proof of Claim refers to Steels being indebted to S.I.P. Holdings in the amount of $7,018,036.85 as of July 1, 2005. This is the amount reflected on the 2011 unaudited financial statements. The Proof of Claim also indicates:

> ... Subsequent to that date, SIP sold real estate in Surrey, Kamloops, Calgary and Edmonton occupied by Steels as tenant to Steels in consideration of preferred shares and $7,924,498.29 evidenced by promissory notes as follows:
>
> (i) Surrey property: $2,150,780.64
>
> (ii) Kamloops property: $573,539.00
>
> (iii) Calgary property: $2,016,181.46
>
> (iv) Edmonton property: $3,183,989.19
>
> for a total indebtedness of $14,942,527.14. This indebtedness was reduced during the course of 2011 and 2012 by $8,988,372.26 through payment by Steels of lease payments and other real estate related indebtedness. The particulars of such payments are known to Steels and are reflected in the financial statements of Steels.

[19] No detail is provided by S.I.P. Holdings with respect to the origins of the original $7,018,036.85 said to be owed as of July 1, 2005.

[20] In its Fifth Report dated July 26, 2012, the Monitor states that Steels and the CRO had accepted the claims of S.I.P. Holdings and Fama Holdings, together with a small claim by another related party. Importantly, the Monitor also stated that Steels did not request the assistance of E&Y with respect to the review and evaluation of these claims. Nor did the Monitor perform any further work on these claims - beyond a review of the documentation provided - pending a determination as to whether any other creditors wished to challenge the claims under paragraph 25 of the Claims Process Order.

[21] The significance of these related party claims cannot be understated. The amount available for distribution to unsecured creditors is expected to be in the range of $4 to $4.2 million. The total claims filed to date pursuant to the Claims Process Order amount to approximately $31 million, which indicates an estimated recovery of between 13% and 14%. Given that the amounts claimed by both Fama

Holdings and S.I.P. Holdings total approximately $19.2 million, these two creditors alone stand to recover approximately 62% of the total monies that will be available for distribution to unsecured creditors.

Discussion

[22] This application is brought by two unsecured creditors: Henry Company Canada Inc. and Canadian Stone Industries Inc. These two creditors are owed approximately $900,000. They say Wolrige Mahon Ltd., a forensic accountant, should be retained to assist them in reviewing and assessing the claims of Fama Holdings and S.I.P. Holdings. They are applying for an order that the reasonable fees and expenses of Wolrige Mahon Ltd.'s services be secured by a priority charge on Steels' assets ranking in priority to all other charges except for the existing Administrative Charge. They seek a priority charge not to exceed $50,000.

[23] It appears that other unsecured creditors of Steels have joined with the applicants. At this time, the total unsecured creditor group (who I will refer to as the "Disputing Creditors") who wish to have these related claims investigated have aggregated claims of approximately $2.6 million, which represents 8% of the present claims.

[24] The Disputing Creditors assert that given the nature of the Fama Holdings and S.I.P. Holdings claims, it is not possible to assess them without the assistance of an accountant with forensic experience. The expertise of Michael Cheevers, President of Wolrige Mahon Ltd., is well known to this Court. In fact, Mr. Cheevers has been appointed by this Court in many instances as a receiver, trustee and bankruptcy monitor. In addition, Mr. Cheevers practices as a forensic accountant and his qualifications in that area are not in question.

[25] Mr. Cheevers indicates that he expects that if appointed, he would review the accounting records of Steels, including banking records and relevant contracts, going back as far as 2005 (which is a date referred to in the S.I.P. Holdings Proof of Claim). He estimates that the fees of Wolrige Mahon Ltd. to undertake this engagement would be between $25,000 and $50,000.

[26] As mentioned earlier in these reasons, it is clear that, contrary to the terms of paragraph 21 of the Claims Process Order, neither the Monitor nor E&Y, as Steels' financial advisors, have assisted Steels or Mr. Wood as CRO in reviewing these Proofs of Claim toward either accepting or revising or rejecting them. The Monitor acknowledges that it was never intended that a review by only Mr. Wood as CRO would be sufficient for a final determination in respect of the Proofs of Claim to be accepted for distribution.

[27] The only evidence from Mr. Wood filed on this application was a very general response on August 23, 2012:

> I have also spent significant time managing the Petitioner's claims process, the details of which are set out [in] the Monitor's Fifth Report to Court filed in this proceeding. I understand that certain creditors have sought information related to those related parties claims, and I have spent time reviewing information related thereto and expect to spend more time on that issue going forward.

[28] Notwithstanding Mr. Wood's comment, he has not engaged in any meaningful dialogue with the Disputing Creditors toward providing clarification about these related party claims. I was advised by counsel there has been some exchange of correspondence between counsel for the Disputing Creditors and counsel acting for both Steels and the CRO (the same counsel acts for both Steels and the CRO). Despite being invited to provide further information concerning these claims, and despite what appears to have been his earlier intention, Mr. Wood has declined to provide further detail or documentation regarding these claims, save in response to a specific request which the Disputing Creditors did not provide.

[29] Counsel for Steels/the CRO and S.I.P. Holdings and Fama Holdings argue that any further review of the related party claims is not necessary. They say that the 2010 financial statements were audited and thus confirmed the amounts owing in that document. In addition, they say that Mr. Wood, as the CRO and the accountant of Steels, has "independently" reviewed these claims. It is apparent from Mr. Wood's prior involvement with Steels, as the Vice-President of Finance and Administration, that he would have some knowledge of these claims. They further argue that as the

CRO, he is an independent officer of the court and, in particular, independent of the related parties. The suggestion is made that his review of the claims is entitled to substantial deference and that funding for any further review should be refused. I would note again, however, that even as late as August 23, 2012, Mr. Wood indicated that he was still in the process of reviewing information regarding these claims.

[30] For all that Mr. Wood appears to have some knowledge of these claims, it is of some significance to me that he has provided no assistance, as an officer of this Court, to the Court in terms of the level of his knowledge with respect to all aspects of these claims. Nor has he disclosed any further work that he has done in reviewing these claims subsequent to receiving the Proofs of Claim and the objections of the Disputing Creditors.

[31] Furthermore, I consider that the Proofs of Claim, with the limited information disclosed and limited documentation attached, leave much to be desired in terms of fully understanding these claims.

[32] There is absolutely no backup with respect to the amounts claimed by S.I.P. Holdings as of July 1, 2005. There appear to be complex transactions after that date involving sales of real estate and tenancy arrangements. No doubt, there is a wealth of documentation which supports those transactions and presumably, the amounts or debts said to arise from those transactions and reductions or payments made.

[33] With respect to the Fama Holdings claim, I appreciate that this amount is referenced in the audited 2010 financial statements. But later reductions are said to arise from real estate sales by S.I.P. Holdings and no details relating to those transactions are provided.

[34] Support for both Proofs of Claim is sparse in terms of particulars provided; there appear to be only vague references to figures that are “reflected in the financial statements of Steels” or “known to Steels”. Such general statements do little to

provide the necessary backup so that other creditors may fully understand these claims and determine whether they are valid.

[35] To a large extent, the submissions made by Steels/the CRO, S.I.P. Holdings and Fama Holdings amount to them saying "trust the auditors" and "trust me". Despite this, the Disputing Creditors continue to harbour concerns and I think justifiably so.

[36] We are therefore at the stage where, despite some efforts, the parties have failed to advance a better understanding of these related party claims through the provision of further information and documentation. The Disputing Creditors' position is, in any event, that a forensic accountant, such as Mr. Cheevers, will be required to fully review the matter.

[37] Under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the claims process is undertaken by a trustee in bankruptcy. Pursuant to s. 135, a trustee is required to examine every proof of claim and may require further evidence in support of a claim prior to determining, valuing or disallowing a claim. The cost of that review is borne by the estate as a whole since it is intended to benefit the body of creditors.

[38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".

[39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356.

To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[40] Indeed, this was the underlying basis upon which the Claims Process Order was granted, particularly as it related to a review of the third party claims. That Order clearly contemplated that other creditors would have the ability to challenge these third party claims, even in the face of the claims process as originally crafted. Again, as stated above, the process set out in the Order was not followed in that there was no independent involvement or assistance by the Monitor or E&Y, as was initially intended. Nor did Steels provide any of the Disputing Creditors with "other material documents in its possession" as contemplated by paragraph 25 of that Order.

[41] In this case, no report from the Monitor has been prepared in any case. As for Mr. Wood in his capacity as CRO, I do not accede to the arguments that this Court should grant any particular deference to his review or conclusions, particularly in the face of the evidentiary deficiencies with respect to the Proof of Claims and his failure to further assist the Court in addressing such deficiencies. Fama Holdings and S.I.P. Holdings have the burden of proving their claims, and this requires more than providing general statements and unclear financial statements.

[42] In all of these circumstances, I have no hesitation in concluding that an independent review of these related parties claims is appropriate and should be undertaken. In addition to understanding how these particular transactions arose and the financial consequences arising from those transactions, an independent review would also focus on the proper characterization of the amounts said to be owed. It is possible, as suggested by counsel for the Disputing Creditors, that some or all of these amounts may have been equity investments in Steels, as opposed to debt. In that event, such equity claims would only be satisfied after all unsecured claims were paid. A similar issue was raised by the disputing creditors in *Pine Valley Mining*.

[43] Counsel for Steels/the CRO and also counsel for S.I.P. Holdings and Fama Holdings contend that the application is premature. Counsel for Steels/the CRO states that Mr. Wood will cooperate in speaking to counsel for the Disputing Creditors in providing documents as requested. No similar offer has been made by S.I.P. Holdings and Fama Holdings. Further, it is suggested that paragraph 27 of the Claims Process Order contemplates a preliminary hearing to discuss the claims and that the issues, including the provision of any further information and documentation, can be addressed at that time.

[44] I would not accede to these arguments that the application is premature. The related party claims have been presented and it does not appear that there is cooperation between the parties, at least to this point in time, with respect to providing the necessary information and backup documentation. In addition, even once such information and documentation is provided to counsel for the Disputing Creditors, it is evident to me that a forensic accounting of these claims will be required in the circumstances. I see no need to engage the court process in addressing these claims until that full review has taken place and positions are crystallized. It may be, for example, that upon that full review, the Disputing Creditors are satisfied that there are no issues to be addressed and that these are valid claims.

[45] I would also note that there is some urgency in dealing with these third party claims. I understand that matters relating to the assets sale are moving to a conclusion which will dictate the actual amount of funds to be distributed. It is intended that a plan will be submitted later this year which will provide for distributions to unsecured creditors. A failure to resolve issues relating to these claims, or resolve them in a timely manner, will result in delayed payment to all unsecured creditors. This is to be avoided if at all possible.

[46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims

would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

[47] The question then becomes who should complete this independent review and who should bear the costs of the review.

[48] The Monitor to this point in time has risen above the fray while these procedural matters are being sorted out. Nevertheless, the Monitor indicates that if directed by the Court, it will, of course, complete an independent review of the claims. In that event, as with any review of a claim that they would have undertaken from the outset, the cost will be borne by the estate. The Monitor, however, raises the issue that if it completes such a review and prepares a report, it would share that report with others who would be interested in the issue.

[49] Counsel for the Disputing Creditors submits that Wolrige Mahon Ltd. should be the party to complete this review. At this stage, it is, at least on the face of it, an adversarial process and the Monitor can remain as the neutral third party in respect of the matter. There would not appear to be any costs considerations in that respect; the Monitor has no vested knowledge of the related party claims that would reduce the cost of completing this review. It is also stated that Wolrige Mahon Ltd.'s expertise with respect to forensic accounting is of particular importance in this case, while the Monitor does not advocate any particular expertise in that regard.

[50] I noted that in *Pine Valley Mining*, the monitor had reviewed and accepted the claim that was the subject of the dispute in *CCAA* proceedings. Madam Justice Garson (as she then was), at para. 13, concluded that the role of the monitor was to determine the validity and amount of the claim, but that it did not do so in an adversarial process. As such, while the monitor's report was to be considered in the dispute, there was no deference to be accorded to that report "in the sense that would alter the burden of proof ordinarily imposed on the claimant".

[51] In my view, the appropriate disposition of this matter is to have the review completed by Wolrige Mahon Ltd. In that event, counsel for the Disputing Creditors can deal directly with Wolrige Mahon Ltd. in terms of the review, which may not necessarily result in a formal report being prepared. This may alleviate the higher costs normally associated with preparing a formal report.

[52] The next issue is whether the results of Wolrige Mahon Ltd.'s review should be shared. Under a *BIA* claims process, a trustee in bankruptcy would review claims. Normally, a trustee would seek the input of the inspectors appointed, however, it may not do so if, for example, there was some concern that an inspector had an interest relating to a potentially disputed claim. If the cost of the report is to be borne as an administrative cost, there is no reason why other interested parties should not have equal access to Wolrige Mahon Ltd.'s work product in respect of this independent review. Accordingly, I am ordering that Wolrige Mahon Ltd.'s work product be shared with the Monitor and any other unsecured creditor (other than the related parties) who wishes to join in a challenge of the related party claims, on terms as might be agreed between then.

[53] The Disputing Creditors seek a charge in favour of Wolrige Mahon Ltd. in an amount limited to $50,000. The *CCAA* provides:

> s. 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of:
> ...
>
> (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[54] I consider that it would be unfair to the Disputing Creditors for them to bear the costs of retaining Wolrige Mahon Ltd., which will not only provide the independent review that was contemplated by the Claims Process Order, but will also potentially benefit the unsecured creditors as a whole. In my view, this charge in favour of Wolrige Mahon Ltd. is necessary for the effective participation by the

Disputing Creditors in these proceedings (and perhaps others who might join in or benefit from such a review).

[55] The final issue is raised by S.I.P. Holdings and Fama Holdings. They take the position that while a charge may be granted at this time, there should be a provision in the order allowing them to seek recovery of some or all of the amounts paid to Wolrige Mahon Ltd. in the event that a review of the related party claims is not fruitful or alternatively, any challenge to those claims is not successful. Such a "comeback" provision is opposed by the Disputing Creditors.

[56] Usually, the cost of an independent review would be borne by the estate and would be indirectly borne by the creditors whose claims were potentially subject to challenge. In this case, I see no reason to depart from the usual manner in which this independent review is to be conducted, which would not include any ability to recoup these expenses. I would note, in any event, that if a challenge to these related party claims is brought against S.I.P. Holdings and Fama Holdings, and that challenge is ultimately unsuccessful, then the related parties will have the ability to seek costs against the unsuccessful applicant creditors at the end of the day.

[57] Accordingly, the order sought is granted. There will be a priority charge in favour of Wolrige Mahon Ltd. not to exceed $50,000, for the purpose of Wolrige Mahon Ltd. assisting the Disputing Creditors to review and assess the claims of Fama Holdings and S.I.P. Holdings. This charge is to rank in priority to all other charges except for the existing Administrative Charge.

"Fitzpatrick J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re),*
2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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 0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.
Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Corrigendum to the Reasons for Judgment

Counsel for the Petitioner:	D.E. Gruber
Counsel for the Monitor, McMillan LLP:	P.J. Reardon
Counsel for S.I.P. Holdings Ltd. and Fama Holdings Ltd.:	D. Hyndman
Counsel for Henry Company Canada Inc. and Stone Industries Inc.:	J. McLean, Q.C.
Place and Date of Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, BC October 11, 2012
Place and Date of Corrigendum:	Vancouver, B.C. December 3, 2012

[58] This is a corrigendum to my Reasons for Judgment issued October 11, 2012. Paragraph 28 of those Reasons is amended to read as follows:

> [28] Notwithstanding Mr. Wood's comment, he has not engaged in any meaningful dialogue with the Disputing Creditors toward providing clarification about these related party claims. I was advised by counsel there has been some exchange of correspondence between counsel for the Disputing Creditors and counsel acting for both Steels and the CRO (the same counsel acts for both Steels and the CRO). Despite being invited to provide further information concerning these claims, and despite what appears to have been his earlier intention, Mr. Wood has declined to provide further detail or documentation regarding these claims, save in response to a specific request which the Disputing Creditors did not provide.

"Fitzpatrick J."

See para. 36

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and in the Matter of a Proposed Plan of Compromise or Arrangement with respect to Stelco Inc., and other Applicants listed in Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

75 O.R. (3d) 5
[2005] O.J. No. 1171
Docket: M32289

Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
March 31, 2005

Corporations -- Directors -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation -- In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under the Companies' Creditors Arrangement

Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set

aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is general ly exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of

its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructurin g efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. The powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of

apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to a ct neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partne r I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc.

(Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); Ivaco Inc. (Re), [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (sub nom. Olympia & York Dev. v. Royal Trust Co.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] [page8] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Stephenson v. Vokes (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as am], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

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Peterson, D.H., Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis--Butterworths, 1989)

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APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and Richard B. Swan, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and Robert A. Centa, for respondent United Steelworkers of America.

Murray Gold and Andrew J. Hatnay, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

David R. Byers, for CIT Business Credit, Agent for DIP Lender. [page9]

The judgment of the court was delivered by

BLAIR J.A.: --

Part I -- Introduction

[1] Stelco Inc. and four of its wholly-owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act (the "CCAA") [See Note 1 at the end of the document] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies -- Clearwater Capital Management Inc. and Equilibrium Capital Management Inc. -- which, respectively, hold approximately 20 per cent of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (the "Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in

being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40 per cent of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their [page10] experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco (the "Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability -- exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as "the bare knuckled arena" of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation -- as opposed to their own best interests as shareholders -- in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as the "Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse. [page11]

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal and order the reinstatement of the applicants to the Board.

Part II -- Additional Facts

[11] Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected 11 directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

[12] Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of 20 directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

[13] Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

[14] In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids and report on the bids to the court.

[15] On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a [page12]capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase

substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

[16] A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

[17] Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately five per cent as at November 19, to 14.9 per cent as at January 25, 2005, and finally to approximately 20 per cent on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

[18] On February 1, 2005, Messrs. Keiper and Woollcombe and other representatives of Clearwater and Equilibrium met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this

view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20 per cent of the company's common shares. [page13]

[19] At paras. 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

> 17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40 per cent of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
>
> 18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

[20] In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed

that:

(a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

(b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and

(c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing -- and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" -- the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but [page14] because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the

Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III -- Leave to Appeal

[23] Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous;

(d) whether the appeal will unduly hinder the progress of the action.

[25] Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on [page15] which there is

little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision-making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be e vident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

Part IV -- The Appeal

The Positions of the Parties

[27] The appellants submit that,

(a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;

(b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

(c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and

> therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the [page16] ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: Re Algoma Steel Inc., [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group -- particular investment funds that have acquired Stelco shares during the CCAA itself -- have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception

of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see Re Olympia & York Development Ltd. (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); Re Ivaco Inc., [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, Chef Ready Foods Ltd. v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; Re Lehndorff General Partners Ltd., [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see Re Dylex Ltd., [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the

statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --), vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the docuemnt], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to

control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end fo the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The section 11 discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion -- in spite of its considerable breadth and flexibility -- does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the Canada Business Corporation Act, R.S.C. 1985, c. C-44 ("CBCA"), and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy gr ounds.

[40] The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . . . .

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1); [page20]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . . . .

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:

Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), at p. 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions [page21]made by directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in

conducting what are in substance the company's restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Stephenson v. Vokes, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: [page22] CBCA, ss. 106(3) and 111 [See Note 4 at the end of the document]. The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court -- where it finds that oppression as therein defined exists -- to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other

applicable statute. There is no legislative "gap" to fill. See Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra, at p. 480 S.C.R.; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

[49] At para. 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in [page23] the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power -- which the courts are disinclined to exercise in any event -- except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The oppression remedy gateway

[52] The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> 20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[53] The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority. [page24]

The level of conduct required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is an extraordinary remedy and certainly should be imposed most sparingly. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada". [See Note 5 at the end of the document]
>
> SS. 18.172 Removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. By tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.

(Emphasis added)

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark,

however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors -- in which capacity they participated over two days in the bid consideration exercise -- in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk -- a reasonable apprehension -- that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future. [page25]

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium -- the shareholders represented by the appellants on the Board -- had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They

are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, at paras. 42-49.

[60] In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well -- in the context of "the shifting interest and incentives of shareholders and creditors" -- the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in [page26]its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs. Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

[62] The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over 14 months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

[63] There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

[64] The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The business judgment rule

[65] The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings -- and courts in general -- will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in Peoples, supra, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ... [page27]

[66] In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.), at p. 320 O.R., this

court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [See Note 6 at the end of the document]

[67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

> There can be no doubt that on an application under s. 234 [See Note 7 at the end of the document] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra; Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd., [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

[69] Here, the motion judge was alive to the "business

judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a [page28]situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

[70] I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) -- which describes the directors' overall responsibilities -- and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e., in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 2 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

[71] This is not to say that the conduct of the Board in

appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

[72] The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion -- not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and [page29] flexible supervisory jurisdiction -- a jurisdiction which feeds the creativity that makes the CCAA work so well -- in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of di rectors.

The reasonable apprehension of bias analogy

[73] In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual aebias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and

responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40 per cent of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably [page30]prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable

apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V -- Disposition

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

Order accordingly.

[page31]

Notes

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: The reference is to the decisions in Dyle, Royal Oak Mines and Westar, cited above.

Note 3: See para. 43, infra, where I elaborate on this decision.

Note 4: It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

Note 5: Dennis H. Peterson, Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis -- Butterworths, 1989), at 18-47.

Note 6:Or, I would add, unpopular with other stakeholders.

Note 7: Now s. 241.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

See paras. 18, 24

And in the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Stelco Inc. and the Other Applicants Listed Under Schedule "A"

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[Indexed as: Stelco Inc. (Re) (No.2)]

78 O.R. (3d) 254
[2005] O.J. No. 4733
Docket: M33099 (C44332)

Court of Appeal for Ontario,
Laskin, Rosenberg and LaForme JJ.A.
November 4, 2005

Debtor and creditor -- Companies' Creditors Arrangement Act -- Jurisdiction -- Jurisdiction of supervising judge not limited to preserving status quo -- Supervising judge having power to vary stay and allow company to enter into agreements to facilitate restructuring, provided that creditors have final decision whether or not to approve Plan -- Supervising judge entitled to use his own judgment and conclude that plan was not doomed to fail despite creditors' opposition -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

The debtor company negotiated agreements with two of its stakeholders and a finance provider which were intrinsic to the success of the Plan of Arrangement that the company proposed. While the stakeholders did not have a right to vote to approve any plan of arrangement and reorganization, they had a functional veto in the sense that no restructuring could be

completed without their support. The company sought court authorization to enter into the agreements. Authorization was granted by the supervising judge. Creditors of the company appealed the orders, arguing that the supervising judge did not have jurisdiction generally to make the orders and that he did not have jurisdiction to approve orders that would facilitate a Plan that was doomed to fail, considering the creditors' opposition to the Plan.

Held, the appeal should be dismissed.

The motions judge had jurisdiction to make the orders authorizing the company to enter into the agreements. Section 11 of the Companies' Creditors Arrangement Act provides a broad jurisdiction to impose terms and conditions on the granting of the stay. Section 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The orders in this case did not usurp the s. 6 rights of the creditors and did not unduly interfere with the business judgment of the creditors. The orders moved the process along to the point where the creditors were free to exercise their rights at the creditors' meeting. It must be a matter of judgment for the supervising judge to determine whether a Plan is doomed to fail. It was apparent in this case that the motions judge brought his judgme nt to bear and decided that the Plan was not doomed to fail. There was no basis for second guessing him on that issue.

Cases referred to

Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 7 O.R. (3d) 362, [1992] O.J. No. 374, 4 B.L.R. (2d) 306, 10 C.B.R. (3d) 23 (Gen. Div.); [page255] Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.) (sub nom. Hongkong Bank of Canada v. Chef Ready Foods); Inducon Development Corp. (Re), [1992] O.J. No. 8, 8 C.B.R.

(3d) 306, 31 A.C.W.S. (3d) 94 (Gen. Div.)

Statutes referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6 [as am.], 11 [as am.], 13 [as am.]

APPEAL from the orders of Farley J., [2005] O.J. No. 4309 (S.C.J.) authorizing the company to enter into agreements.

Robert W. Staley and Alan P. Gardner, for Informal Committee of Senior Debentureholders, appellants.

Michael E. Barrack and Geoff R. Hall, for Stelco Inc., respondent.

Robert I. Thornton and Kyla E.M. Mahar, for Monitor, respondent.

John R. Varley, for Salaried Active Employees, respondents.

Michael C.P. McCreary and David P. Jacobs, for USW Locals 8782 and 5328, respondents.

George Karayannides, for EDS Canada Inc., respondent.

Aubrey E. Kauffman, for Tricap Management Ltd., respondents.

Ben Zarnett and Gale Rubenstein, for the Province of Ontario, respondents.

Murray Gold, for Salaried Retirees, respondents.

Kenneth T. Rosenberg, for USW International, respondents.

Robert A. Centa, for USWA, respondents.

George Glezos, for AGF Management Ltd., respondents.

The judgment of the court was delivered by

[1] ROSENBERG J.A.:-- This appeal is another chapter in the continuing attempt by Stelco Inc. and four of its wholly-owned subsidiaries to emerge from protection from their creditors under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ["CCAA"]. The appellant, an Informal Committee of Senior Debenture Holders who are Stelco's largest creditor, applies for leave to appeal under s. 13 of the CCAA and if leave be granted appeals three orders made by Farley J. on October 4, 2005 in the CCAA proceedings. These orders authorize Stelco to enter into agreements with two of its stakeholders and a finance provider. The appellant submits that the motions judge had no jurisdiction to make these orders and that the effect of these orders is to distort or skew the CCAA process. A group of Stelco's equity holders support the submissions of the appellant. The various other players with a stake in the restructuring and the court-appointed Monitor support the orders made by the motions judge. [page256]

[2] Given the urgency of the matter it is only possible to give relatively brief reasons for my conclusion that while leave to appeal should be granted, the appeal should be dismissed.

The Facts

[3] Stelco Inc. and the four wholly-owned subsidiaries obtained protection from their creditors under the CCAA on January 29, 1994. Thus, the CCAA process has been going on for over 20 months, longer than anyone expected. Farley J. has been managing the process throughout. The initial order made under s. 11 of the CCAA gives Stelco sole and exclusive authority to propose and file a plan of arrangement with its creditors. To date, attempts to restructure have been unsuccessful. In particular, a plan put forward by the Senior Debt Holders failed.

[4] While there have no doubt been many obstacles to a successful restructuring, the paramount problem appears to be

that stakeholders, the Ontario government and Stelco's unions, who do not have a formal veto (i.e., they do not have a right to vote to approve any plan of arrangement and reorganization) have what the parties have referred to as a functional veto. It is unnecessary to set out the reasons for these functional vetoes. Suffice it to say, as did the Monitor in its Thirty-Eighth Report, that each of these stakeholders is "capable of exercising sufficient leverage against Stelco and other stakeholders such that no restructuring could be completed without that stakeholder's support".

[5] In an attempt to successfully emerge from CCAA protection with a plan of arrangement, the Stelco board of directors has negotiated with two of these stakeholders and with a finance provider and has reached three agreements: an agreement with the provincial government (the "Ontario Agreement"), an agreement with The United Steelworkers International and Local 8782 (the "USW Agreement"), and an agreement with Tricap Management Limited (the "Tricap Agreement"). Those agreements are intrinsic to the success of the Plan of Arrangement that Stelco proposes. However, the debt holders including this appellant have the ultimate veto. They alone will vote on whether to approve Stelco's Plan. The vote of the affected debt holders is scheduled for November 15, 2005.

[6] The three agreements have terms to which the appellant objects. For example, the Tricap Agreement contemplates a break fee of up to $10.75 million depending on the circumstances. Tricap will be entitled to a break fee if the Plan fails to obtain the requisite approvals or if Tricap terminates its obligations to provide financing as a result of the Plan being amended without Tricap's approval. Half of the break fee becomes payable if the Plan [page257] is voted down by the creditors. Another example is found in the Ontario Agreement, which provides that the order sanctioning the Final Plan shall name the members of Stelco's board of directors and such members must be acceptable to the province. Consistent with the Order of March 30, 2005 and as required by the terms of the agreements themselves, Stelco sought court authorization to enter into the three agreements. We were told that, in any event, it is common practice to seek court approval of

agreements of this importance. The appellant submits that t he motions judge had no jurisdiction to make these orders.

[7] There are a number of other facts that form part of the context for understanding the issues raised by this appeal. First, on July 18, 2005, the motions judge extended the stay of proceedings until September 9, 2005 and warned the stakeholders that this was a "real and functional deadline". While that date has been extended because Stelco was making progress in its talks with the stakeholders, the urgency of the situation cannot be underestimated. Something will have to happen to either break the impasse or terminate the CCAA process.

[8] Second, on October 4, 2005, the motions judge made several orders, not just the orders to authorize Stelco to enter into the three agreements to which the appellant objects. In particular, the motions judge extended the stay to December and made an order convening the creditors' meeting on November 15 to approve the Stelco Plan. The appellant does not object to the orders extending the stay or convening the meeting to vote on the Plan.

[9] Third, the appellant has not sought permission to prepare and file its own plan of arrangement. At present, the Stelco Board's Plan is the only plan on the table and as the motions judge observed, "one must also realistically appreciate that a rival financing arrangement at this stage, starting from essentially a standing start, would take considerable time for due diligence and there is no assurance that the conditions will be any less onerous than those extracted by Tricap" [at para. 5].

[10] Fourth, in his orders authorizing Stelco to enter into these agreements, the motions judge made it clear that these authorizations, "are not a sanction of the terms of the plan ... and do not prohibit Stelco from continuing discussions in respect of the Plan with the Affected Creditors".

[11] Fifth, the independent Monitor has reviewed the Agreements and the Plan and supports Stelco's position.

[12] Finally, and importantly, the Senior Debenture Holders that make up the appellant have said unequivocally that they will not approve the Plan. The motions judge recognized this in his reasons [at para. 7]: [page258]

> The Bondholder group has indicated that it is firmly opposed to the plan as presently constituted. That group also notes that more than half of the creditors by $ value have advised the Monitor that they are opposed to the plan as presently constituted. ... The present plan may be adjusted (with the blessing of others concerned) to the extent that it, in a revised form, is palatable to the creditors (assuming that they do not have a massive change of heart as to the presently proposed plan).

Leave to Appeal

[13] The parties agree on the test for granting leave to appeal under s. 13 of the CCAA. The moving party must show the following:

(a) the point on appeal is of significance to the practice;

(b) the point is of significance to the action;

(c) the appeal is prima facie meritorious; and

(d) the appeal will not unduly hinder the progress of the action.

[14] In my view, the appellant has met this test. The point raised is a novel and important one. It concerns the jurisdiction of the supervising judge to make orders that do not merely preserve the status quo but authorize key elements of the proposed plan of arrangement. The point is of obvious significance in this action. If the motions judge's approvals were to be set aside, it is doubtful that the Plan could proceed. On the other hand, the appellant submits that the orders have created a coercive and unfair environment and that the Plan is doomed to fail. It was therefore wrong to authorize Stelco to enter into agreements, especially the Tricap

Agreement, that could further deplete the estate. The appeal is prima facie meritorious. The matter appears to be one of first impression. It certainly cannot be said that the appeal is frivolous. Finally, the appeal will not unduly hinder the progress of the action. Because of the speed with which this court is able to deal with the case, t he appeal will not unduly interfere with the continuing negotiations prior to the November 15th meeting.

[15] For these reasons, I would grant leave to appeal.

Analysis

Jurisdiction generally

[16] The thrust of the appellant's submissions is that while the judge supervising a CCAA process has jurisdiction to make orders that preserve the status quo, the judge has no jurisdiction to make an order that, in effect, entrenches elements of the proposed Plan. Rather, the approval of the Plan is a matter solely for [page259] the business judgment of the creditors. The appellant submits that the orders made by the motions judge are not authorized by the statute or under the court's inherent jurisdiction and are in fact inconsistent with the scheme and objects of the CCAA. They submit that the orders made in this case have the effect of substituting the court's judgment for that of the debt holders who, under s. 6, have exclusive jurisdiction to approve the plan. Under s. 6, it is only after a majority in number representing two-thirds in value of the creditors vote to approve the plan that the court has a role in deciding whether to sanction the plan.

[17] Underlying this argument is a concern on the part of the creditors that the orders are coercive, designed to force the creditors to approve a plan, a plan in which they have had no input and of which they disapprove.

[18] In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of

the stay. In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at para. 10:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

(Emphasis added)

[19] In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and [page260] do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

[20] The argument that the orders are coercive and therefore

unreasonably interfere with the rights of the creditors turns largely on the potential $10.75 million break fee that may become payable to Tricap. However, the motions judge has found as a fact that the break fee is reasonable. As counsel for Ontario points out, this necessarily entails a finding that the break fee is not coercive even if it could to some extent deplete Stelco's assets.

[21] Further, the motions judge [at para. 9] both in his reasons and in his orders made it clear that he was not purporting to sanction the Plan. As he said in his reasons, "I wish to be absolutely clear that I am not ruling on or considering in any way the fairness of the plan as presented". The creditors will have the ultimate say on November 15 whether this plan will be approved.

Doomed to fail

[22] The appellant submits that the motions judge had no jurisdiction to approve orders that would facilitate a Plan that is doomed to fail. The authorities indicate that a court should not approve a process that will lead to a plan that is doomed to fail. The appellant says that it has made it as clear as possible that it does not accept the proposed Plan and will vote against it. In Inducon Development Corp. (Re), [1992] O.J. No. 8, 8 C.B.R. (3d) 306 (Gen. Div.), at p. 310 C.B.R., Farley J. said that, "It is of course, ... fruitless to proceed with a plan that is doomed to failure at a further stage."

[23] However, it is important to take into account the dynamics of the situation. In fact, it is the appellant's position that nothing will happen until a vote on a Plan is imminent or a proposal from Stelco is voted down; only then will Stelco enter into realistic negotiations with its creditors. It is apparent that the motions judge is of the view that the Plan is not doomed to fail; he would not have approved steps to continue the process if he thought it was. As Austin J. said in Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 7 O.R. (3d) 362, [1992] O.J. No. 374 (Gen. Div.), at p. 369 O.R.:

> The jurisprudence is clear that if it is obvious that no plan will be found acceptable to the required percentages of creditors, then the application should be refused. The fact that Paribas, the Royal Bank and K Mart now say there is no plan that they would approve, does not put an end to the inquiry. All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally ...

(Emphasis added) [page261]

[24] It must be a matter of judgment for the supervising judge to determine whether the Plan is doomed to fail. This Plan is supported by the other stakeholders and the independent Monitor. It is a product of the business judgment of the Stelco board as a way out of the CCAA process. It was open to the motions judge to conclude that the plan was not doomed to fail and that the process should continue. Despite its opposition to the Plan, the appellant's position inherently concedes the possibility of success, otherwise these creditors would have opposed the extension of the stay, opposed the order setting a date for approval of the plan and sought to terminate the CCAA proceedings.

[25] The motions judge said this in his reasons [at para. 2]:

> It seems to me that Stelco as an ongoing enterprise is getting a little shop worn/shopped worn. It would not be helpful to once again start a new general process to find the ideal situation [sic solution?]; rather the urgency of the situation requires that a reasonable solution be found.

He went on to state [at para. 7] that in the month before the vote there "will be considerable discussion and negotiation as to the plan which will in fact be put to the vote" and that the present Plan may be adjusted. He urged the stakeholders and Stelco to "deal with this question in a positive way" and that "it is better to move forward than backwards, especially where progress is required". It is obvious that the motions judge has brought his judgment to bear and decided that the Plan or some

version of it is not doomed to fail. I can see no basis for second-guessing the motions judge on that issue.

[26] I should comment on a submission made by the appellant that no deference should be paid to the business judgment of the Stelco board. The appellant submits that the board is entitled to deference for most of the decisions made in the day-to-day operations during the CCAA process except whether a restructuring should proceed or a plan of arrangement should proceed. The appellant submits that those latter decisions are solely the prerogative of the creditors by reason of s. 6. While there is no question that the ultimate decision is for the creditors, the board of directors plays an important role in the restructuring process. Blair J.A. made this clear in an earlier appeal to this court concerning Stelco reported at (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A.), at para. 44:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply [page262] to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the schem e and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

(Emphasis added)

[27] The approvals given by the motions judge in this case are consistent with these principles. Those orders allow the company's restructuring efforts to move forward.

[28] The position of the appellant also fails to give any weight to the broad range of interests in play in a CCAA process. Again to quote Blair J.A. in the earlier Stelco case at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction.

(Emphasis added)

[29] For these reasons, I would not give effect to the submissions of the appellant.

Submissions of the equity holders

[30] The equity holders support the position of the appellant. They point out that the Stelco CCAA situation is somewhat unique. While Stelco entered the process in dire straits, since then almost unprecedented worldwide prices for steel have boosted Stelco's fortunes. In an endorsement of February 28, 2005, [2005] O.J. No. 730, 7 C.B.R. (5th) 310 (S.C.J.), the motions judge recognized this unusual state of affairs [at para. 5]:

> In most restructurings, on emergence the original shareholder equity, if it has not been legally "evaporated" because the insolvent corporation was so far under water, is very substantially diminished. For example, the old shares

> may be converted into new emergent shares at a rate of 100 to 1; 1,000 to 1; or even 12,000 to 1. ... Stelco is one of those rare situations in which a change of external circumstances ... may result in the original equity having a more substantial "recovery" on emergence than outline above.

[31] The equity holders point out that while an earlier plan would have allowed the shareholders to benefit from the continued [page263] and anticipated growth in the Stelco equity, the present plan does not include any provision for the existing shareholders. I agree with counsel for Stelco that these arguments are premature. They raise issues for the supervising judge if and when he is called upon to exercise his discretion under s. 6 to sanction the Plan of arrangement.

Disposition

[32] Accordingly, I would dismiss the appeal. On behalf of the court, I wish to thank all counsel for their very helpful written and oral submissions that made it possible to deal with this appeal expeditiously.

Appeal dismissed.

COURT FILE NO.: 04-CL-5306
DATE: 20051110

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: Michael E. Barrack, James D. Gage, Geoff R. Hall for the Applicants
Kyla Mahar for the Monitor
Robert Staley for Senior Debenture Holders
Ashley John Taylor for CIT, Agent to Secured Creditors
Paul MacDonald, Andy Kent, Hilary Clarke for Converts Committee
Aubrey Kauffman for Tricap
Ken Rosenberg, Jeff Larry for USW
Gale Rubenstein, for the Superintendent
H. Whiteley for CIBC
Steven Bosnick for USW Locals 8782 and 8328
Murray Gold, Andrew Hatnay for Salaried Retirees

HEARD: November 9, 2005

E N D O R S E M E N T

[1] Fortunately time cleared so that the motion of the Informal Independent Converts' Committee ("ConCom") which surfaced late last week – and the responding cross motion of the Informal Committee of Senior Debenture Holders ("BondCom") – could be accommodated today, less than week before the scheduled vote on Stelco Inc.'s Plan of Arrangement under the CCAA set for November 15, 2005.

[2] The motion of ConCom was for an order:

(i) directing the Applicants to amend page 39 of the Notice of Proceedings and Meetings and Information Circular (the "Information Circular") with

respect to the Applicants' Proposed Plan of Arrangement or Compromise (the "Proposed Plan") in the manner set out in the Draft Order to confirm that the right (if any) of the Bondholders (as hereinafter defined) to assert claims or other remedies against other creditors of Stelco Inc. ("Stelco") will be subject to the effect of the Proposed Plan (the "Bondholders Claims Statement") and that the right (if any) of the Bondholders to assert claims (the "Anti-Convert Claims") pursuant to Article 6 (the "Inter-Trustee Provisions") of the First Supplemental Trust Indenture dated January 21, 2002 between Stelco and CIBC Mellon Trust Company (the "Supplemental Trust Indenture") will be extinguished effective upon the implementation of the Proposed Plan;

(ii) declaring that, if the Proposed Plan is approved by the requisite majority of the creditors of Stelco and sanctioned by this Court, the Inter-Trustee Provisions shall, from and after the effective date of the Proposed Plan, be of no force or effect;

(iii) in the alternative, directing the Applicants to amend the Proposed Plan to provide that the Noteholders (as hereinafter defined) shall constitute a separate class of Stelco creditors for the purposes of voting on the Proposed Plan or any amended version thereof; and

(iv) such further and other relief as counsel may request and this Honourable Court may permit.

[3] The cross motion of BondCom was for an Order:

2 . for a declaration that, if any or all of the relief sought by the Convertible Noteholders as set out in its notice of motion dated November 4, 2005 is granted, that the Senior Debenture Holders shall constitute a separate class of Stelco Inc. ("Stelco") creditors for the purposes of voting on the Proposed Plan of Arrangement or Compromise (the "Proposed Plan") or any amended version thereof; and

3. such further and other relief as to this Honourable Court seems just.

[4] No one present at this hearing disputed the proposition that it was appropriate to have the creditors vote on the Plan with the necessary benefit of clear statements of what was involved in such a vote and to eliminate therefore any ambiguities to the extent possible so that an objective creditor could make a reasoned decision. In that respect it would appear to me that the language of the Information Circular at p.39 thereof should be clarified to track that of the Meeting Order of October 4, 2005 at para. 34 thereof as to the operative element. Further it was acknowledged by everyone that the Plan itself provided that it may be amended before the vote. In that respect there would be no impediment for Stelco to adjust the language of the Plan in the sense of clarifying what its intent has been and continues to be in respect of matters affecting the debt in question and as held by those represented by the ConCom and by the BondCom. (Note:

Subsequent to release of these reasons in handwritten form, I was advised on November 10, 2005 that Stelco has undertaken to make the aforesaid clarifications.)

[5] I wish to emphasize that nothing in my reasons should be taken as being determinative of or affecting the relationship of the ConCom holders of debt vis-à-vis the BondCom holders of debt (that would as well encompass the holders of all Senior Debt as that term is defined in the Supplemental Trust Indenture). If those two sides are not able to work out an agreement between themselves, then they are at liberty to come to court to have that adjudicated.

[6] ConCom points out that the Supplemental Trust Indenture was an agreement between Stelco and the holders of the ConCom debt, but it was not an agreement signed by the holders of the BondCom debt. While true, that would not preclude a claim of the BondCom holders based on the concept of third party beneficiary.

[7] The CCAA is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. See *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (S.C.) at paras. 24-25; *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2000] O.J. No. 315 (S.C.J.) at para. 41, appeal dismissed [2001] O.J. No. 2344 (C.A.); *Re 843504 Alberta Ltd.*, [2003] A.J. No. 1549 (Q.B.) at para. 13; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 709 (Gen. Div.) at para. 24; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 864 (Gen. Div.) at para. 1.

[8] ConCom points out the language of article 4.01 of the Plan:

> 4.01 Cancellation of Certificates
>
> At the Effective Time, all debentures, certificates, agreements, invoices and other instruments evidencing Affected Claims against Stelco or Existing Common Shares will not entitle any holder thereof to any compensation or participation other than as expressly provided for in this Plan or in the Articles or Reorganization, respectively, and will be cancelled and null and void, and all debentures, certificates, agreements, invoices and other instruments evidencing Affected Claims against any Subsidiary Applicant will not entitle any holder thereof (other than Stelco or its successors and assignees) to any compensation or participation other than as expressly provided for in this Plan and, if in the possession or control of any Person must, at the request of Stelco, be delivered to Stelco. (emphasis added)

However this must be carefully analyzed in context. This deals with "Affected Claims against Stelco." See also in this respect articles 6.01, 6.02 and 6.05.

> 6.01 Effect of Plan Generally

At the Effective Time, the treatment of Affected Claims will be final and binding on the Applicants, the Affected Creditors and the trustees under the trust indentures for the Bonds (and their respective heirs, executors, administrators and other legal representatives, successors and assigns), and this Plan will constitute: (a) full, final and absolute settlement of all rights of the Affected Creditors; (b) an absolute release and discharge of all indebtedness, liabilities and obligations of or in respect of the Affected Claims against Stelco, including any interest and costs accruing thereon; (c) an absolute assignment to Stelco of all indebtedness, liabilities and obligations of or in respect of the Affected Claims against Subsidiary Applicants, including any interest and costs accruing thereon, and an absolute release and discharge of any rights of Affected Creditors in respect thereof (excluding, for greater certainty, any rights assigned to Stelco); and (d) a reorganization of the capital and change in the minimum and maximum number of directors of Stelco in accordance with the provisions of Article 3 and the Articles of Reorganization. (emphasis added)

6.02 Prosecution of Judgments

At the Effective Time, no step or proceeding may be taken in respect of any suit, judgement, execution, cause of action or similar proceeding in connection with any Affected Claim (other than by Stelco in respect of Affected Claims assigned to it pursuant to this Plan) and any such proceedings will be deemed to have no further effect against any Applicant or any of its assets and will be released, discharged, dismissed or vacated without cost to the Applicants. Any Applicant may apply to Court to obtain a discharge or dismissal, if necessary, of any such proceedings without notice to the Affected Creditor. (emphasis added)

6.05 Consents, Waivers and Agreements

At the Effective Time, each Affected Creditor will be deemed to have consented and agreed to all of the provisions of the Plan, as an entirety. Without limitation to the foregoing, each Affected Creditor (but for greater certainty, excluding Stelco in respect of Affected Claims assigned to it pursuant to this Plan) will be deemed:

(a) to have executed and delivered to the Applicants all consents, assignments, releases and waivers, statutory or otherwise, required to implement and carry out this Plan as an entirety;

(b) to have waived any default by or rescinded any demand for payment against any Applicant that has occurred on or prior to the Plan Implementation Date pursuant to, based on or as a result of any provision, express or implied, in any agreement or other arrangement, written or oral, existing between such Affected Creditor and such Applicant with respect to an Affected Claim; and

> (c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and any Applicant with respect to an Affected Claim as at the Plan Implementation Date and the provisions of this Plan, then the provisions of this Plan take precedence and priority and the provisions of such agreement or other arrangement are amended accordingly. (emphasis added)

This is not language which purports to, nor in my opinion does, affect relationships between creditors vis-à-vis themselves. With respect, I do not see s. 8 of the CCAA as coming into play here, nor is it necessary to have it come into play in this inter-creditor dispute which does not directly involve Stelco. No doubt it would be helpful to have Stelco clarify that aspect which ConCom has sincerely felt was ambiguous in article 4.01 of the Plan to reflect that these instruments are cancelled and null and void only as to the future (ie. that is after the Effective Time) vis-à-vis Stelco, but not as to the inter-creditor dispute or relationship. (See note above re: undertaking of Stelco.)

[9] I would only note in passing that the holders of the ConCom debt freely bought into a situation governed by s. 6.2 of the Supplemental Trust Indenture which contemplated their relationship with the BondCom debt (Senior Debt) in the event of insolvency proceedings or a reorganization. Give the caveats in s. 6.3 it would not appear to me that this clause advances the argument pressed by the ConCom.

[10] Therefore as to the relief request by ConCom in (i) and (ii) above, I would dismiss that part of the motion. That dismissal in no way affects the clarification of language mentioned above which would be of assistance to all concerned.

[11] Secondly, I would note that while apparently Stelco had not specifically advised as to its position, at the time of the hearing, its counsel was quite straight forward in his opening comments when he stated that Stelco had intended and always intended that its Plan (as distributed) was only to affect rights between Stelco and its Affected Creditors, and specifically Stelco had no intent to alter the relationship between its creditors in the sense of one group of creditors vis-à-vis another group (i.e. the ConCom debt vis-à-vis BondCom debt (Senior Debt)). In this latter regard he indicated that Stelco was not intending to affect whatever subordination rights there may be between these two groups. This would be in the sense that what was the situation between these two groups as a result of the Supplemental Trust Indenture, especially at s. 6, would continue to be the relationship after the Effective Time.

[12] The next question is whether or not there should be separate classes for the ConCom debt and/or the BondCom debt/Senior Debt. I am of the view that the law in regard to classification is correctly set out in *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), leave to appeal denied (2000), 19 C.B.R. (4th) (Alta. C.A. [In Chambers]), cited in the Alberta Court of Appeal subsequent decision *Re Canadian Airlines Corp.* (2000), 261 A.R. 120, 2000 A.B.C.A. 149 (Alta. C.A. [In Chambers]) at para. 27. See also *Re San Francisco Gifts Ltd.* (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at

para. 11, leave to appeal denied [2004] A.J. No. 1369, 2004 A.B.C.A. 386 (C.A.). As noted by Toplinski J. at para. 11 of San Francisco:

> (11) The commonality of interest test has evolved over time and now involves application of the following guidelines that were neatly summarized by Paperny J. (as she then was) in *Resurgence Asset Management LLS v. Canadian Airlines Corp.* ("Canadian Airlines")
>
> 1. Community of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor prior to and under the Plan as well as on liquidation.
>
> 3. The commonality of interests should be viewed purposively, bearing in mind that the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the Plan in a similar manner. (emphasis added)

[13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation – and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

[14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of ComCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible (subject to the

practical caution that whatever is achieved must be compatible with Stelco being able to continue in a competitive industry so that the burden of this consideration cannot be so great as to swamp the newly renovated boat which had previously been sinking). That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the valuation of the consideration obtained.

[15] Counsel for BondCom and Stelco raised generally the question of there possibly being a tyranny of the minority if the ConCom debt was a separate class; counsel for ConCom raised the issue of tyranny of the majority if there was not a separate class for the ConCom debt. To my mind that questions of tyranny of the majority is something which may be addressed in the sanction hearing, if one takes place, as to the fairness, reasonableness and equitableness of the Plan. See item 4 of the Paperny list in *Canadian Airlines*; see also *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3rd) 312 (Gen. Div.) at p. 318 and *Re Campeau Corp.* (1991), 10 C.B.R. (3rd) 100 (Gen. Div.) at p. 103.

[16] Therefore I do not see that ConCom has made out a case for a separate class. That aspect of its motion is also dismissed.

[17] Given the dismissal of the ConCom motion, the BondCom motion for a separate class for its debt becomes moot.

J.M. Farley

DATE: November 10, 2005

See paras. 22-23

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and in the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Stelco Inc., and the Other Applicants Listed Under Schedule "A"

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[Indexed as: Stelco Inc. (Re)]

78 O.R. (3d) 241
[2005] O.J. No. 4883
Dockets: C44436 and M33171

Court of Appeal for Ontario,
Goudge, Sharpe and Blair JJ.A.
November 17, 2005

Debtor and creditor -- Companies' Creditors Arrangement Act -- Creditors -- Classification -- Classification of creditors should be determined by their legal rights in relation to debtor company as opposed to their rights as creditors in relation to each other.

The appellant represented unsecured creditors who held convertible unsecured subordinated debentures issued by the debtor company pursuant to a Supplemental Trust Indenture. Their claims were subordinated to Senior Debt Holders. The Supplemental Trust Indenture provided that if the Subordinated Debenture Holders received any payment from the company, or any distribution from the assets of the company, before the Senior Debt was fully paid, they were obliged to remit any such payment or distribution to the Senior Debt Holders until the latter had been paid in full, but that no such payment or distribution by the company shall be deemed to constitute

payment on the Subordinated Debenture Holders' debt. The parties referred to these provisions as the "Turnover Payment" provisions. In the company's Proposed Plan, the Subordinated Debenture Holders and the Senior Debt Holders were included in the same class (along with Trade Creditors) for the purposes of voting on the Proposed Plan. The appellant sought an order from the supervising judge classifying the Subordinated Debenture Holders as a separate class for voting purposes, arguing that their interests were different than those of the Senior Debt Holders and that creditors who do not have common interests should not be classified in the same group for voting purposes. The motion was dismissed. The appellant appealed.

Held, the appeal should be dismissed.

The classification of creditors is a fact-driven exercise, dependent upon the circumstances of each particular case. It is determined by the creditors' legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. The supervising judge did not err in finding that there was no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis--vis the company. Each was entitled to be paid the moneys owing under their respective debt contracts. The only difference was that the former creditors were subordinated in interest to the latter and had agreed to pay over to the latter any portion of their recovery received until the Senior Debt had been paid in full. As between the two groups of creditors, this merely reflected the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. The supervising judge was also entitled to determine that th is was not a case involving any confiscation of legal rights. Finally, the supervising judge's finding that there was no realistic conflict of interest between the creditors was supported on the record. [page242] Each had the same general interest in relation to the company, namely to be paid under their contracts, and to maximize the amount recoverable from the company through the Plan negotiation process. The Senior Debt Holders' efforts would not be moderated in some respect because they would be content to make their recovery on the

backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders would require the support of the Trade Creditors, whose interest was not affected by the subordination agreement. Thus, the Senior Debt Holders would be required to support the maximization approach.

Canadian Airlines Corp. (Re), [2000] A.J. No. 1693, 19 C.B.R. (4th) 12 (Q.B.), apld

NsC Diesel Power Inc. (Re), [1990] N.S.J. No. 484, 97 N.S.R. (2d) 295, 258 A.P.R. 295, 79 C.B.R. (N.S.) 1 (T.D.), not folld

Other cases referred to

Campeau Corp. (Re), [1991] O.J. No. 2338, 86 D.L.R. (4th) 570, 10 C.B.R. (3d) 100 (Gen. Div.); Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A.); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180, 41 O.A.C. 282, 1 C.B.R. (3d) 101 (C.A.) (sub nom. Nova Metal Products v. Comiskey); Fairview Industries Ltd. (Re), [1991] N.S.J. No. 456, 109 N.S.R. (2d) 32, 11 C.B.R. (3d) 71, 30 A.C.W.S. (3d) 376 (T.D.); Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1988] A.J. No. 1226, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139, 72 C.B.R. (N.S.) 20 (Q.B.); Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, [1989] B.C.J. No. 63, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363, 73 C.B.R. (N.S.) 195 (C.A.); Northland Properties Ltd. (Re), [1988] B.C.J. No. 1937, 32 B.C.L.R. (2d) 309 (C.A.), affg [1988] B.C.J. No. 1530, 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S 166 (S.C.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 610, 2000 ABCA 149, 80 Alta. L.R. (3d) 213, 261 A.R. 12, 19 C.B.R. (4th) 33, 97 A.C.W.S. (3d) 844 (C.A.); Savage v. Amoco Acquisition Co., [1988] A.J. No. 330, 59 Alta. L.R. (2d) 260, 40 B.L.R. 188, 68 C.B.R. (N.S.) 154 (C.A.) (sub. nom. Amoco Acquisition Co. v. Savage); Sklar-

Peppler Furniture Corp. v. Bank of Nova Scotia, [1991] O.J. No. 2288, 86 D.L.R. (4th) 621, 8 C.B.R. (3d) 312 (Gen. Div.); Sovereign Life Assurance Co. v. Dodd (1892), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573, 8 T.L.R. 684, 36 Sol. Jo. 644, 41 W.R. 4, 62 L.J.Q.B. 19, 67 L.T. 396 (C.A.); Stelco Inc. (Re) (2005), 75 O.R. (3d) 5, [2005] O.J. No. 117, 1196 O.A.C. 142, 253 D.L.R. (4th) 109, 9 C.B.R. (5th) 135, 2 B.L.R.(4th) 238 (C.A.); Wellin gton Building Corp. Ltd. (Re), [1934] O.R. 653, [1934] 4 D.L.R. 626, 16 C.B.R. 48 (H.C.J.); Woodward's Ltd. (Re), [1993] B.C.J. No. 852, 84 B.C.L.R. (2d) 206, 20 C.B.R. (3d) 74 (S.C.)

Statutes referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Joint Stock Companies Arrangement Act 1870 (U.K.), 33 and 34 Vict., c. 104

Authorities referred to

Edwards, S.E., "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587

Robertson, Q.C., R.N., "Legal Problems on Reorganization of Major Financial and Commercial Debtors" (Canadian Bar Association -- Ontario Continuing Legal Education, April 5, 1983) [page243]

APPEAL from an order of Farley J., [2005] O.J. No. 4814, 143 A.C.W.S. (3d) 623 (S.C.J.) dismissing a motion for an order classifying the appellants as a separate class of creditors for voting purposes.

Paul Macdonald, Andrew Kent and Brett Harrison, for Informal Independent Converts' Committee.

Michael E. Barrack and Geoff R. Hall, for Stelco Inc.

Robert Staley and Alan Gardner, for Senior Debenture Holders.

Fred Myers, for Her Majesty the Queen in Right of Ontario, and the Superintendent of Financial Services.

Ken Rosenberg, for United Steelworkers of America.

A. Kauffman, for Tricap Management Ltd.

Kyla Mahar, for Monitor.

Murray Gold, for Salaried Retirees.

Heath Whitley, for CIBC.

Steven Bosnick, for U.S.W.A. Loc. 5328 and 8782.

The judgment of the court was delivered by

BLAIR J.A.:--

Background

[1] This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the Companies' Creditors Arrangement Act ("CCAA") [See Note 1 at the end of the document]. Stelco has been in the midst of this fractious process for approximately 21 months. Justice Farley has been the supervising judge throughout.

[2] Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee (the "Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday

afternoon (the courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005. [page244]

[3] This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument -- and in order to clarify matters so that the vote could proceed the following day -- we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

[4] The endorsement read as follows:

> In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.
>
> Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

[5] These are those expanded reasons.

Facts

[6] Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

[7] The Converts' Committee represents unsecured creditors who hold $90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With

interest, the claims of the Subordinated Debenture Holders now amount to approximately $110 million. Those claims are subordinated to approximately $328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately $228 million. In the Proposed Plan, these three groups of unsecured creditors -- the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders and the Trade Creditors -- have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

[8] The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.). They also argue that the supervising [page245] judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

[9] In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

[10] In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

[11] The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

[12] The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled -- the elimination of their subordinated position by virtue of the Turnover Payment provisions.

[13] Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paras. 13 and 14 of his reasons: [page246]

> I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/ Senior Debt [See Note 2 at the end of the document] plus the trade debt vis--vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid

> any unnecessary fragmentation -- and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.
>
> Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis--vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible . . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the considerat ion obtained.

[14] We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

[15] The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous; and [page247]

(d) whether the appeal will unduly hinder the progress of the action.

See Stelco Inc. (Re) (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A.), at para. 24; Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15; Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 610, 19 C.B.R. (4th) 33 (C.A.), at para. 7.

[16] Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in Canadian Airlines Corp. (Re), [2000] A.J. No. 1693, 19 C.B.R. (4th) 12 (Q.B), this court has not dealt with the issue since its decision in Elan Corp. v. Comiskey, supra, and the Converts' Committee argues that the Alberta line of authorities is contrary to Elan.

[17] A brief further comment respecting the leave process may be in order.

[18] The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada -- including this one -- have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the

authorities cited above remain good law.

[19] Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings -- particularly in major ones such as this one involving Stelco -- has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded. [page248]

[20] As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No error in law or principle

[21] Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to Sovereign Life Assurance Co. v. Dodd (1892), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (C.A.) which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited. At pp. 249-50 All E.R., Lord Esher said:

The Act provides that the persons to be summoned to the

> meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act [See Note 3 at the end of the document] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251 All E.R., Bowen L.J. stated:

> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

[22] These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process -- a flexibility which is its genius -- there can be no fixed rules that must apply in all cases.

[23] In Canadian Airlines Corp. (Re), supra, Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said: [page249]

> In summary, the cases establish the following principles

applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;

2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation;

3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if at all possible;

4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches which would potentially jeopardize viable plans.

5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

[24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, [1991] O.J. No. 2288, 86 D.L.R. (4th) 621 (Gen. Div.); Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1988] A.J. No. 1226, 72 C.B.R. (N.S.) 20 (Q.B.); Fairview Industries Ltd. (Re), [1991] N.S.J. No. 456, 11 C.B.R. (3d) 71 (T.D.); Woodward's Ltd. (Re), [1993] B.C.J. No. 852, 84 B.C.L.R. (2d) 206 (S.C.); Northland Properties Ltd. (Re), [1988] B.C.J. No. 1530, 73 C.B.R. (N.S.) 166 (S.C.); Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, [1989] B.C.J. No. 63, 73 C.B.R. (N.S.) 195 (C.A.); NsC Diesel Power Inc. (Re), [1990] N.S.J. No. 484, 79 C.B.R. (N.S.) 1 (T.D.); Savage v. Amoco Acquisition Co., [1988] A.J. No. 330, 68 C.B.R. (N.S.) 154 (C.A.) (sub nom. Amoco Acquisition Co. v.

Savage); Wellingt on Building Corp. (Re), [1934] O.R. 653, 16 C.B.R. 48 (H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent Canadian Airlines decision: Canadian Airlines Corp. (Re), supra, at para. 27.

[25] In the passage from his reasons cited above (paras. 13 and 14) the supervising judge in this case applied those principles. In our view, he was correct in law in doing so.

[26] We do not read the foregoing principles as being inconsistent with the earlier decision of this court in Elan Corp. v. Comiskey. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the [page250] two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 299 O.R.), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

[27] Elan Corp. v. Comiskey did not deal with the issue of whether creditors with divergent interests as amongst themselves -- as opposed to divergent legal interests vis--vis the debtor company -- could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test -- a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra); Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra; Fairview Industries Ltd. (Re), supra; Woodward's Ltd. (Re), supra. In our view, there is nothing in the decision in Elan Corp. that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

[28] In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include Elan Corp. v. Comiskey [See Note 4 at the end of the document] and [page251] Wellington Building Corp. Ltd. (Re), supra [See Note 5 at the end of the document]. Examples of the latter include Sklar-Peppler, supra [See Note 6 at the end of the document] and Campeau Corp. (Re), [1991] O.J. No. 2338, 10 C.B.R. (3d) 100 (Gen. Div.) [See Note 7 at the end of the document].

[29] Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality

of interest they may have vis--vis Stelco.

[30] We agree with the line of authorities summarized in Canadian Airlines (Re) and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary -- see, for example NsC Diesel Power Inc. (Re), supra -- we prefer the Alberta approach.

[31] There are good reasons for such an approach.

[32] First, as the supervising judge noted [at para. 7], the CCAA itself is more compendiously styled "An Act to facilitate compromises and arrangements between companies and their creditors." There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.), at para. 24 [page252] (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[33] In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

[34] Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the

Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at p. 602.

[35] Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", supra; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association -- Ontario Continuing Legal Education, April 5, 1983 at 19-21; Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra, at para. 27; Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, supra; Sklar-Peppler, supra; Woodwards Ltd. (Re), supra.

[36] In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted [at para. 31] in Canadian Airlines (Re), "the Court should be careful to resist classification approaches that would potentially jeopardize viable plans". [page253]

Discretion and fact finding

[37] Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

[38] We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis--vis Stelco. Each is entitled to be paid the moneys owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

[39] Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

[40] We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis--vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

[41] Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

Appeal dismissed. [page254]

Notes

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

Note 3: The Joint Stock Companies Arrangement Act 1870 (U.K.), 33 & 34 Vict., c. 104.

Note 4: A second secured creditor with superior voting power was separated from a first secured creditor for the voting purposes, in order [to] prevent the former from utilizing its superior voting strength to adversely affect the latter's prior security position.

Note 5: The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

Note 6: Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power" [at p. 627 D.L.R.].

Note 7: Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

CITATION: Urbancorp Cumberland 2 GP Inc., (Re), 2017 ONSC 7649
COURT FILE NO.: CV-16-11541-00CL
DATE: 20171220

See para. 20

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, RSC 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP CUMBERLAND 2 GP INC., URBANCORP CUMBERLAND 2 L.P., BOSVEST INC., EDGE ON TRIANGLE PARK INC., AND EDGE RESIDENTIAL INC.

BEFORE: F.L. Myers J.

COUNSEL: *Robert J. Drake and Lori Goldberg*, counsel for The Fuller Landau Group Inc., Monitor

Mark van Zandvoort and Timothy Jones, counsel for Cooltech Air Systems Ltd., Cooltech Home Comfort Ltd., Genesis Home Services Inc., AEM Capital Corp., and Icarus Holdings (Milton) Inc.

Clifton P. Prophet, counsel for Alvarez & Marsal Canada Inc., receiver, manager and construction lien trustee of Urbancorp (Leslieville) Developments Inc., Urbancorp (Riverdale) Developments Inc., and Urbancorp (The Beach) Developments Inc.

HEARD: December 13, 2017

ENDORSEMENT

Outcome

[1] The Monitor moves for advice and directions on whether payments in kind made by the *CCAA* debtors Edge on Triangle Park Inc. and Edge Residential Inc. to creditors of other Urbancorp affiliates were oppressive. The Monitor argues that using the currency of condominium units owned by Edge to satisfy debts of the other affiliates to their trade creditors amounts to oppression that should result in a monetary award against the trade creditors who received the units.

[2] In my view, even if the Monitor had been empowered to bring this proceeding and if it is entitled to discretionary recognition as a complainant under the oppression remedy provisions of the *OBCA*, it still has not proved that, at the time that Edge transferred its property, any creditor or "the creditors," collectively, had any particular expectations, that any such expectations as might have been held were reasonable, or that anyone relied on any such reasonable expectations as he, she, it, or they might have held. Neither has the Monitor proved that the breach of any such reasonable expectations met any of the three qualitative assessments of oppression.

[3] The motion is therefore dismissed.

The Basic Facts

[4] The responding parties, whom I will refer to collectively for convenience as Cooltech, were creditors of Edge on Triangle Park Inc., other Urbancorp affiliates, and Urbancorp's owner Alan Saskin personally. Cooltech was a plumbing and HVAC contractor on several Urbancorp projects. It had a long history of satisfactory business dealings with Mr. Saskin and his businesses.

[5] The Monitor challenges approximately $2.3 million paid by Edge to Cooltech, in July and August 2015, by means of the transfer of condominium units, parking spots, and storage lockers, transferred at or near fair market value, to pay off debts of other Urbancorp entities and a debt of $500,000 owed to Cooltech by Alan Saskin personally.

[6] The transfers were made more than one year prior to the commencement of insolvency proceedings by Urbancorp. The Monitor does not challenge the transfers as fraudulent conveyances. It does not rely on any badges of fraud surrounding the transactions.

[7] The Monitor no longer challenges the payments in kind made by Edge to Cooltech in respect of Edge's own debts. It does not challenge them under even the enhanced powers available in insolvency proceedings to remedy unjust preferences or transfers at undervalue for example.

[8] In return for paying Cooltech, Edge received intercompany book entries from the affiliates whose loans it paid and other inter-company credits to account for the payment of Mr. Saskin's personal debt. The Monitor says that replacing hard assets with what have subsequently turned out to be impaired loans from insolvent entities prejudiced creditors' recovery in these proceedings and therefore was oppressive.

The Position of Cooltech

[9] Cooltech was am arm's length, third party creditor with a cash-flow strapped customer with whom it had dealt for 20 years. Mr. Saskin approached it and offered to pay Urbancorp's bills by transferring property in kind. Cooltech knew Mr. Saskin to run asset-rich but cash-poor businesses. When Mr. Saskin offered units in kind to pay Cooltech's outstanding invoices, Cooltech agreed.

[10] Tthe Monitor does not claim that the value of the units was amiss. Cooltech received value commensurate with what it was owed. There was no gift component to the transaction. Rather, the source of the Monitor's complaints is not the sales *per se*, but the fact that the inter-company loans advanced to compensate Edge have subsequently turned out to be impaired. That had nothing to do with Cooltech. There is no basis in the evidence to suggest that it did anything wrong for which it should be held liable for recovery under an oppression remedy aimed at Triangle or Urbancorp. Cooltech is not alleged in this proceeding to have induced or procured a tort or a breach of fiduciary duty for example.

The Evidence

[11] The Monitor has been able to show, from the books and records of various Urbancorp entities, that in mid-2015, when the transfers in kind occurred, Cooltech had been owed money by various Urbacorp entities for many months. There is no evidence as to whether this was unusual for these parties. There was no discussion in the evidence of the implication, if any, of the timing in the condominium development business cycle - just before the buildings were completed - when a developer's cash and credit might be expected to be near exhaustion perhaps. Was this normal for these parties? Was anyone particularly fussed? Payments in kind are not unknown in the industry. Were they unusual between these parties? Without knowing some of these answers, I cannot draw any inference about what Cooltech might have known about the state of Urbancorp's finances if anything.

[12] I also do not know what Mr. Saskin thought or knew about the status of his business at the time. There is simply no evidence before me other than (a) the fact that Urbancorp had outstanding debts to Cooltech for many months on different projects or loans; and (b) Urbancorp failed in late 2016. The financial statements are not particularly instructive. A snapshot of a moment in time based on depreciated book values does not provide a real time assessment of cash flows and realizable values or allow an inference that the business had failed or inevitably would be failing shortly so as to suggest that other creditors' interests ought to have been top-of-mind at the time.

[13] In fact, in January, 2016, many months *after* the property transfers occurred, Urbancorp raised a very substantial amount of money by issuing bonds in Israel. That transaction may be challenged by the Israeli bondholders and their legal representative. I am not suggesting that it was not also problematic. But, the simple fact that Urbacorp was having cash flow problems that were then followed by a successful public financing also does not lead to any ready inference that Urbancorp or Cooltech knew or ought to have known that, in the summer of 2015, Urbancorp was so near failure that by accepting units in kind Cooltech was stealing a march on other creditors - some of whom (e.g. the Israeli bondholders) did not even exist as yet.

[14] Apparently, Mr. Saskin offered units to other creditors too. Some took them and others did not. Cooltech's principal spoke to some of the other creditors prior to agreeing to take units. That fact, on its own, does not allow me to infer anything nefarious or any particular state of knowledge in Cooltech.

[15] Neither does the fact that Cooltech accepted units from Edge on indebtedness from other entities establish any entitlement to relief against Cooltech. A creditor is indifferent as to which entity pays the bills in a wholly-owned group. Absent complicity in a tort or breach of trust, the pocket from which Mr. Saskin chooses to pay is no business of Cooltech. Mr. Saskin owned the whole outfit 100%. Absent insolvency, you are not robbing Peter to pay Paul if you are Peter.

The Role of the Monitor

[16] Trustees in bankruptcy can be recognized as complainants in oppression proceedings. *Olympia & York Developments Ltd (Trustee of) v Olympia & York Realty Corp*. (2001), 68 OR (3d) 544 (CA). The recognition is discretionary. At para. 45 of *Olympia & York*, Goudge JA explained:

> …s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly [page 556] oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

[17] In *Ernst & Young Inc. v Essar Global Fund Ltd*., 2017 ONSC 1366, the *CCAA* court specifically empowered the Monitor to bring oppression proceedings against a party whom the Monitor alleged was impairing the company's ability to restructure by its oppressive conduct. See paras. 34 and 37.

[18] In the case at bar, the Monitor has not been empowered to bring proceedings on behalf of the *CCAA* debtors. Mr. Drake points to the Monitor's authority to seek advice and directions in its initial order. In my view, that power ought to have been used *before* the Monitor purported to act on behalf of the debtor corporations in claiming relief against a creditor. Until empowered to sue, the Monitor is a neutral with duties to all interested parties. See *Essar,* at para. 30.

[19] The Monitor is not truly seeking advice and directions in this motion. It has sued Cooltech for monetary relief under the banner of a motion for advice and directions. It seeks judgment holding Cooltech liable. It is not asking for the court's input or advice other than to adjudicate the complaint.

[20] Monitors can certainly be empowered to bring legal proceedings and to act on behalf of *CCAA* debtors in appropriate circumstances. Under s. 23 (1)(k) of the *CCAA* the court has broad discretion to empower the Monitor to take steps to facilitate the restructuring or to advance the goals of the *CCAA. Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 (CanLII) at para. 70. Mr. Drake submits that when the court appointed a creditors' committee in this case, a sealed report from the Monitor made reference to the Monitor bringing proceedings in the interests of creditors. However, the order itself grants no such authority to the Monitor. A reference in a Monitor's report that is not adopted into an order is not approval for the Monitor to take steps. There are no steps delineated. There are no parameters for the exercise established.

[21] The Monitor is not a trustee in bankruptcy. The creditors know how to bankrupt a debtor if they believe doing so is appropriate. In the interim, I do not see how, in this liquidating *CCAA* process, the Monitor bringing proceedings in place of the creditors who stand to gain from it can be said to facilitate the restructuring. In *Essar* there was a particular roadblock to a fair and proper restructuring affecting all interested parties. Here, by contrast, the Monitor pits the current creditors against a group of creditors who were paid over one year before the proceedings commenced. Why is this a fight for the Monitor rather than the creditors who stand to benefit from the claim? There is no evidence before me concerning the existing creditor body. Perhaps there are tens of thousands of powerless or involuntary creditors who need representation as in the *CCAA* proceedings for *Nortel Networks Limited.* Or is there, perhaps, one legal representative of a body of similarly situated creditors who is well able to bring proceedings if he should wish to do so?

[22] I accept that if proceedings are available, they can be brought summarily within the procedural context of this case as was done in *Essar* and as approved expressly in *Stelco Inc., Re*, 2006 CanLII 16526 (ON CA). But, I am not convinced in the utility of empowering the Monitor to drop its cloak of neutrality to bring what are really inter-creditor proceedings or that doing so facilitates this restructuring process.

[23] Moreover, the Monitor asserts that the creditors generally held a reasonable expectation that they would be treated fairly and lawfully by Edge. It asks to be recognized as a complainant under the oppression remedy on the creditors' behalves. However, in *Lord v Clearspring Spectrum Holdings L.P.*, 2017 ONSC 2246 (CanLII)**,** I explained:

> …before a person can claim an oppression remedy, he or she must actually, subjectively, i.e. personally, hold an expectation. For example, at para. 63 of [*BCE Inc. v. 1976 Debentureholders*, [2008] 3 SCR 560] the Court wrote:
>
> > [63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 1999 CanLII 14946 (ON SC), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.
>
> [56] That is, a stakeholder must personally (i.e. subjectively) have an expectation and actually rely on it before it even gets to the question of whether that expectation is also objectively reasonable.

[24] I accept that the Monitor does not have to hold the expectation that it asserts. Moreover, as discussed in *Lord* at para. 56, the expectation may be proved by inference. In this case though, I know absolutely nothing about the creditors in existence in July and August 2015 or what they might have known or expected. I have no facts on which to assess whether any expectation that they might have held was reasonable. I have no evidence that anyone relied or ought reasonably to have relied on whatever expectation they may have held or from which to infer that fact. It is

trite to say that any creditor expects fair and legal treatment. In the summer of 2015, did they receive fair and legal treatment? There is no suggestion that the payments made by Edge were unlawful. How do I know if they were fair? Were they offered to all equally? What effect did the payments have on the company when made? Did the payments, perhaps, stave off a group failure for long enough to allow the refinancing of the enterprise to occur in January, 2016? Was that refinancing a good, bad, or indifferent thing *vis-à-vis* Edge and its creditors as at mid-2015?

[25] In short, there is no evidence before me to allow me to assess whether there is a reason for the Monitor to be entitled to the exercise of discretion to (a) allow it to sue; or (b) allow it to qualify as complainant. Absent evidence that can lead to an inference of the existence of reasonable expectations, reliance, and oppression, the Monitor is unsuited to act for creditors in this case.

[26] If there is no actual creditor with a sufficient stake to sue or to support the Monitor with evidence in a suit, then I again question the utility of empowering the Monitor to bring a claim that pits creditors against each other. It is not the Monitor's role to "try one on" to see if it can increase recovery for the current creditor body. Creditors are free to spend their money and face the consequences. The Monitor, by contrast, acts with the *imprimatur* the Court. It is far more constrained in its activities and ought typically to consider seeking court approval before undertaking litigation on behalf of particular interests.

Costs

[27] The Monitor initially brought the case challenging the value of the transferred units and also challenging the transfers of units by Edge in respect of its own debt. It trimmed back its allegations as it realized it lacked evidence and a legal basis to make those claims. That should have been determined before the Monitor put the respondents to the cost of responding to those broad, meritless claims. Mr. Drake agreed that the respondents' request for $40,000 was a reasonable quantum for costs if they succeeded.

Order

[28] The motion for advice and directions is dismissed. The Monitor shall pay costs to the respondents fixed at $40,000 all-in forthwith.

F.L. Myers J.

Date: December 20, 2017

CITATION: U.S. Steel Canada Inc. (Re), 2017 ONSC 1967
COURT FILE NO.: CV-14-10695-00CL
DATE: 20170419

See paras. 5-7, 12, 17

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Heather Meredith* and *Sharon Kour*, for the Applicant, U.S. Steel Canada Inc.

Robert Staley and *Kevin J. Zych*, for the Monitor, Ernst & Young Inc.

Gale Rubenstein and *Melaney Wagner*, for the Superintendent of Financial Institutions and the Province of Ontario

Lily Harmer, for the United Steelworkers International Union and the United Steelworkers International Union, Local 8782

Sharon L.C. White, for the United Steelworkers International Union, Local 1005

James Harnum, Representative Counsel for the non-unionized active employees and retirees

Michael Barrack, *Mitch Grossell* and *Leanne Williams*, for United States Steel Corporation

Michael Kovacevic, for the City of Hamilton

Lou Brzezinski, for Robert and Sharon Milbourne

Patrick Riesterer, for Brookfield Capital Partners Ltd.

Mario Forte, for Bedrock Industries Canada LLC and Bedrock Industries L.P.

Vlad Calina, for USSCF, the Plan Advisor

HEARD: March 15, 2017

ENDORSEMENT

[1] The applicant, U.S. Steel Canada Inc. ("USSC"), sought a number of orders in respect of a proposed plan of arrangement and compromise (the "Plan") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Plan contemplates the acquisition of substantially all of USSC's operating business and assets on a going-concern basis by Bedrock Industries Canada LLC ("Bedrock") through the acquisition of all of USSC's outstanding shares. At the conclusion of the hearing of the motions, I advised the parties that the motions were granted for written reasons to follow. This Endorsement sets out the reasons for such relief.

[2] As a preliminary matter, it should be noted that the motions were supported by Her Majesty the Queen in Right of the Province of Ontario ("Ontario") and the United States Steel Corporation ("USS") and were not opposed by Representative Counsel for the current and former non-unionized employees of USSC or by the United Steelworkers International Union (the "USW"), USW Local 8782 or USW Local 1005. In addition, in its thirty-seventh report, dated March 13, 2017 (the "Monitor's Report"), the Monitor recommended approval of each of the motions for the reasons set out therein. Such level of support constituted an important consideration in the Court's approval of each of the motions, in addition to the specific considerations set out below.

The Supplementary Claims Process Order

[3] USSC seeks approval of an order providing for a process to identify and determine claims not previously determined pursuant to the order dated November 13, 2014 (the "General Claims Process Order"). The General Claims Process Order excluded claims of current and former employees respecting outstanding wages, salaries and benefits, claims relating to USSC's retirement plans, claims relating to non-pension post-employment benefits ("OPEB"s), and claims against the directors and officers of USSC.

[4] The purpose of the order sought is to crystallize the pool of claims that will be affected under the Plan. The proposed supplementary claims process would pertain to a subset of the creditors whose claims were excluded from the General Claims Process Order, being: (1) current and former non-unionized employees with pension claims, OPEB claims and supplemental pension claims; (2) former non-unionized employees with claims pertaining to the termination of their employment; (3) persons with claims against the directors and officers of USSC; and (4) persons who filed a claim after December 22, 2014 but before March 1, 2017.

[5] The Court has the authority under s. 11 of the CCAA to make orders it considers appropriate in the circumstances, subject to restrictions set out in the CCAA. It is not disputed that such authority includes the authority to approve a process to solicit and determine claims against a debtor company and its directors and officers.

[6] In this case, the claims process sought is necessary for the approval and implementation of the Plan, both for voting purposes and in order to determine the universe of claims subject to the releases contemplated by the Plan. There is no suggestion from the stakeholders appearing on this motion that the proposed claims process is not fair to the potential claimants in terms of notice or process. The timeline provided for the determination of the relevant claims is also expedient in as much as it is consistent with the timing of the proposed meetings of creditors dealt with below. In this regard, the Monitor has advised in the Monitor's Report that it believes

the proposed claims process provides sufficient and timely notification to allow creditors to submit proofs of claim or dispute notices, as applicable, prior to the claims bar date under the proposed order, being April 20, 2017, particularly in view of the fact that non-unionized employees and retirees will not need to file individual proofs of claim in most circumstances. Further, the Monitor will have a supervisory role to ensure that claimants are dealt with reasonably and fairly. In respect of the late-filed claims in item (4) above, the Monitor does not believe their inclusion in the claims process will materially prejudice the other creditors in view of the *de minimus* amount of these claims and the current status of the Plan.

[7] Based on the foregoing, including the support for the motion and the absence of any objections thereto as set out above, I am satisfied that the proposed supplementary claims process order should be approved.

The Meetings Order

[8] USSC seeks an order accepting the filing of the Plan; authorizing USSC to convene creditors meetings to vote on the Plan; approving the classification of creditors as set out in the Plan for the purposes of the meetings and voting on the Plan; approving the distribution of the notice of meeting and materials pertaining to the Plan; approving the procedures to be followed at the meetings; and setting May 9, 2017 as the date for the hearing of USSC's motion for an order of the Court sanctioning the Plan.

[9] The Plan is the outcome of an initial sales and restructuring/recapitalization process and a subsequent sale and investment solicitation process. These activities have been addressed fully in other endorsements of the Court, and are summarized in the affidavit of the chief restructuring officer of USSC, William Aziz, sworn March 10, 2017, and therefore need not be repeated here.

[10] There are two classes of "affected creditors" pursuant to the Plan:

(1) General unsecured creditors, which for this purpose do not include Ontario and USS, who would receive a cash distribution in respect of their claims which would be released, discharged and barred; and

(2) Creditors having claims for non-unionized pension benefits and OPEBs, which would be replaced by new non-unionized pension benefits and OPEBs, with these creditors' existing claims to be released, discharged and barred.

[11] USSC proposes that the meetings of these two classes of creditors be held on April 27, 2017.

[12] In determining whether the Court should approve the filing of the Plan under paragraph 3 of the initial order in these proceedings under the CCAA (the "Initial Order") and order the convening of a meeting of creditors to vote upon the Plan, the Court must be satisfied that the Plan is not doomed to failure. This standard is amply satisfied in the present circumstances, given the level of support for the motion and the absence of any objections as described above. The Court is not to determine the fairness and reasonableness of the Plan at this stage, such issues being reserved for the sanction hearing after the creditors meetings.

[13] Section 22 of the CCAA requires approval by the Court of the division of creditors into the classes contemplated by the Plan. The two classes of creditors contemplated by the Plan have been described above. For clarity, the Plan leaves the treatment of the claims of other creditors to be addressed pursuant to contractual arrangements to be negotiated between those creditors and USSC.

[14] I am satisfied that the creditors in each of the classes contemplated have the necessary commonality of interest required by s. 22(2) of the CCAA. The creditors in class (1) will receive a cash distribution in respect of their claims. The creditors in class (2) will not receive a cash distribution but will instead receive replacement benefits. Accordingly, the two classes of creditors receive different treatment under the Plan while each of the creditors within each class is an unsecured creditor who receives similar treatment under the Plan and would have similar remedies if the Plan is not accepted. I note as well that the Monitor supports the proposed classification of creditors as being appropriate based on the fact that the two classes have different interests and are treated differently under the Plan.

[15] Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings.

[16] The other terms of the proposed meetings order regarding the notice of the meetings, the conduct of the meetings, and voting at the meetings do not otherwise raise any substantive issues of fairness and reasonableness.

[17] Based on the foregoing, the proposed meetings order is approved.

Amendment of the Plan Support Agreement

[18] USSC also seeks an order authorizing USSC to enter into:

(1) An agreement (the "PSA Amending Agreement") amending the "CCAA Acquisition and Plan Sponsor Agreement" dated December 9, 2016 between USSC, Bedrock and Bedrock Industries L.P. (the "PSA"); and

(2) An agreement (the "Support Amending Agreement") amending the "Support Agreement" made December 9, 2016 between USSC and Ontario.

[19] The Court has the authority under ss. 11 and 11.02(2) to approve a debtor company entering into an agreement to facilitate a restructuring. The Court has previously authorized the PSA and the Support Agreement pursuant to such powers.

[20] The PSA Amending Agreement and the Support Amending Agreement, among other things, amend the timetable for various milestones to reflect the timetable contemplated by the meetings order. They also amend the existing agreements to reflect the term sheets as finalized to date respecting various aspects of the Plan arrangements.

[21] I am satisfied that the PSA Amending Agreement and the Support Amending Agreement should be approved as necessary for, and as furthering the purposes of, the proposed restructuring of USSC pursuant to the Plan.

Extension of the Stay Period

[22] Lastly, USSC seeks an order extending the stay of proceedings under the Initial Order in these proceedings to May 31, 2017.

[23] Section 11.02(2) of the CCAA gives the Court the discretion to extend the stay of proceedings if the requirements of s. 11.02(3) are satisfied.

[24] In this case, USSC has established that it has acted, and is acting, in good faith and with due diligence to implement a plan of restructuring and compromise. The proposed stay extension provides USSC with the time required to allow the creditors to vote on the Plan at the creditors meetings and, if approved, to seek the Court's approval at the sanction hearing. It also grants USSC sufficient time to negotiate the necessary agreements and to finalize the necessary arrangements that are conditions to implementation of the Plan. The Monitor advises in the Monitor's Report that the revised cash flow forecast of USSC contemplates that USSC will have sufficient liquidity to continue to operate throughout the proposed stay extension period.

[25] Accordingly, I am satisfied that it is appropriate to approve the extension of the stay of proceedings under the Initial Order to May 31, 2017.

Wilton-Siegel, J.

Date: April 19, 2017

Court File No. CV-21-00655505-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	WEDNESDAY, THE 4TH
JUSTICE KOEHNEN	DAY OF AUGUST, 2021

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 YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A"

CLAIMS PROCEDURE ORDER

THIS MOTION, made by Yatsen Group of Companies Inc. ("**YGC**"), SAR Real Estate Inc. and the companies listed in Schedule "A" hereto (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an Order establishing a claims procedure for the identification and quantification of certain claims against the Applicants and their directors and officers was heard this day by video conference at Toronto, Ontario.

ON READING the Notice of Motion of the Applicants, the Affidavit of Joseph McCullagh sworn July 29, 2021, including the exhibits thereto, and the Fifth Report of Alvarez & Marsal Canada Inc., in its capacity as Monitor (the "**Monitor**") dated July 29, 2021, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, and such other

counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Andrew Harmes sworn July 29, 2021, filed,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and Motion Record herein be and is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS AND INTERPRETATION

2. THIS COURT ORDERS that, for the purposes of this Order (this "**Claims Procedure Order**"), in addition to terms defined elsewhere herein, the following terms shall have the following meanings:

   (a) "**Affected Landlord Claims**" means all Claims by Landlords against one or more of the Applicants that are not Unaffected Claims, including, for certainty, the Existing Allowed Landlord Claims;

   (b) "**Affected Landlord Creditor**" means a Landlord holding an Affected Landlord Claim, but only in respect of and to the extent of its Affected Landlord Claim, including, for certainty, an Existing Allowed Landlord Creditor;

   (c) "**Amended and Restated Initial Order**" means the Amended and Restated Initial Order granted in these CCAA Proceedings under the CCAA dated February 2, 2021, as amended, restated or varied from time to time;

   (d) "**Applicants**" has the meaning set forth in the preamble of this Claims Procedure Order;

(e) "**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday on which banks are generally open for business in Toronto, Ontario;

(f) "**CCAA**" has the meaning set forth in the preamble of this Claims Procedure Order;

(g) "**CCAA Proceedings**" means the within proceedings commenced by the Applicants under the CCAA under Court File No. CV-21-00655505-00CL;

(h) "**Claim**" means:

(i) any right or claim of any Person against any of the Applicants, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of any such Applicant in existence on the Filing Date, and costs payable in respect thereof, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against any of the Applicants with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts that existed prior to the Filing Date and any other claims that would have

been claims provable in bankruptcy had such Applicant become bankrupt on the Filing Date;

(ii) any right or claim of any Person against any of the Applicants in connection with any indebtedness, liability or obligation of any kind whatsoever owed by any such Applicant to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by such Applicant on or after the Filing Date of any contract, lease or other agreement whether written or oral (each, a "**Restructuring Period Claim**", and collectively, the "**Restructuring Period Claims**"); and

(iii) any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer (each a "**D&O Claim**", and collectively, the "**D&O Claims**"), in each case other than any Unaffected Claim;

(i) "**Claims Bar Date**" means 5:00 p.m. on September 1, 2021;

(j) "**Claims Officer**" means an individual that is agreed to by the Applicants and the Monitor, acting reasonably, or otherwise appointed by the Court from time to time on application by the Applicants, to adjudicate a Disputed Claim(s) pursuant to paragraphs 33 to 37 hereof;

(k) "**Claims Package**" means the materials to be provided to Landlords who may have a Claim in accordance with this Claims Procedure Order (other than the Existing Allowed Landlord Creditors), which materials shall include a Notice of Claim, a Notice of Dispute of Claim, an Instruction Letter, and such other materials as the Applicants, with the consent of the Monitor, may consider appropriate or desirable;

(l) "**Claims Schedule**" means a list of all Landlords, other than the Existing Allowed Landlord Creditors, prepared as at the date hereof by the Applicants, with the assistance of the Monitor, showing the name, last known address, last known fax number and last known email address of each such Landlord, to the extent such information is available in the books and records of the Applicants (except that where such Landlord is represented by counsel known by the Applicants, the address, fax number and email address of such counsel may be substituted) and the amount of each such Landlord's Affected Landlord Claim against the applicable Applicant(s) as determined by the Applicants in consultation with the Monitor;

(m) "**Court**" means the Ontario Superior Court of Justice (Commercial List);

(n) "**Creditors' Meeting**" means the virtual meeting of the Affected Landlord Creditors of the Applicants called for the purpose of considering and voting in respect of a Plan pursuant to the Meeting Order;

(o) "**D&O Claim**" has the meaning ascribed to that term in paragraph 2(h)(iii) of this Claims Procedure Order;

(p) "**D&O Claim Instruction Letter**" means the letter containing instructions for the completion of the D&O Proof of Claim, substantially in the form attached as Schedule "E" hereto;

(q) "**D&O Notice of Dispute of Revision or Disallowance**" means the notice referred to herein, substantially in the form attached as Schedule "H" hereto, which must be duly completed and delivered to the Monitor by any Landlord asserting a D&O Claim (other than any Existing Allowed Landlord Creditor) wishing to dispute a D&O Notice of Revision or Disallowance, with reasons for its dispute;

(r) "**D&O Notice of Revision or Disallowance**" means the notice referred to herein, substantially in the form attached as Schedule "G" hereto, advising a Landlord asserting a D&O Claim (other than any Existing Allowed Landlord Creditor) that the Applicants, with the consent of the Monitor, have revised or rejected all or part of such Landlord's D&O Claim set out in its D&O Proof of Claim;

(s) "**D&O Proof of Claim**" means the proof of claim referred to herein to be filed by any Landlord asserting a D&O Claim (other than any Existing Allowed Landlord

Creditor) against any of the Directors and/or Officers of any of the Applicants, substantially in the form attached as Schedule "F" hereto, and which shall include all available supporting documentation in respect of such D&O Claim;

(t) "**Director**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Applicants, in such capacity;

(u) "**Disputed Claim**" means a Disputed Voting Claim or a Disputed Distribution Claim (and for certainty does not include any Existing Allowed Landlord Claim);

(v) "**Disputed D&O Claim**" means a D&O Claim, or such portion thereof, which is not barred by any provision of this Claims Procedure Order, which is validly disputed in accordance with this Claims Procedure Order and which remains subject to adjudication in accordance with this Claims Procedure Order;

(w) "**Disputed Distribution Claim**" means an Affected Landlord Claim, or such portion thereof, that is not barred by any provision of this Claims Procedure Order, that has not been allowed as a Distribution Claim, that is validly disputed for distribution purposes in accordance with this Claims Procedure Order and that remains subject to adjudication for distribution purposes in accordance with this Claims Procedure Order (and for certainty does not include any Existing Allowed Landlord Claim);

(x) "**Disputed Voting Claim**" means an Affected Landlord Claim, or such portion thereof, that is not barred by any provision of this Claims Procedure Order, that

has not been allowed as a Voting Claim, that is validly disputed for voting purposes in accordance with this Claims Procedure Order and that remains subject to adjudication for voting purposes in accordance with this Claims Procedure Order (and for certainty does not include any Existing Allowed Landlord Claim);

(y) "**Distribution Claim**" means an Affected Landlord Claim, or such portion thereof, that is not barred by any provision of this Claims Procedure Order and that has been finally determined and accepted for distribution purposes in accordance with this Claims Procedure Order and the CCAA (including, for certainty, the Existing Allowed Landlord Claims);

(z) "**Existing Allowed Landlord Claim**" means a Claim of a Landlord against one or more of the Applicants that, as at the date of this Claims Procedure Order, has been agreed to in writing by such Landlord and the applicable Applicant(s), and consented to by the Monitor for voting and distribution purposes;

(aa) "**Existing Allowed Landlord Creditor**" means a Landlord in respect of and to the extent of its Existing Allowed Landlord Claim;

(bb) "**Filing Date**" means January 25, 2021;

(cc) "**Instruction Letter**" means the instruction letter to Affected Landlord Creditors (other than any Existing Allowed Landlord Creditor), substantially in the form attached as Schedule "B" hereto;

(dd) "**Landlord**" means a landlord under a Lease, on behalf of itself and all of such landlord's affiliates, shareholders, directors, officers, agents and other

representatives who are a party to or may have a Claim in respect of such Lease (and, for certainty, does not include a landlord under a real property lease that has been guaranteed by YGC but under which the tenant is not an Applicant, in such landlord's capacity as landlord under such lease);

(ee) "**Lease**" means a real property lease or occupancy agreement with an Applicant as the tenant under such lease or occupancy agreement, as such lease or occupancy agreement may have been or may be amended from time to time pursuant to its terms (and, for certainty, does not include a real property lease or occupancy agreement that has been guaranteed by YGC but under which the tenant is not an Applicant);

(ff) "**Meeting Order**" means an Order under the CCAA that, among other things, sets the date for the Creditors' Meeting, as same may be amended, restated or varied from time to time;

(gg) "**Monitor**" has the meaning set forth in the preamble of this Claims Procedure Order;

(hh) "**Monitor's Website**" means the case website established by the Monitor in respect of these CCAA Proceedings at the following URL: www.alvarezandmarsal.com/YatsenGroup;

(ii) "**Notice of Claim**" means the notice referred to in paragraph 14 hereof, substantially in the form attached as Schedule "C" hereto, prepared by the Applicants in consultation with the Monitor, to be disseminated by the Monitor

and/or its agents to each Landlord listed on the Claims Schedule (for certainty, not including the Existing Allowed Landlord Creditors) advising each such Landlord of its Affected Landlord Claim against the Applicants for voting and distribution purposes, as determined by the Applicants based on the books and records of the Applicants;

(jj) "**Notice of Dispute of Claim**" means the notice referred to in paragraph 20 hereof, substantially in the form attached as Schedule "D" hereto, which must be duly completed and delivered to the Monitor by any Affected Landlord Creditor (other than the Existing Allowed Landlord Creditors) wishing to dispute a Notice of Claim, with reasons for its dispute;

(kk) "**Officer**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Applicants, in such capacity;

(ll) "**Person**" means any individual, corporation, firm, limited or unlimited liability company, general or limited partnership, association (incorporated or unincorporated), trust, unincorporated organization, joint venture, trade union, government or any agency, regulatory body or officer thereof or any other entity, wherever situate or domiciled, and whether or not having legal status;

(mm) "**Plan**" means any proposed plan of compromise and arrangement to be filed by the Applicants pursuant to the CCAA, as the same may be amended, supplemented or restated from time to time in accordance with the terms thereof;

(nn) "**Post-Filing Lease Payments**" means any payment obligations incurred by any of the Applicants pursuant to a Lease from and after the Filing Date but before the earlier of (i) the Plan Implementation Date, and (ii) if applicable, the disclaimer, repudiation, resiliation or termination of the applicable Lease, in each case which are required to be paid pursuant to the Amended and Restated Initial Order;

(oo) "**Restructuring Period Claim**" has the meaning ascribed to that term in paragraph 2(h)(ii) of this Claims Procedure Order;

(pp) "**Restructuring Period Claims Bar Date**" means 5:00 p.m. on the later of (i) the Claims Bar Date and (ii) the date that is seven (7) Business Days after disclaimer, repudiation, resiliation or termination of the applicable agreement or other event giving rise to the applicable Restructuring Period Claim;

(qq) "**Unaffected Claims**" and each an "**Unaffected Claim**" shall have the meaning ascribed thereto in the Plan, and shall include:

(i) Claims secured by the Charges (as defined in the Amended and Restated Initial Order);

(ii) Claims enumerated in sections 5.1(2) and 19(2) of the CCAA;

(iii) equity claims enumerated in Section 2(1) of the CCAA;

(iv) any Claims in respect of Post-Filing Lease Payments;

(v) any Claims pursuant to any guarantees provided by YGC in respect of obligations of its subsidiaries that are not Applicants;

(vi) any Claims against an Applicant by (A) another Applicant or (B) a non-Applicant affiliate of one or more of the Applicants; and

(vii) any Claims by any Person that is not a Landlord (including, without limitation, any Claims of Wells Fargo against YGC as guarantor under the Wells Fargo Canadian Guarantee, as such terms are defined in the Amended and Restated Initial Order);

(rr) "**Voting Claim**" means an Affected Landlord Claim, or such portion thereof, that is not barred by any provision of this Claims Procedure Order and which has been finally determined and accepted for purposes of voting at the Creditors' Meeting in accordance with the provisions of this Claims Procedure Order and the CCAA (including, for certainty, any Existing Allowed Landlord Claim); and

(ss) "**YGC**" has the meaning set forth in the preamble of this Claims Procedure Order.

3. THIS COURT ORDERS that all references to the word "including" shall mean "including without limitation".

4. THIS COURT ORDERS that all references to the singular herein include the plural, the plural include the singular, and any gender includes all genders.

GENERAL PROVISIONS

5. THIS COURT ORDERS that (a) all references as to time herein shall mean local time in Toronto, Ontario, Canada, (b) any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein,

and (c) any reference to an event occurring on a day that is not a Business Day shall mean the next following day that is a Business Day.

6. THIS COURT ORDERS that all Claims shall be denominated in U.S. dollars. Any Claims denominated in a different currency shall be converted to U.S. dollars at the Bank of Canada daily exchange rate in effect on the Filing Date.

7. THIS COURT ORDERS that, unless otherwise agreed by the Applicants in consultation with the Monitor, interest and penalties that would otherwise accrue, if applicable, after the Filing Date shall not be included in any Claim.

8. THIS COURT ORDERS that the forms of Notice of Claim, Instruction Letter, Notice of Dispute of Claim, D&O Claim Instruction Letter, D&O Proof of Claim, D&O Notice of Revision or Disallowance and D&O Notice of Dispute of Revision or Disallowance are hereby approved, subject to such immaterial or non-substantive amendments as may be necessary or desirable as determined by the Applicants in consultation with the Monitor.

9. THIS COURT ORDERS that, notwithstanding any other provisions of this Claims Procedure Order, the delivery of a Notice of Claim to a Landlord, the solicitation of D&O Proofs of Claim and any filing by any Person of a D&O Proof of Claim shall not, for that reason only, grant any Person any rights under any proposed Plan or otherwise, including without limitation, in respect of the nature, validity, quantum and priority of its Claim, or any standing in these CCAA Proceedings, except as specifically set out in this Claims Procedure Order.

10. THIS COURT ORDERS that the Applicants and the Monitor are hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered pursuant to this Claims Procedure Order are completed and executed and the time in which they are submitted, and may, where they are satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Claims Procedure Order as to completion, execution and time of delivery of such forms and to request any further documentation from the applicable Person that the Applicants or the Monitor may require in order to enable them to determine the validity of a Claim.

11. THIS COURT ORDERS that, notwithstanding anything to the contrary herein, the Applicants may at any time, and from time to time, refer any Claim (including any D&O Claim) for resolution to the Court where in the view of the Applicants, in consultation with the Monitor, such a referral is necessary, preferable or advisable for the resolution or determination of the Claim.

MONITOR'S ROLE

12. THIS COURT ORDERS that, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, the Amended and Restated Initial Order and any other Orders of the Court, the Monitor shall assist the Applicants in connection with the administration of the claims procedure provided for herein, and is hereby authorized, directed and empowered to take such actions and fulfill such other roles as are contemplated by this Claims Procedure Order or incidental thereto.

13. THIS COURT ORDERS that, in carrying out the terms of this Order, the Monitor: (a) shall have all of the protections given to it by the CCAA, the Amended and Restated Initial Order, this Claims Procedure Order, and any other Orders of the Court in these CCAA Proceedings, and as an officer of the Court, including the stay of proceedings in its favour; (b) shall incur no liability or obligation as a result of the carrying out of the provisions of this Claims Procedure Order, other than in respect of any gross negligence or wilful misconduct on its part; (c) shall be entitled to rely on the books and records of the Applicants and any information provided by the Applicants, all without independent investigation; (d) shall not be liable for any claims or damages resulting from any errors or omissions in such books, records and information; and (e) may seek such assistance as may be reasonably required to carry out its duties and obligations pursuant to this Claims Procedure Order from the Applicants or any of their affiliated companies.

NOTICE

14. THIS COURT ORDERS that, as soon as practicable after the date of this Claims Procedure Order, the Monitor or its agent shall send a Claims Package to each of the Affected Landlord Creditors (other than the Existing Allowed Landlord Creditors) by e-mail, courier or prepaid ordinary mail to the address as shown on the Claims Schedule. The Notice of Claim included in the Claims Package shall specify the Affected Landlord Creditor's Affected Landlord Claim for voting and distribution purposes as determined by the Applicants, in consultation with the Monitor, based on the books and records of the Applicants.

15. THIS COURT ORDERS that the Monitor shall cause copies of the form of the Claims Package, the D&O Instruction Letter and the D&O Proof of Claim to be posted on the Monitor's Website as soon as practicable after the date of this Claims Procedure Order.

16. THIS COURT ORDERS that to the extent any Landlord requests documents or information regarding the Claims Process prior to the Claims Bar Date, or if the Applicants or the Monitor become aware of any further Claims of a Landlord, the Monitor shall forthwith send, or cause to be sent, to such Landlord a Claims Package, direct such Landlord to the documents posted on the Monitor's Website or otherwise respond to the requests for documents or information as the Monitor may consider appropriate in the circumstances, in consultation with the Applicants.

17. THIS COURT ORDERS that the sending of the Claims Package to the applicable Landlords and the posting of the Claims Package on the Monitor's Website, in accordance with this Claims Procedure Order, shall constitute good and sufficient service and delivery of notice of this Claims Procedure Order, the Claims Bar Date and the Restructuring Period Claims Bar Date on all Persons who may be entitled to receive notice and who may wish to assert a Claim, and no other notice or service need be given or made and no other document or material need be sent to or served upon any Person in respect of this Claims Procedure Order, except as otherwise specifically provided for in this Claims Procedure Order.

EXISTING ALLOWED LANDLORD CLAIMS

18. THIS COURT ORDERS that neither the Applicants nor the Monitor shall be required to send a Claims Package to the Existing Allowed Landlord Creditors in respect of any

Existing Allowed Landlord Claims, and the Existing Allowed Landlord Creditors shall not be required to file any documentation in respect of their Existing Allowed Landlord Claims.

19. THIS COURT ORDERS that the Claims comprising each of the Existing Allowed Landlord Claims shall be and are deemed to be the full and final Claims of the applicable Existing Allowed Landlord Creditors (including, without limitation, in respect of any D&O Claims) and shall constitute Voting Claims and Distribution Claims for purposes of voting on and receiving distributions pursuant to the Plan. The claims procedure otherwise set forth in paragraphs 20 to 37 this Claims Procedure Order shall not apply to the Existing Allowed Landlord Creditors in respect of such Existing Allowed Landlord Claims. For greater certainty, and notwithstanding anything to the contrary elsewhere herein, the Existing Allowed Landlord Creditors shall not be entitled to file a D&O Proof of Claim and any D&O Claims by the Existing Allowed Landlord Creditors are hereby forever barred.

CLAIMS PROCEDURE FOR CLAIMS AGAINST THE APPLICANTS

20. THIS COURT ORDERS that if an Affected Landlord Creditor wishes to dispute the amount of its Affected Landlord Claim set out in the Notice of Claim, the Affected Landlord Creditor shall deliver to the Monitor a Notice of Dispute of Claim which must be received by the Monitor by no later than the Claims Bar Date. Such Affected Landlord Creditor shall specify therein the details of the dispute with respect to its Affected Landlord Claim and shall specify whether it disputes the determination of the Affected Landlord Claim for voting and/or distribution purposes.

21. THIS COURT ORDERS that if an Affected Landlord Creditor does not deliver to the Monitor a completed Notice of Dispute of Claim such that it is received by the Monitor by the Claims Bar Date disputing its Claims as set out in the Notice of Claim for voting and distribution purposes, then (a) such Affected Landlord Creditor shall be deemed to have accepted the determination of the Affected Landlord Creditor's Claim as set out in the Notice of Claim for both voting and distribution purposes, (b) such Affected Landlord Creditor's Claim as determined in the Notice of Claim shall be treated as both a Voting Claim and a Distribution Claim as set out in the Notice of Claim, and (c) any and all of the Affected Landlord Creditor's rights to dispute the Claims as determined in the Notice of Claim, or to otherwise assert or pursue such Claims other than as they are determined in the Notice of Claim, shall be forever extinguished and barred without further act or notification. An Affected Landlord Creditor may accept a determination of a Claim for voting purposes as set out in the Notice of Claim and dispute the determination of the Claim for distribution purposes provided that it does so in its Notice of Dispute of Claim and such Notice of Dispute of Claim is received by the Monitor by the Claims Bar Date, in which case such determination of the Affected Landlord Creditor's Claim for voting purposes shall not in any way affect and is without prejudice to the process to determine such Affected Landlord Creditor's Claim for distribution purposes.

22. THIS COURT ORDERS that the Monitor and the Applicants shall review all Notices of Dispute of Claim which may be received by the Claims Bar Date.

23. THIS COURT ORDERS that, in the event that the Applicants, with the assistance of the Monitor, are unable to resolve a dispute regarding any Disputed Voting Claim with an Affected Landlord Creditor, the Applicants shall so notify the Monitor and the Affected

Landlord Creditor. Thereafter, the Disputed Voting Claim shall be referred to the Court or a Claims Officer for resolution, or to such alternative dispute resolution as may be ordered by the Court or as agreed to by the Monitor, the Applicants and the applicable Affected Landlord Creditor; provided that to the extent a Claim is referred under this paragraph to the Court or a Claims Officer, or an alternative dispute resolution, it shall be on the basis that the Claim against the Applicants shall be resolved or adjudicated for voting purposes (and that it shall remain open to the Applicants, in consultation with the Monitor, to determine whether such Claim shall be concurrently resolved or adjudicated for distribution purposes or subject to a future hearing by the Court or a Claims Officer, or an alternative dispute resolution, to determine the Affected Landlord Creditor's Distribution Claim in accordance with paragraph 25 hereof). The Court, the Claims Officer or an alternative dispute resolution, as the case may be, shall resolve the dispute between the Applicants and the Affected Landlord Creditor.

24. THIS COURT ORDERS that where the Affected Landlord Creditor's Disputed Voting Claim has not been finally determined in accordance with this Claims Procedure Order by the date on which a vote is held at the Meeting, the ability of such Affected Landlord Creditor to vote its Disputed Voting Claim and the effect of casting any such vote shall be governed by the Meeting Order.

25. THIS COURT ORDERS that, in the event that the Applicants, with the assistance of the Monitor, are unable to resolve a dispute with an Affected Landlord Creditor regarding any Disputed Distribution Claim, the Applicants shall so notify the Monitor and the Affected Landlord Creditor. Thereafter, the Disputed Distribution Claim shall be referred to the Court or a Claims Officer for resolution, or to such alternative dispute

resolution as may be ordered by the Court or as agreed to by the Monitor, the Applicants and the applicable Affected Landlord Creditor. The Court, the Claims Officer or an alternative dispute resolution, as the case may be, shall resolve the dispute between the Applicants and such Affected Landlord Creditor.

26. THIS COURT ORDERS that the following shall apply with respect to any Restructuring Period Claims:

(a) any notices of disclaimer or resiliation delivered to Landlords by the Applicants after the date of this Claims Procedure Order shall be accompanied by a Claims Package;

(b) the Monitor shall as soon as practicable send a Claims Package to any Landlord that makes a request therefor in respect of a Restructuring Period Claim prior to the Restructuring Period Claims Bar Date;

(c) the Monitor shall, as soon as practicable after becoming aware of any other circumstance giving rise to a Restructuring Period Claim, send a Claims Package to the Landlord in respect of such Restructuring Period Claim in the manner provided for herein; and

(d) the Restructuring Period Claims Bar Date shall apply to Restructuring Period Claims, and all other steps, actions, deadlines and other requirements set forth in this Claims Procedure Order shall apply *mutatis mutandis*.

CLAIMS PROCEDURE FOR D&O CLAIMS

27. THIS COURT ORDERS that any Landlord (other than any Existing Allowed Landlord Creditor) that intends to assert a D&O Claim shall file a D&O Proof of Claim with the Monitor on or before the Claims Bar Date. The Monitor or the Applicants shall provide a copy of the form of D&O Proof of Claim to any Landlord (other than any Existing Allowed Landlord Creditor) that makes a request therefor prior to the Claims Bar Date.

28. THIS COURT ORDERS that if a Landlord does not file a D&O Proof of Claim with respect to a D&O Claim with the Monitor such that it is received by the Monitor by the Claims Bar Date, any and all such D&O Claims of such Landlord shall be forever extinguished and barred without any further act or notification and irrespective of whether or not such Landlord received a Claims Package, and the Directors and Officers shall have no liability whatsoever in respect of such D&O Claims, for certainty, whether or not a Plan is ultimately approved in these CCAA Proceedings.

29. THIS COURT ORDERS that the Applicants, with the assistance of the Monitor, shall review all D&O Proofs of Claim which may be received from Landlords (other than Existing Allowed Landlord Creditors) by the Claims Bar Date and shall accept, revise or reject each D&O Claim set out therein. The Monitor shall provide copies of the D&O Proofs of Claim in respect of D&O Claims to any subject Director or Officer (or their respective counsel) upon such request being made. The Monitor shall notify each Landlord (other than any Existing Allowed Landlord Creditor) who has delivered a D&O Proof of Claim by the Claims Bar Date in respect of D&O Claims as to whether such Landlord's Claim as set out therein has been revised or rejected and the reasons therefor,

by sending a D&O Notice of Revision or Disallowance. The Monitor shall provide a copy of such D&O Notice of Revision or Disallowance to any subject Director or Officer (or their respective counsel) upon such request being made.

30. THIS COURT ORDERS that any Landlord who wishes to dispute a D&O Notice of Revision or Disallowance sent pursuant paragraph 29 above shall deliver a D&O Notice of Dispute of Revision or Disallowance to the Monitor, with a copy to the Applicants, such that it is received by the Monitor by no later than 5:00 p.m. on the date that is five (5) Business Days after the date of delivery to the applicable Landlord of the D&O Notice of Revision or Disallowance. The Monitor shall provide a copy of such D&O Notice of Dispute of Revision or Disallowance to any subject Director or Officer (or their respective counsel).

31. THIS COURT ORDERS that where a Landlord that receives a D&O Notice of Revision or Disallowance pursuant to paragraph 29 above does not file a D&O Notice of Dispute of Revision or Disallowance by the time set out in paragraph 30 above, such Landlord's D&O Claim(s) shall be deemed to be as determined in the D&O Notice of Revision or Disallowance and any and all of such Landlord's rights to dispute the D&O Claim(s) as determined in the D&O Notice of Revision or Disallowance or to otherwise assert or pursue such D&O Claims other than as they are determined in the D&O Notice of Revision or Disallowance shall be forever extinguished and barred without further act or notification, for certainty, whether or not a Plan is ultimately approved in these CCAA Proceedings.

32. THIS COURT ORDERS that in the event that the Applicants, in consultation with the Monitor, determine that it is necessary to finally determine the amount of a D&O Claim and the Applicants, with the assistance of the Monitor and the consent of the applicable Directors and Officers, are unable to resolve a dispute regarding such D&O Claim with the Landlord asserting such D&O Claim, the Applicants shall so notify the Monitor and such Landlord. Thereafter, the Disputed D&O Claim shall be referred to the Court or a Claims Officer for resolution, or to such alternative dispute resolution as may be ordered by the Court or as agreed to by the Monitor, the Applicants and the applicable Landlord. The Court, the Claims Officer or an alternative dispute resolution, as the case may be, shall resolve the dispute, for certainty, whether or not a Plan is ultimately approved in these CCAA Proceedings.

CLAIMS OFFICER

33. THIS COURT ORDERS that the decision as to whether a Disputed Claim or a Disputed D&O Claim should be adjudicated by the Court or a Claims Officer shall be determined by the Applicants in consultation with the Monitor.

34. THIS COURT ORDERS that the Applicants may apply to this Court for an Order appointing a Claims Officer to resolve Disputed Claims and/or Disputed D&O Claims on the terms set forth in this Claims Procedure Order and/or such other terms as may be ordered by this Court, or may agree on a Claims Officer with the Monitor to resolve such Affected Landlord Creditor's Disputed Claim and/or Disputed D&O Claim on the terms set forth in this Claims Procedure Order.

35. THIS COURT ORDERS that, in the event a Disputed Claim is to be adjudicated by a Claims Officer pursuant to paragraph 33 hereof, such Claims Officer shall determine the validity and amount of such Disputed Claim and to the extent necessary may determine whether any Claim or part thereof constitutes an Unaffected Claim and shall provide written reasons. The Claims Officer shall determine all procedural matters which may arise in respect of their determination of these matters, including the manner in which any evidence may be adduced. The Claims Officer shall have the discretion to determine by whom and to what extent the costs of any hearing before the Claims Officer shall be paid.

36. THIS COURT ORDERS that the Monitor, the Affected Landlord Creditor or the applicable Applicant may, within ten (10) days of such party receiving notice of a Claims Officer's determination of the value of an Affected Landlord Creditor's Claim, appeal such determination or any other matter determined by the Claims Officer in accordance with paragraph 35 hereof or otherwise to the Court by filing a notice of appeal, and the appeal shall be initially returnable within ten (10) days of filing such notice of appeal.

37. THIS COURT ORDERS that if no party appeals the determination of the value of a Claim by a Claims Officer within the time set out in paragraph 36 hereof, the decision of the Claims Officer in determining the value of the Affected Landlord Creditor's Claim shall be final and binding upon the Applicants, the Monitor, and the Affected Landlord Creditor, and there shall be no further right of appeal, review or recourse to the Court from the Claims Officer's final determination of a Claim.

SET-OFF

38. THIS COURT ORDERS that the allowance of any Claim hereunder shall not constitute a waiver or release by the Applicants of any claim for set-off (whether by way of legal, equitable or contractual set-off) that the Applicants may have against any Person.

NOTICE OF TRANSFEREES

39. THIS COURT ORDERS that if, after the Filing Date and subject to any restrictions contained in Applicable Laws or any contractual arrangement with any of the Applicants, the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor the Applicants shall be obligated to give notice or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until written notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received and acknowledged by the Applicants and the Monitor in writing, and thereafter such transferee or assignee shall for the purposes hereof constitute the "Affected Landlord Creditor" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Claims Procedure Order prior to receipt and acknowledgement by the Applicants and the Monitor of satisfactory evidence of such transfer or assignment. For greater certainty, the Applicants shall not recognize partial transfers or assignments of Claims or any transfers or assignments of Claims that are not completed pursuant to Applicable Laws and in compliance with any applicable contractual arrangements. A transferee or assignee of a Claim takes the Claim subject to any rights of set-off to which the Applicants may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set-off, apply,

merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to the Applicants. The effect of a transfer or assignment of a Claim for purposes of voting at the Creditors' Meeting shall be governed by the Meeting Order.

SERVICE AND NOTICES

40. THIS COURT ORDERS that the Applicants and the Monitor may, unless otherwise specified by this Claims Procedure Order, serve and deliver, or cause to be served and delivered, the Claims Packages, and any letters, notices or other documents, to Landlords or any other interested Person by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, fax or email to such Persons at the physical or electronic address or fax number, as applicable, last shown on the books and records of the Applicants. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Ontario, the fifth Business Day after mailing within Canada (other than within Ontario) or the United States, and the tenth Business Day after mailing internationally (other than the United States); (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by fax or email by 5:00 p.m. on a Business Day, on such Business Day, and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

41. THIS COURT ORDERS that any notice or communication required to be provided or delivered by a Landlord to the Monitor or the Applicants under this Claims Procedure Order shall be in writing in substantially the form, if any, provided for in this Claims

Procedure Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery or email addressed to:

If to the Applicants:

c/o Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Attention: L. Joseph Latham / Caroline Descours
Email: jlatham@goodmans.ca / cdescours@goodmans.ca

If to the Monitor:

Alvarez & Marsal Canada Inc.
Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
Toronto, ON M5J 2J5

Attention: Alan J. Hutchens / Joshua Nevsky / Andrew Sterling
Email: ahutchens@alvarezandmarsal.com /
jnevsky@alvarezandmarsal.com /
asterling@alvarezandmarsal.com

With a copy (which shall not constitute notice) to:

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
100 King Street West, Suite 6200
Toronto, ON M5X 1B8

Attention: Tracy Sandler / Dave Rosenblat
Email: tsandler@osler.com / drosenblat@osler.com

Any such notice or communication delivered by a Landlord shall be deemed to be received upon actual receipt thereof by the Applicants or the Monitor, as applicable, during normal business hours on a Business Day or if delivered outside of normal business hours, the next Business Day.

42. THIS COURT ORDERS that if during any period during which notices or other communications are being given pursuant to this Claims Procedure Order a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, fax or email in accordance with this Claims Procedure Order.

43. THIS COURT ORDERS that in the event that this Claims Procedure Order is later amended by further Order of the Court, Monitor shall post such further Order on the Monitor's Website and such posting shall constitute adequate notice of such amended claims procedure.

MISCELLANEOUS

44. THIS COURT ORDERS that the Applicants or the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Claims Procedure Order, or for advice and directions concerning the discharge of their respective powers and duties under this Claims Procedure Order or the interpretation or application of this Claims Procedure Order.

45. THIS COURT ORDERS that nothing in this Claims Procedure Order shall prejudice the rights and remedies of any Directors or Officers under any applicable insurance policy or prevent or bar any Person from seeking recourse against or payment from any liability insurance policy or policies that exist to protect or indemnify the Directors or Officers,

whether such recourse or payment is sought directly by the Person asserting a Claim from the insurer or derivatively through the Director or Officer or any Applicant; provided, however, that nothing in this Claims Procedure Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Claims Procedure Order limit, remove, modify or alter any defence to such Claim available to the insurer pursuant to the provisions of any insurance policy or at law; and further provided that any Claim or portion thereof for which the Person receives payment directly from, or confirmation that they are covered by, any liability insurance policy or policies that exist to protect or indemnify the Directors or Officers shall not be recoverable as against an Applicant or Director or Officer as applicable.

RECOGNITION

46. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States or in any other foreign jurisdiction, to give effect to this Claims Procedure Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Claims Procedure Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Claims Procedure Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Claims Procedure Order.

47. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Claims Procedure Order and for assistance in carrying out the terms of this Claims Procedure Order, including, without limitation, the Monitor in its capacity as the foreign representative of the Applicants and of the within proceedings in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code.

SCHEDULE "A"

1. HEAP Japanese Food Inc.
2. KB Wisconsin Food Inc.
3. MT Security Square Food Inc.
4. SAR Buckland Food Inc.
5. SAR Coastland Food Inc.
6. SAR Coventry Food Inc.
7. SAR Dulles Expo Center Inc.
8. SAR First Colony Food Inc.
9. SAR Glenbrook Food Inc.
10. SAR Greenbrier Food Inc.
11. SAR Laurel Food Inc.
12. SAR Lloyd Food Inc.
13. SAR Oglethorpe Food Inc.
14. SAR Orange Park Food Inc.
15. SAR Oviedo Food Inc.
16. SAR Park Place Food Inc.
17. SAR Plymouth Food Inc.
18. SAR Ramsey Food Inc.
19. SAR Santa Rosa Food Inc.
20. SAR Security Square Food Inc.
21. SAR St. Charles Food Inc.
22. SAR Stafford Food Inc.
23. SAR Superstition Springs Food Inc.
24. SAR Tanforan Food Inc.

25. SAR Valley Plaza Food Inc.

26. SAR Westgate Massachusetts Food Inc.

27. SAR Willowbrook Food Inc.

28. SJ Arsenal Inc.

29. SJ Boynton Inc.

30. SJ Fox Run Inc.

31. SJ Lenox Food Inc.

32. SJ Macon Food Inc.

33. SJ Rosspark Food Inc.

34. SJ Savannah Food Inc.

35. SJ South Hills Food Inc.

SCHEDULE "B"

INSTRUCTION LETTER FOR THE CLAIMS PROCEDURE FOR AFFECTED LANDLORD CREDITORS OF YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A" (COLLECTIVELY, THE "APPLICANTS")

CLAIMS PROCEDURE

By Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated August 4, 2021 (as such Order may be amended from time to time, the "**Claims Procedure Order**") under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "**CCAA**"), the Applicants and Alvarez & Marsal Canada Inc., in its capacity as Court-appointed monitor of the Applicants (the "**Monitor**"), have been authorized to conduct a claims procedure (the "**Claims Procedure**"). A copy of the Claims Procedure Order and other public information concerning these CCAA proceedings can be obtained from the Monitor's website at www.alvarezandmarsal.com/YatsenGroup. Please review the Claims Procedure Order for the full terms of the Claims Procedure.

The Claims Procedure is intended to identify and determine the amount of any Landlord Claims against the Applicants, whether unliquidated, contingent or otherwise, that are to be affected in the plan of compromise and arrangement being pursued by the Applicants under the CCAA and any Claims against any or all of the Directors or Officers of the Applicants.

Pursuant to the Claim Procedure Order, the Monitor shall distribute a Notice of Claim to each Affected Landlord Creditor (other than any Existing Allowed Landlord Creditor) setting out the amount of such Affected Landlord Creditor's Affected Landlord Claim, for voting and distribution purposes, as determined by the Applicants, in consultation with the Monitor, based on the Applicants' books and records.

If you have received a Notice of Claim and you dispute the determination of your Claim as set forth therein for voting and/or distribution purposes, you must file a Notice of Dispute of Claim with the Monitor. All Notices of Dispute of Claim must be **received by the Monitor on or before 5:00 p.m. (Toronto time) on September 1, 2021** (the "**Claims Bar Date**"). If a Notice of Dispute of Claim is not received on or before that time, then you shall be deemed to have accepted the determination of your Claim as set out in the Notice of Claim for both voting and distribution purposes, and any and all of your rights to dispute such Claim as so valued or to otherwise assert or pursue such Claim in an amount that exceeds the amount set forth on the Notice of Claim shall be forever extinguished and barred without further act or notification.

This letter provides general instructions for completing a Notice of Dispute of Claim. Defined terms not defined within this instruction letter shall have the meaning ascribed thereto in the Claim Procedure Order.

FOR AFFECTED LANDLORD CREDITORS DISPUTING A NOTICE OF CLAIM

SECTION 1 – PARTICULARS OF THE CREDITOR

1. The full legal name and contact information of the Affected Landlord Creditor must be provided.

2. Unless the Claim is assigned or transferred pursuant to the terms of the Claims Procedure Order, all future correspondence, notices, etc., regarding the Claim will be directed to the address and contact indicated in this section.

SECTION 2 – ASSIGNEE OR TRANSFEREE

3. If the Affected Landlord Creditor has been assigned or otherwise transferred its Claim, then Section 2 must be completed.

4. The full legal name of the assignor or transferor must be provided.

5. Include all available supporting documentation evidencing the assignment or transfer of the Affected Landlord Claim.

6. If the Monitor, in consultation with the Applicants, is satisfied that an assignment or transfer has occurred in accordance with the terms of the Claims Procedure Order, all future correspondence, notices, etc., regarding the Affected Landlord Claim will be directed to the assignee or transferee at the address and contact indicated in the Dispute of Notice of Claim.

SECTION 3 – DISPUTE OF CLAIM

7. Indicate the name of the Applicant(s) against which the Affected Landlord Creditor is asserting a Claim.

8. Indicate whether the Claim is being disputed for voting and/or distribution purposes by checking the applicable box, and include the amount of the Claim being asserted for voting and/or distribution purposes.

9. All Claims shall be converted to U.S. dollars at the Bank of Canada daily exchange rate in effect at January 25, 2021. Claim amounts listed in the Notice of Claim are denominated in U.S. dollars.

SECTION 4 – REASONS FOR DISPUTE

10. Provide a description and full particulars of the Claim being disputed, including all available supporting documentation.

Additional Notice of Dispute of Claim forms can be obtained from the Monitor's website at www.alvarezandmarsal.com/YatsenGroup or by contacting the Monitor at the contact information provided above.

FOR AFFECTED LANDLORD CREDITORS ASSERTING A D&O CLAIM

If you believe you have a D&O Claim, you must file a D&O Proof of Claim asserting any such D&O Claim such that the D&O Proof of Claim is **received by the Monitor by the Claims Bar Date**, otherwise any such D&O Claim shall be forever extinguished and barred without further act or notification.

D&O Proof of Claim forms and instructions for completing a D&O Proof of Claim can be obtained from the Monitor's website at www.alvarezandmarsal.com/YatsenGroup or by contacting the Monitor at the contact information provided above.

All notices and inquiries with respect to the Claims Procedure should be directed to the Monitor by prepaid registered mail, courier, personal delivery, fax, email or telephone at the address below:

Alvarez & Marsal Canada Inc., Court-appointed Monitor of the Yatsen Group of Companies Inc. and certain of its subsidiaries

Claims Process

Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
P.O. Box 22
Toronto, Ontario M5J 2J

Attention: ●
Telephone: 1-888-447-5187.
Email: yatsengroup@alvarezandmarsal.com
Fax: 416.847.5201

DATED this _____ day of _____, 2021.

SCHEDULE "C"

Court File No. CV-21-00655505-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A" (COLLECTIVELY, THE "APPLICANTS")

NOTICE OF CLAIM

TO: **[INSERT NAME AND ADDRESS OF CREDITOR]**

This notice is issued pursuant to the Claims Procedure Order of the Ontario Superior Court of Justice (Commercial List) granted August 4, 2021 ("**Claims Procedure Order**") in the Applicants' proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"). A copy of the Claims Procedure Order can be obtained from the website of Alvarez & Marsal Canada Inc., the Court-appointed Monitor of the Applicants (the "**Monitor**"), at www.alvarezandmarsal.com/YatsenGroup. Capitalized terms used herein but not otherwise defined herein have the meanings given to such terms in the Claims Procedure Order. Please review the Claims Procedure Order for the full terms of the Claims Procedure.

According to the books, records and other relevant information in the possession of the Applicants, your total Affected Landlord Claim(s) are as follows:

Applicant	Type of Claim	Amount*
		$
		$

* Amount is in U.S. dollars. All Claims in an original currency other than U.S. dollars are converted to U.S. dollars using the Bank of Canada daily exchange rate on January 25, 2021.

If you agree that the foregoing determination accurately reflects your Claim(s) against the Applicants, you are not required to respond to this Notice of Claim.

If you disagree with the determination of your Claim(s) against the Applicants as set out herein, you must deliver a Notice of Dispute of Claim to the Monitor such that it is received by the Monitor **by no later than 5:00 p.m. (Toronto time) on September 1, 2021** (the "**Claims Bar Date**"). You may deliver your Notice of Dispute of Claim by prepaid registered mail, courier, personal delivery, fax or email to the following address:

> Alvarez & Marsal Canada Inc., Court-appointed Monitor of the Yatsen Group of Companies Inc. and certain of its subsidiaries
>
> Claims Process
>
> Royal Bank Plaza, South Tower
> 200 Bay Street, Suite 2900
> P.O. Box 22
> Toronto, Ontario M5J 2J
>
> Attention: ●
> Telephone: 1-888-447-5187.
> Email: yatsengroup@alvarezandmarsal.com
> Fax: 416.847.5201

You may accept the Claim(s) set out in this Notice of Claim for voting purposes without prejudice to your rights to dispute such Claim(s) for distribution purposes. If you fail to deliver a Notice of Dispute of Claim for voting and/or distribution purposes such that it is received by the Monitor by the Claims Bar Date, then you shall be deemed to have accepted your Claim(s) for voting and distribution purposes as set out in this Notice of Claim.

If you believe you have a D&O Claim, you must complete a D&O Proof of Claim in respect of such D&O Claim and deliver it to the Monitor at the address noted above such that it is received by the Monitor by the Claims Bar Date. You may obtain a copy of a D&O Proof of Claim form on the Monitor's website noted above or by contacting the Monitor at the contact information provided above to request a copy. If you fail to deliver a completed D&O Proof of Claim by the Claims Bar Date, any D&O Claim you may have shall be forever extinguished and barred.

DATED at Toronto, this ____ day of _____, 2021.

SCHEDULE "D"

Court File No. CV-21-00655505-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A" (COLLECTIVELY, THE "APPLICANTS")

NOTICE OF DISPUTE OF CLAIM

---

1. **PARTICULARS OF CREDITOR**

(a) Full Legal Name of Creditor: _____

(b) Full Mailing Address of Creditor: _____

_____

_____

_____

(c) Telephone Number of Creditor: _____

(d) Fax Number of Creditor: _____

(e) E-mail Address of Creditor: _____

(f) Attention (Contact Person): _____

2. **PARTICULARS OF ORIGINAL CREDITOR FROM WHOM YOU ACQUIRED CLAIM, IF APPLICABLE:**

(a) Have you acquired this Claim by assignment? Yes ☐ No ☐

(if yes, attach documents evidencing assignment)

(b) Full Legal Name of original creditor(s): _____

3. **DISPUTE OF DETERMINATION OF CLAIM FOR VOTING AND/OR DISTRIBUTION PURPOSES:**

(Any Claims not denominated in U.S. dollars shall be converted to U.S. dollars at the Bank of Canada daily exchange rate in effect as of January 25, 2021.)

We hereby disagree with the determination of our Claim as set out in the Notice of Claim dated _____, as set out below:

Name of Applicant(s) against which Creditor asserts its Claims:

_____

	As specified in Notice of Claim	**Disputed for (check all that apply)**	**Claim asserted by Creditor**
Voting Claim	$		$
Distribution Claim	$		$

(Insert particulars of Claim per Notice of Claim and the value of your Claim as asserted by you.)

4. **REASONS FOR DISPUTE:**

(Provide full particulars of the Claim, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, etc., and include copies of supporting documentation. The particulars provided must support the description of the Claim as stated by you in item 3, above. You may attach a separate schedule if more space is required.)

_____

_____

_____

_____

_____

_____

This Notice of Dispute of Claim must be returned to and received by the Monitor **by no later than 5:00 p.m. (Toronto time) on September 1, 2021**, the Claims Bar Date, at the following address by prepaid registered mail, courier, personal delivery, fax or email:

Alvarez & Marsal Canada Inc., Court-appointed Monitor of the Yatsen Group of Companies Inc. and certain of its subsidiaries

Claims Process

Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
P.O. Box 22
Toronto, Ontario M5J 2J

Attention: ●
Telephone: 1-888-447-5187.
Email: yatsengroup@alvarezandmarsal.com
Fax: 416.847.5201

Dated at _____ this _____ day of _____, 2021.

Signature of Witness	Signature of Creditor
Print name of Witness:	Print name of Creditor:
	If Creditor is a Corporation, print name and title of authorized signatory
	Name: _____
	Title: _____

SCHEDULE "E"

**D&O PROOF OF CLAIM INSTRUCTION LETTER
FOR THE CLAIMS PROCEDURE FOR CREDITORS OF YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A" (COLLECTIVELY, THE "APPLICANTS")**

CLAIMS PROCEDURE

By Order of the Ontario Superior Court of Justice (Commercial List) dated August 4, 2021 (as such Order may be amended from time to time, the "**Claims Procedure Order**") under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "**CCAA**"), the Applicants and Alvarez & Marsal Canada Inc., in its capacity as Court-appointed monitor of the Applicants (the "**Monitor**"), have been authorized to conduct a claims procedure (the "**Claims Procedure**"). A copy of the Claims Procedure Order and other public information concerning these proceedings can be obtained from the Monitor's website at www.alvarezandmarsal.com/YatsenGroup. Please review the Claims Procedure Order for the full terms of the Claims Procedure.

The Claims Procedure is, among other things, intended to identify and determine any claims against the Directors or Officers of the Applicants, whether unliquidated, contingent or otherwise. If you believe that you have a D&O Claim against a Director or Officer of the Applicants, you must complete and file a D&O Proof of Claim with the Monitor **before 5:00 p.m. (Toronto time) on September 1, 2021** (the "**Claims Bar Date**")

This letter provides general instructions for completing a D&O Proof of Claim. Capitalized terms not defined within this instruction letter shall have the meaning ascribed thereto in the Claims Procedure Order.

A separate D&O Proof of Claim must be filed by each legal entity or person asserting a claim against the Applicants' Directors or Officers. The claimant shall include any and all D&O Claims that it asserts against the Applicants' Directors or Officers in a single D&O Proof of Claim. The D&O Proof of Claim form is NOT for claims against the Applicants.

SECTION 1 – PARTICULARS OF THE DIRECTORS OR OFFICERS

1. The full name of all of the Applicants' Directors or Officers against whom the D&O Claim is asserted must be listed.

SECTION 2 – PARTICULARS OF THE CLAIMANT

2. The full legal name of the claimant must be provided.

3. Unless the D&O Claim is assigned or transferred pursuant to the terms of the Claims Procedure Order, all future correspondence, notices, etc., regarding the D&O Claim will be directed to the address and contact indicated in this section.

SECTION 3 – ASSIGNEE OR TRANSFEREE

4. If the claimant has been assigned or otherwise transferred its D&O Claim, then Section 3 must be completed.

5. The full legal name of the assignor or transferor must be provided.

6. Include all available supporting documentation evidencing the assignment or transfer of the claim.

7. If the Monitor, in consultation with the Applicants, is satisfied that an assignment or transfer has occurred in accordance with the terms of the Claims Procedure Order, all future correspondence, notices, etc., regarding the D&O Claim will be directed to the assignee or transferee at the address and contact indicated in this section.

SECTION 4 – AMOUNT OF CLAIM /CERTIFICATION

8. Indicate the amount of the D&O Claim being asserted against the Director(s) and/or Officer(s) in the Amount of Claim column, including interest.

9. All D&O Claims not denominated in U.S. dollars shall be converted to U.S. dollars at the Bank of Canada daily exchange rate in effect as of January 25, 2021.

10. The person signing the D&O Proof of Claim should:

    (a) be the claimant or an authorized representative of the claimant;

    (b) have knowledge of all of the circumstances connected with this D&O Claim;

    (c) assert the claim against the Director(s) or Officer(s) as set out in the D&O Proof of Claim and certify all available supporting documentation is attached; and

    (d) have a witness to its certification.

11. By signing and submitting the D&O Proof of Claim, the claimant is asserting the Claim against the Director(s) or Officer(s) specified therein.

SECTION 5 – PARTICULARS OF CLAIM

12. Attach to the D&O Proof of Claim all particulars of the D&O Claim and all available supporting documentation, including descriptions of transaction(s), agreement(s) or legal breach(es) giving rise to the Claim.

SECTION 6 – FILING OF CLAIM

All D&O Proofs of Claim for D&O Claims **must be received by the Monitor before 5:00 p.m. (Toronto time) on the Claims Bar Date of September 1, 2021**. If you do not file a completed D&O Proof of Claim by the Claims Bar Date, any D&O Claims you may have shall be forever extinguished and barred.

All notices and inquiries with respect to the Claims Procedure should be directed to the Monitor by prepaid registered mail, courier, personal delivery, fax or email at the address below:

Alvarez & Marsal Canada Inc., Court-appointed Monitor of the Yatsen Group of Companies Inc. and certain of its subsidiaries

Claims Process

Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
P.O. Box 22
Toronto, Ontario M5J 2J

Attention: ●
Telephone: 1-888-447-5187.
Email: yatsengroup@alvarezandmarsal.com
Fax: 416.847.5201

Additional D&O Proof of Claim forms can be obtained from the Monitor's website at www.alvarezandmarsal.com/YatsenGroup or by contacting the Monitor at the contact information provided above.

DATED this _____ day of _____, 2021.

SCHEDULE "F"

Court File No. CV-21-00655505-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A" (COLLECTIVELY, THE "APPLICANTS")

D&O PROOF OF CLAIM

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1. **PARTICULARS OF DIRECTORS(S) AND/OR OFFICER(S)**

   (a) Name of Directors(s) and/or Officer(s) of the Applicants: _____

2. **PARTICULARS OF CLAIMANT**

   (a) Full Legal Name of Claimant: _____

   (b) Full Mailing Address of Claimant: _____

   _____

   _____

   _____

   (c) Telephone Number of Claimant: _____

   (d) Fax Number of Claimant: _____

(e) E-mail Address of Claimant: _____

(f) Attention (Contact Person): _____

3. **PARTICULARS OF ORIGINAL CREDITOR FROM WHOM YOU ACQUIRED CLAIM, IF APPLICABLE:**

(a) Have you acquired this Claim by assignment? Yes ☐ No ☐

(if yes, attach documents evidencing assignment)

(b) Full Legal Name of original creditor(s): _____

4. **D&O PROOF OF CLAIM**

THE UNDERSIGNED CERTIFIES AS FOLLOWS:

(a) That I am a claimant against a Director or Officer of the Applicants / I hold the position of _____ of the claimant;

(b) That I have knowledge of all the circumstances connected with the D&O Claim described and set out below;

(c) The Director(s) or Officer(s) of the Applicants were and still are indebted to the claimant as follows *(Any Claims not denominated in U.S. dollars shall be converted to U.S. dollars at the Bank of Canada daily exchange rate in effect as of January 25, 2021.)*

(i) Name of Director or Officer(s) to which the D&O Claim relates:

_____

(ii) Amount of D&O Claim

$_____

5. **PARTICULARS OF CLAIM:**

(Provide full particulars of the D&O Claim and all available supporting documentation, any claim assignment/transfer agreement or similar document, if applicable, and including amount, description of transaction(s), agreement(s) or legal breach(es) giving rise to the D&O Claim. You may attach a separate schedule if more space is required.)

_____

_____

_____

_____

_____

_____

_____

_____

6. **FILING OF CLAIM**

This D&O Proof of Claim must be returned to and received by the Monitor by **5:00 p.m. (Toronto time) on the Claims Bar Date of September 1, 2021**.

Completed forms must be delivered by prepaid registered mail, courier, personal delivery, fax or email at the address below to the Monitor at the following address:

Alvarez & Marsal Canada Inc., Court-appointed Monitor of the Yatsen Group of Companies Inc. and certain of its subsidiaries

Claims Process

Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
P.O. Box 22
Toronto, Ontario M5J 2J

Attention: ●
Telephone: 1-888-447-5187.
Email: yatsengroup@alvarezandmarsal.com
Fax: 416.847.5201

Dated at _____ this _____ day of _____, 202___.

_____	_____
Signature of Witness	Signature of Claimant
Print name of Witness:	Print name of Claimant:
_____	_____
	If Claimant is a Corporation, print name and title of authorized signatory
	Name: _____
	Title: _____

SCHEDULE "G"

Court File No. CV-21-00655505-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A" (COLLECTIVELY, THE "APPLICANTS")

D&O NOTICE OF REVISION OR DISALLOWANCE

TO: **[INSERT NAME AND ADDRESS OF CREDITOR]**

The Applicants have reviewed your D&O Proof of Claim dated _____, and have revised or rejected your D&O Claim in respect of_____ _____ for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____

_____

Subject to further dispute by you in accordance with the provisions of the Claims Procedure Order, your D&O Claim will be allowed as follows:

D&O CLAIM	AMOUNT
Per D&O Proof of Claim	**$**
Allowed Amount of D&O Claim as Revised	**$**

If you intend to dispute this D&O Notice of Revision or Disallowance, you must notify the Monitor of such intent by delivery to the Monitor of a D&O Notice of Dispute of Revision or Disallowance in accordance with the Claims Procedure Order such that it is received by the Monitor by no later than five (5) Business Days after the date of delivery of such D&O Notice of Revision or Disallowance at the following address by prepaid registered mail, courier, personal delivery, fax or email:

Alvarez & Marsal Canada Inc., Court-appointed Monitor of the Yatsen Group of Companies Inc. and certain of its subsidiaries

Claims Process

Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
P.O. Box 22
Toronto, Ontario M5J 2J

Attention: ●
Telephone: 1-888-447-5187.
Email: yatsengroup@alvarezandmarsal.com
Fax: 416.847.5201

If you do not deliver a D&O Notice of Dispute of Revision or Disallowance in accordance with the Claims Procedure Order, the value of your D&O Claim shall be deemed to be as set out in this D&O Notice of Revision or Disallowance.

DATED at Toronto, Ontario this _____ day of _____, 2021.

Alvarez & Marsal Canada Inc., solely in its capacity as Court-appointed Monitor of Yatsen Group of Companies Inc., SAR Real Estate Inc. and the companies listed in Schedule "A", and not in its personal or corporate capacity.

Per: _____

Name:

Title:

SCHEDULE "H"

Court File No. CV-21-00655505-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A" (collectively, the "Applicants")

D&O NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE

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1. **PARTICULARS OF CLAIMANT**

(a) Full Legal Name of Claimant: _____

(b) Full Mailing Address of Claimant: _____

_____

_____

_____

(c) Telephone Number of Claimant: _____

(d) Fax Number of Claimant: _____

(e) E-mail Address of Claimant: _____

(f) Attention (Contact Person): _____

2. **PARTICULARS OF ORIGINAL CREDITOR FROM WHOM YOU ACQUIRED CLAIM, IF APPLICABLE:**

(a) Have you acquired this Claim by assignment? Yes ☐ No ☐

(if yes, attach documents evidencing assignment)

(b) Full Legal Name of original creditor(s): _____

3. **DISPUTE OF REVISION OR DISALLOWANCE OF D&O CLAIM:**

(Any Claims not denominated in U.S. dollars shall be converted to U.S. dollars at the Bank of Canada daily exchange rate in effect as of January 25, 2021.)

We hereby disagree with the determination of our D&O Claim as set out in the D&O Notice of Revision or Disallowance dated _____, 2021, as set out below:

	Amount allowed per D&O Notice of Revision or Disallowance	**Amount claimed by Claimant**
D&O Claim	$	$

(Insert particulars of D&O Claim per D&O Notice of Revision or Disallowance, and the value of your D&O Claim as asserted by you).

4. **REASONS FOR DISPUTE:**

(Provide full particulars of the D&O Claim and all available supporting documentation, any claim assignment/transfer agreement or similar document, if applicable, and including amount, description of transaction(s), agreement(s) or legal breach(es) giving rise to the D&O Claim. The particulars provided must support the determination of the D&O Claim as stated by you in item 3, above. You may attach a separate schedule if more space is required.)

_____

_____

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_____

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_____

_____

If you intend to dispute the D&O Notice of Revision or Disallowance, you must notify the Monitor of such intent by delivery to the Monitor of a D&O Notice of Dispute of Revision or Disallowance in accordance with the Claims Procedure Order such that it is received by the Monitor by no later than five (5) Business Days after delivery of the D&O Notice of Revision or Disallowance at the following address by prepaid registered mail, courier, personal delivery, fax or email:

Alvarez & Marsal Canada Inc., Court-appointed Monitor of the Yatsen Group of Companies Inc. and certain of its subsidiaries

Claims Process

Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
P.O. Box 22
Toronto, Ontario M5J 2J

Attention: ●
Telephone: 1-888-447-5187.
Email: yatsengroup@alvarezandmarsal.com
Fax: 416.847.5201

Dated at _____ this _____ day of _____, 2021.

Signature of Witness	Signature of Claimant
Print name of Witness:	Print name of Claimant:
	If Claimant is a Corporation, print name and title of authorized signatory
	Name: _____
	Title: _____

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

Court File No.: CV-21-00655505-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF YATSEN GROUP OF COMPANIES INC., SAR REAL ESTATE INC. AND THE COMPANIES LISTED IN SCHEDULE "A"

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

CLAIMS PROCEDURE ORDER

GOODMANS LLP
Barristers & Solicitors
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Toronto, Canada M5H 2S7

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Tel: (416) 979-2211
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Lawyers for the Applicants

monitor was of the view that errors in the proofs of claim were due to inadvertence, and for all of the claims it issued a notice of revision, allowing the claims as revised if the court determined that it had the power to do so.[78] The Court held that the *CCAA* defines a claim to mean any obligation that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *BIA*; however, the *CCAA* does not set out a process for identification or determination of claims, instead, the court orders a claims process.[79] The monitor, as an officer of the court, is obliged to ensure that the interests of the stakeholders are considered, including all creditors, the company and its shareholders; and the monitor had the necessary authority to revise the claims, either as to classification or amount.[80]

Appellate courts will generally defer to the *CCAA* supervising judge regarding decisions made in respect of claims bar dates and motions to extend the time for filing. Where a chambers judge had denied an application to extend the time for the filing of a proof of claim, the appellate court held that the applicant had not shown that the chambers judge's decision was clearly wrong and concluded that there was no basis to interfere with her decision not to extend the time to file the proof of claim.[81]

IV. ORDERING A VOTE AND CREDITOR APPROVAL

Section 4 of the *CCAA* specifies that where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. Section 5 contains the same provision for secured creditors.

The process for creditors to vote on the proposed plan must be approved by the court. The court has the discretion not to order a meeting of creditors to consider a plan. In exercising its authority to order a vote, the court must consider whether the proposed plan of arrangement has a reasonable chance of success.[82] This threshold prevents unnecessary costs being expended in calling and conducting a vote where it is evident at the outset that there is not yet sufficient support by creditors to vote in favour of the plan.

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78 *Ibid.* at para. 5.

79 *Ibid.* at para. 18.

80 *Ibid.* at paras. 40, 48.

81 *Re West Bay SonShip Yachts Ltd.*, 2009 CarswellBC 139, 2009 BCCA 31 (B.C.C.A.), additional reasons 2009 CarswellBC 3082 (B.C.C.A.).

82 *Royal Bank v. Fracmaster Ltd.*, 1999 CarswellAlta 539 (Alta. C.A.).

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 **JTI-MACDONALD CORP.**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Court File No. CV-19-615862-00CL
Court File No CV-19-616077-00CL
Court File No CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

JOINT BOOK OF AUTHORITIES OF THE COURT-APPOINTED MEDIATOR & MONITORS
Motions for Meeting Orders & Claims Procedure Orders
(Returnable October 31, 2024)

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