2026 01G 0099
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act*, RSC 1985 c.B-3, as amended

AND IN THE MATTER OF the receivership of 15132738 Canada Inc.

BETWEEN: **JANES & NOSEWORTHY LTD. IN ITS CAPACITY AS RECEIVER OF 15132738 CANADA INC.**

APPLICANT

AND: **15132738 CANADA INC.**

RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

(Approval and Vesting)

O'KEEFE & SULLIVAN
Solicitors for the Receiver
80 Elizabeth Ave Suite 202
St. John's, NL A1A 1W7
Attention: Darren O'Keefe
Email: dokeefe@okeefesullivan.com

TO: **Supreme Court of Newfoundland and Labrador,**
General Division (St. John's) 309 Duckworth Street
P.O. Box 937 St. John's, NL A1C 5M3

AND TO: Service List at **Schedule "A"**

2026 01G 0099
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Bankruptcy and Insolvency Act*, RSC 1985 c.B-3, as amended

AND IN THE MATTER OF the receivership of 15132738 Canada Inc.

BETWEEN: **JANES & NOSEWORTHY LTD. IN ITS CAPACITY AS RECEIVER OF 15132738 CANADA INC.**

APPLICANT

AND: **15132738 CANADA INC.**

RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

(Approval and Vesting)

PART I – OVERVIEW AND RELIEF SOUGHT

1. The Receiver seeks approval of the transaction contemplated by the Asset Purchase Agreement with BTG Critical Infrastructure Co-invest L.P. I (the "**Transaction**") and a related Approval and Vesting Order, together with ancillary relief to implement closing efficiently and free and clear of encumbrances, subject to permitted encumbrances.

2. The Receiver submits that the relief is appropriate at this time for the following reasons:

   (a) the Receiver conducted and completed a fair, transparent, Court-approved sale and investment solicitation process ("SISP");

   (b) no superior binding bid emerged;

   (c) the consideration reflects market-tested value in the current circumstances;

   (d) the proposed order (the "**Approval and Vesting Order**" or "**AVO**") provides a practical path to closing and protects stakeholder priorities by attaching to proceeds; and

(e) all stakeholders were afforded notice and opportunity to participate.

3. The Receiver also seeks approval of releases tailored to preserve finality for the transaction and the Court-appointed officer, without affecting claims barred by statute or arising from wilful misconduct, fraud, or gross negligence.

PART II – FACTS

4. By Order dated January 22, 2026, Janes & Noseworthy Limited ("**JNL**") was appointed as interim receiver of the Respondent's assets, including the Stephenville Dymond International Airport, under section 47 of the BIA; the interim receivership outside date was extended to March 9, 2026, and on February 26, 2026 BTG applied for and obtained the appointment of JNL as receiver pursuant to section 243 of the BIA.

5. On March 9, 2026, the Court approved SISP procedures, including potential auction mechanics; the Receiver ran Phase I in accordance with the approved timeline, and Phase II was not triggered.

6. The Receiver undertook a SISP designed to maximize value, supported by a stalking horse agreement and bid protections the Receiver considered commercially reasonable and not chilling to the process.

7. The Receiver implemented a comprehensive marketing program, including targeted teaser distribution via MailChimp, multiple national and regional media placements (Insolvency Insider, Postmedia, AllNL), and a controlled virtual data room; seven parties expressed interest, four executed NDAs with VDR access, and BTG submitted the only qualifying bid.

8. BTG, the stalking horse bidder and DIP lender, was selected as the successful bidder under the SISP; the Receiver accepted the bid and seeks approval to implement the transaction by way of an Approval and Vesting Order.

9. Under the BTG bid: (a) cash at closing will satisfy priority claims, the Receiver's charge, and a $100,000 Administration Wind-Down Amount; and (b) BTG's indebtedness ($3,081,678.96 as of March 1, 2026, plus interest and costs) will be satisfied by credit bid and set-off; the Purchased Assets comprise all right, title and interest in the real property, chattels, records, permits and licences, airspace rights, goodwill and IP, cash with

exclusions, leases/tenancies, and certain proceedings and contract entitlements; closing is seven days after Court approval (subject to registry availability and written extensions).

10. The Receiver recommends approval and submits that the SISP was fair and consistent with Court-approved processes; the consideration is the highest and best available; all parties acted in good faith; and the structure allows for an orderly wind-down and efficient conclusion of the proceedings.

11. The proposed Approval and Vesting Order vests the Purchased Assets in the Purchaser free and clear of encumbrances (other than permitted encumbrances), provides for encumbrances to attach to net proceeds with the same priority, directs discharge mechanics, addresses CRA deemed trust interests to the extent permitted by law, and provides narrowly tailored releases in favour of defined Released Parties, excluding claims not permitted by statute and claims for wilful misconduct, fraud, or gross negligence.

12. The Receiver has initiated an independent review of security interests and encumbrances potentially affecting distribution, including CRA source deduction liabilities asserted at $628,195.30 and a Tristar Electric claim asserted at $2,447,595.96 with a purported lien, and will report further at the distribution hearing.

PART III – ISSUES

13. The issues to be determined by the Court are:

    (a) whether the proposed Transaction and Approval and Vesting Order should be approved;

    (b) whether the SISP and the Receiver's activities should be approved; and

    (c) whether the proposed releases are appropriate.

PART IV – LAW AND ARGUMENT

A. Approval of the Transaction under the *Soundair* Principles

14. Courts have uniformly and consistently applied the framework laid out in ***Royal Bank of Canada v. Soundair***, 1991 CanLII 2727 (ON CA)[1] in determining whether to approve a proposed sale of assets. The principles to be considered are:

    (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

    (b) whether the interests of all parties have been considered;

    (c) the efficacy and integrity of the process by which offers are obtained; and

    (d) whether there has been unfairness in the working out of the process.

15. The proposed transaction satisfies *Soundair principles as illustrated below:*

(1) Sufficient effort to get the best price; no improvident conduct

16. The Receiver executed a broad and multi-channel marketing program (targeted teasers, Insolvency Insider with strong open and click metrics, Postmedia print/digital ads totalling 185,491 e-views, AllNL placement, and a controlled VDR), coupled with a Court-approved SISP and a stalking horse baseline.

17. Despite robust outreach and engagements with eight interested parties (and VDR access for those executing NDAs), BTG's stalking horse bid was the only qualifying bid received by the deadline.

(2) Consideration of interests of all parties

18. The Receiver's SISP and acceptance decision were taken with a view to maximizing realizable value for all stakeholders, and the structure provides for encumbrances to attach to proceeds with preserved priority for later distribution adjudication.

(3) Efficacy and integrity of the sale process

[1] *Royal Bank of Canada v. Soundair,* 1991 CanLII 2727 (ON CA) **[TAB 1]**

19. While the primary concern of a receiver is to protect the interests of creditors, a secondary consideration in the sale context is the integrity of the process by which the sale is effected.

20. The SISP was developed and administered independently by the Receiver under a Court-approved order with clear milestones; Phase I ran as approved and Phase II was not triggered due to the absence of competing qualified bids.

(4) Absence of unfairness

21. The Receiver acted in good faith and with due diligence, confirming impartial administration and the appropriateness of the AVO in the circumstances, including accommodations given the insider status of the stalking horse.

16. On these facts, the Receiver recommends approval of the proposed Transaction. The outcome reflects market testing, fair process integrity.

B. Related-Party Considerations and Good Faith Efforts

17. Where a purchaser is related, courts look for robust market exposure and good-faith efforts to solicit non-related bids and ensure superior consideration to alternatives.

18. In the present case the stalking horse was a related party to BTG Capital Inc. and also the DIP lender. The Receiver has confirmed that good faith efforts to market to non-related persons were made and bid from BTG is the highest consideration available on the record.

19. No binding offers superior to the stalking horse emerged despite significant marketing and engagement with multiple strategic and financial buyers.

C. Vesting Free and Clear; Attachment to Proceeds

20. Approval and vesting orders routinely provide that encumbrances are discharged from the purchased assets and attach to proceeds in their existing priorities, safeguarding stakeholders pending distribution.

21. The draft AVO vests the Purchased Assets free and clear of encumbrances (other than permitted encumbrances) upon delivery of a Receiver's certificate; directs registry officials

to update title; and provides that all encumbrances attach to net proceeds with the same priority as pre-sale.

19. The approach is especially apt here, where asserted statutory trusts and lien claims remain under review.

22. The AVO addresses CRA deemed trust interests to the extent permitted by law and contemplates priority to be addressed against proceeds, preserving parties' positions for a subsequent distribution motion.

23. The Receiver is completing an independent security review, including CRA's asserted source deductions and Tristar's purported mechanics' lien claim, and will return for distribution directions.

D. Releases

24. Limited releases in sale approval orders are commonly granted to protect the integrity of court-supervised processes and provide finality for parties acting under the Court's authority.

25. Further, when determining whether a release is rationally connected to the purpose of the transaction, Courts have considered:

    (a) the extent to which the releasee is involved in the implementation of the transaction;[2] and

    (b) whether the releases provide finality and clarity to the closing of the transaction.[3]

26. The proposed releases cover the Receiver (in personal and official capacities), the Company's specified stakeholders, and the Purchaser and counsel, in respect of claims arising prior to the Effective Time and connected to the assets, affairs, these BIA proceedings, the Asset Purchase Agreement and completion of the transaction, excluding claims not permitted by the BIA and claims for wilful misconduct, fraud, or gross negligence, and preserving obligations under the APA.

---

[2] *Delta 9 Cannabis Inc (Re)*, 2025 ABKB 52 at para 114 **[TAB 2]**
[3] *Long Run Exploration Ltd. (Re)*, 2024 ABKB 710 at para 23 **[TAB 3]**

27. The releases are circumscribed, transaction-connected, and necessary to secure closing and limit collateral litigation risk in the administration of the estate and will provide finality and clarity at the closing of the Transaction.

E. Approval of Receiver's Activities and the SISP

28. The Receiver is seeking approval of its reports and activities. There are good policy and practical reasons for the Court to approve the activities of the Receiver.[4]

29. The Fourth Report details the SISP design, marketing, bidder engagement, acceptance of the stalking horse, and the rationale for the recommendation to approve BTG's bid as the highest and best offer.

PART V – ORDER REQUESTED

30. The Receiver respectfully requests an order:

    (a) approving the transaction contemplated by the Asset Purchase Agreement between the Receiver and BTG Critical Infrastructure Co-invest L.P. I and authorizing the Receiver to take all necessary steps to complete it;

    (b) vesting the Purchased Assets in the Purchaser free and clear of encumbrances other than permitted encumbrances, with all such encumbrances to attach to net sale proceeds with the same priority;

    (c) directing such discharges and title updates as are necessary to give effect to vesting and closing;

    (d) providing deemed trust language in respect of the Crown to the extent permitted by law, with any such interests attaching to proceeds pending further order;

    (e) approving the releases in favour of the defined Released Parties, carved out for non-permitted releases and for wilful misconduct, fraud, or gross negligence, and preserving obligations under or in connection with the transaction documents;

---

[4] *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 at paras 65-67, **[TAB 4]** citing Regional Senior Justice G.B. Morawetz (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras 12 and 23. **[TAB 5]**

(f) approving the SISP and the Receiver's activities as described in the Fourth Report; and

(g) sealing the confidential appendices to the Receiver's Fourth Report, for a period not exceeding three months from the date of this Order or until the closing of the Transaction, whichever is earlier; and

(h) such further and other relief as to this Honourable Court seems just.

All of which is respectfully submitted.

DATED at St. John's, Newfoundland and Labrador, this 14th day of April 2026.

O'KEEFE & SULLIVAN

DARREN O'KEEFE
Counsel for the Receiver
80 Elizabeth Avenue, Suite 202
St. John's, NL A1A 1W7
E: dokeefe@okeefesullivan.com

SCHEDULE "A"

SERVICE LIST

COX & PALMER 235 Water Street, Suite 1100 St John's, NL A1C 1B6 **William Cahill** wcahill@coxandpalmer.com **Mark Russell** mrussell@coxandpalmer.com *Solicitors for BTG Capital Inc.*	**STAGG & STAGG** PO Box 214 28 Main Street Stephenville, NL A2N 2Z4 **Trevor Stagg** tstagg@frs-law.com *Solicitors for 15132738 Canada Inc.*
JANES & NOSEWORTHY LIMITED Suite 201, 516 Topsail Road St John's, NL A1E 2C5 **Ian Penney** Ipenney@jnltrustee.ca **David Buckingham** dbuckingham@jnltrustee.ca *Receiver*	**O'KEEFE & SULLIVAN** 80 Elizabeth Ave Suite 202 St. John's, NL A1A 1W7 **Darren O'Keefe** dokeefe@okeefesullivan.com *Solicitors for the Receiver*
STEWART MCKELVEY 11th Floor, Cabot Place 100 New Gower Street St John's, NL A1C 5V3 **Greg Moores KC** gmoores@stewartmckelvey.com *Solicitors for Tristar Electric Inc.*	**MCINNES COOPER** Baine Johnston Centre 10 Fort William Place St John's, NL A1C 5X4 **Adam Foote** adam.foote@mcinnescooper.com
STEWART MCKELVEY 11th Floor, Cabot Place 100 New Gower Street St John's, NL A1C 5V3 **Joe Thorne** jthorne@stewartmckelvey.com *Solicitors for the Town of Stephenville*	**CANADA REVENUE AGENCY** Po Box 12075 165 Duckworth Street St John's, NL A1B 4R5 **Deanna Frappier KC** deanna.frappier@justice.gc.ca

INDEX

List of Authorities

TAB 1

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

> contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)
I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a

sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to

show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that

the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced

that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a

bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated

purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it

contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline

which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as

to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by

the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in

no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

> is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are

they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a

deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not

include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be

noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however,

contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to

negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of

its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the

law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and

procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to

court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB 2

Court of King's Bench of Alberta

Citation: Delta 9 Cannabis Inc (Re), 2025 ABKB 52

Date: 20250129
Docket: 2401 09688
Registry: Calgary

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

In the Matter of the Compromise or Arrangement of Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc., and Delta 9 Cannabis Store Inc.

Corrected judgment: A corrigendum was issued on March 6, 2026, the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction and Background

[1] "**Delta 9**", comprised of Delta 9 Cannabis Inc (**Delta 9 Parent**), Delta 9 Logistics Inc, Delta 9 Lifestyle Cannabis Clinic Inc, Delta 9 Cannabis Store Inc and Delta 9 Bio-Tech Inc (**Bio-Tech**), is a vertically integrated group of companies in the business of cannabis cultivation, processing, extraction, wholesale distribution, retail sales and business to business sales.

[2] In recent years, Delta 9 has suffered losses due to a number of factors, including intense competition; over-supply of cannabis products leading to significant price compression; illicit supply of cannabis; burdensome regulatory costs; significant capital required for new product development; increased financing costs due to changing capital market investor sentiment driving investment away from the cannabis sector; and higher interest rates. By March 2024, Delta 9 was in breach of covenants owed to its secured creditor and, in May 2024, it received a demand and notice of intention to enforce security under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[3] Delta 9 then sought relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (*CCAA*). On July 15, 2024, the Court granted an initial order (**Initial Order**) under the *CCAA* providing, among other things, a stay of proceedings against Delta 9 (**Stay**).

[4] On July 24, 2024, on the "comeback" application with respect to the Initial Order, the Court granted an Amended and Restated Initial Order (**ARIO**), a Claims Procedure Order and an order approving a sale and investment solicitation process (**SISP**) with respect to Bio-Tech (**Bio-Tech SISP Order**). The ARIO approved, among other things, the appointment of a Chief Restructuring Officer, Delta 9 group borrowing funds from 2759054 Ontario Inc operating as Fika Herbal Goods (**Fika** or **Plan Sponsor**) subject to an approved interim financing term sheet, among other things.

[5] On September 11, 2024, the Court granted an order, among other things, extending the Stay period under the ARIO to November 1, 2024 and approving an amendment to the Interim Financing Term Sheet between the Delta 9 group and Fika.

[6] On November 1, 2024, I granted a further extension order extending the Stay to January 31, 2025, approving a further amendment to the interim financing, increasing the financing charge, and amending a claims procedure order to allow the court-appointed monitor (**Monitor**) to accept late claims.

[7] On November 8, 2024, I dismissed Fika's application seeking, among other things, a creditors' meeting for a proposed plan of arrangement: ***Delta 9 Cannabis Inc (Re)***, 2024 ABKB 657.

[8] On November 21, 2024, Fika's counsel notified the Court that January 10, 2025 had been scheduled for two separate applications in this matter: determining the amount owing under a credit facility between SNDL Inc and Delta 9 (**SNDL Dispute**) and an application for approval of an amended plan of arrangement (**Plan**).

[9] On December 2, 2024, the Court granted an order (**Meeting Order**) for, among other things, a creditor's meeting (**Meeting**) for the Plan.

[10] On December 20, 2024, the Meeting was held in accordance with the Meeting Order. The single class of unsecured affected creditors (**Affected Creditors**) overwhelmingly approved the Plan.

[11] On December 30, 2024, Delta 9's counsel served unfiled applications (**Applications**) to the service list in this matter, which included:

(a) an application for a Sanction Order and Stay Extension (**Sanction Application**) relating to the Plan for defined "Plan Entities", extending the Stay, and approving the fees and disbursements of the Monitor and its legal counsel; and

(b) an application for a "Sale Approval and Vesting Order" (**SAVO**) and an "Approval and Reverse Vesting Order" (**ARVO**), for two proposed transactions:

(i) first, approving a sale and vesting of certain assets to 6599362 Canada Ltd (**659**) contemplated in a December 28, 2024 asset purchase agreement (**APA**), including in particular a 95,000 square-foot cannabis cultivation

and processing facility in Winnipeg, Manitoba (**Bio-Tech Facility**) (the **659 Transaction**); and

(ii) second, approving a December 28, 2024 share purchase agreement (**SPA**) between Delta 9 Parent, Bio-Tech and Simply Solventless Concentrates Ltd (**SSCL**) by which Delta 9 Parent would sell its shares of Bio-Tech to SSCL pursuant to a reverse vesting order (**RVO**) structure (the **SSCL Transaction**).

[12] At the same time, Delta 9's counsel served a sixth affidavit of John Arbuthnot IV (**Arbuthnot**) dated December 30, 2024 (**Sixth Affidavit**) and a seventh Arbuthnot affidavit dated December 30, 2024 (**Seventh Affidavit**).

[13] On January 3, 2025, the Monitor's counsel provided the Court with the sixth report of the Monitor dated January 4, 2025 (**Sixth Monitor's Report**).

[14] On January 4, 2025, Delta 9's counsel advised the Court that the SNDL Dispute application had been adjourned by consent to be heard by another Justice on February 11, 2025. On January 6, 2025, Delta 9's counsel served filed copies of the Applications, the Sixth Affidavit, the Seventh Affidavit, and briefs supporting the Applications.

[15] On January 9, 2025, Delta 9's counsel provided the Court updated proposed forms of orders and an affidavit of service. Counsel also advised that they had recently been told that the Canada Revenue Agency (**CRA**) may oppose aspects of the Applications and provided the Court additional case authorities and evidence filed earlier in the action that Delta 9 might rely on.

[16] On January 9, 2025, the Monitor's counsel provided the Court with a supplement to the Sixth Monitor's Report (**Monitor's Supplement**).

[17] There was no questioning on any of the evidence filed in respect of or relied on at the Hearing.

[18] On January 10, 2025, I heard the Applications (**Hearing**).

[19] During the Hearing, CRA objected to certain aspects of the Applications, particularly the releases contemplated in the AVRO for the SSCL Transaction. I understand that CRA raised its opposition only shortly before the Hearing. During oral argument at the Hearing, CRA provided me a written brief, which seeks (among other things) a lifting of the Stay to allow it to issue director's liability assessments against Bio-Tech's director (Arbuthnot) and former directors for Bio-Tech's unremitted excise duties. CRA filed no application or evidence in support of its position. It referred to, among other things, an SSCL press release that was not in evidence and upon which I have not relied in making my decision.

[20] No party sought an adjournment of the Hearing, or the opportunity to file any further evidence. The Applications proceeded on the record before me.

[21] Ultimately, only CRA had any opposition to the Applications.

[22] On January 10, 2025, I granted uncontested aspects of the Applications, for a restricted court access and sealing order, and approving the Monitor and its counsel's fees and disbursements. I reserved on the core aspects of the Applications.

II. Issues

[23] The issues raised in the Applications are:

(a) Should the Court sanction the Plan?

(b) Should the Court extend the Stay?

(c) Should the Court approve the 659 Transaction on the terms proposed?

(d) Should the Court approve the SSCL Transaction on the terms proposed?

III. Analysis

A. Sanction Application

1. Legal Framework for Plan Sanction under the *CCAA*

[24] The Court may sanction a compromise or plan of arrangement if a majority in number representing two thirds in value of the creditors (or class of creditors), at a creditors' meeting, vote in agreement to a compromise or arrangement as proposed (or altered or modified at the meeting): *CCAA*, section 6(1); ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10 [***Callidus***] at para 57; Once sanctioned, the plan is binding on each class of creditors that participated in the vote: *CCAA*, section 6(1); ***Callidus*** at para 57.

[25] The general test courts apply when considering whether to sanction a plan is well established. It requires: (i) strict compliance with all statutory requirements; (ii) all materials filed and procedures carried out must authorized by the *CCAA*; and (iii) a fair and reasonable plan: ***Target Canada Co (Re)***, 2016 ONSC 316 [***Target Canada 2016***] at para 70; ***Re Northland Properties Ltd***, 1988 CanLII 3250 aff'd 1989 CanLII 2672 (BC CA); ***Canadian Airlines Corp (Re)***, 2000 ABQB 442 at para 60 leave to appeal refused 2000 ABCA 238; ***Lutheran Church Canada (Re)***, 2016 ABQB 419 at para 114; ***Re: Canwest Global Communications Corp***, 2010 ONSC 4209 at para 14; ***Laurentian University of Sudbury***, 2022 ONSC 5645 at para 23.

[26] In considering whether the applicant has complied with all statutory requirements under the *CCAA*, the Court will typically consider the following, as described in ***Laurentian University*** at para 24 (citing ***Canwest Global*** at para 15):

(a) if the applicant comes within the definition of a "debtor company" under section 2(1) of the *CCAA*:

(b) if the applicant has total claims in excess of $5 million;

(c) if the creditors were properly classified;

(d) if the notice of meeting was sent in accordance with the meeting order;

(e) if the meeting was properly constituted;

(f) if the voting was properly carried out; and

(g) if the plan was approved by the requisite majorities.

[27] The assessment of whether a plan is fair and reasonable engages the Court's discretion: ***Canadian Airlines*** at para 95. In considering whether a plan is fair and reasonable, perfection is not required: ***Laurentian University*** at para 31; ***AbitibiBowater Inc (Re)***, 2010 QCCS 4450 at para 33. The Court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a fair balancing of interests in light of other options: ***Laurentian University*** at para 31; ***Canadian Airlines*** at para 3.

[28] Accordingly, the Court will consider the following, as set out in ***Laurentian University*** at para 32 (citing ***Canwest Global*** at para 21), and recently confirmed in ***Nordstrom Canada Retail, Inc***, 2024 ONSC 1622:

(a) whether the claims were properly classified and whether the requisite majorities of creditors approved the plan;

(b) what creditors would receive on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

[29] The *CCAA* specifically allows for releases of directors for pre-filing claims that relate to the obligations of the company where the directors are by law liable in their capacity as directors for payment of such obligations: *CCAA*, section 5.1. However, the Court's power to sanction a plan goes further to include plans that contain other third-party releases: ***Canadian Airlines*** at para 92; ***Wiebe v Weinrich Contracting Ltd***, 2020 ABCA 396 at para 32; ***Metcalfe & Mansfield Alternative Investments II Corp, (Re)***, 2008 ONCA 587 at paras 43, 78; ***Lutheran Church Canada*** at para 171; ***Canwest Global*** at paras 28-30; ***Laurentian University*** at para 39.

[30] While no single factor will be determinative, the jurisprudence about releases of third parties has developed over time and currently reflects the consideration of the following key factors summarized in ***Laurentian University*** at para 40 and ***Green Relief Inc***, 2020 ONSC 6837 at para 27 (both citing ***Lydian International Limited (Re)***, 2020 ONSC 4006 at para 54):

(a) whether the released claims are rationally connected to the purpose of the plan;

(b) whether the plan can succeed without the releases;

(c) whether the parties being released contributed to the plan;

(d) whether the releases benefit the debtors as well as the creditors generally;

(e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) whether the releases are fair, reasonable and not overly broad.

[31] Some factors may assume greater weight in one case than in another. Where releases are objected-to, the Court may also analyze the quality of the claims the objecting party wishes to maintain: ***Green Relief*** at paras 28-29.

[32] Finally, in considering whether a plan is fair and reasonable, courts are also mindful of the *CCAA's* remedial purpose: ***Canadian Airlines*** at para 95; ***Canwest Global*** at para 20.

[33] A modern summary of the *CCAA's* remedial purpose is set out in ***Callidus*** at paras 40-42. In summary: among Canada's insolvency statutes' objectives (providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company), the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" and has "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally": ***Callidus*** at paras 40-41, citing (among others): ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at para 70 [***Century Services***]; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp 4-5 and 14; ***Ernst & Young Inc v Essar Global Fund Ltd***, 2017 ONCA 1014 at para 103.

2. Should the Court Sanction the Plan?

[34] The Plan affects the Affected Creditors but not persons holding unaffected claims (as defined). It contemplates certain "convenience" Affected Creditors with small claims to elect to receive the lesser of $4,000 and the value of their allowed affected claim. It also provides for the establishment by the Plan Sponsor of a $750,000 cash creditor pool and a creditor equity pool of Fika shares worth $4,000,000 (and the entitlement of each eligible voting non-convenience Affected Creditor with a proven claim to receive a *pro rata* cash and equity payment from those pools on Plan implementation in satisfaction of their claims). SNDL will ultimately be paid in full as part of Plan implementation (subject to confirmation of the total amount as affected by resolution of the adjourned SNDL Dispute). Upon sanctioning, the Plan shall constitute the full, final and absolute settlement of all rights by Affected Creditors.

[35] The Plan provides for releases (**Plan Releases**) of the Plan Entities, past and current employees, legal and financial advisors, other Plan Entities' representatives, directors and officers, the Monitor (and its legal advisors), and the Plan Sponsor.

[36] I accept the unchallenged evidence and find that there has been compliance with the *CCAA* statutory requirements and that all materials filed, and procedures carried out, including the Meeting, were *CCAA*-authorized and compliant. The Plan was overwhelmingly approved by the required special majority of properly classified and unsecured Affected Creditors.

[37] With respect to whether the Plan is fair and reasonable, I accept the unchallenged evidence and find that:

(a) the Plan Entities and the Plan Sponsor made considerable efforts to prepare the Plan in a manner that addresses, to the extent possible, the various stakeholder concerns;

(b) there are no other viable restructuring options available other than the Plan, the alternative to which would be formal liquidation. Under a formal liquidation, the Affected Creditors would likely receive no recovery, while under the Plan they receive significant and material recovery and a potential upside through the receipt of Plan Sponsor shares. In a liquidation scenario, there would be increased professional fees and bankruptcy costs;

(c) there is no prejudice to the Affected Creditors, who voted overwhelmingly in favour of the Plan. A high degree of creditor support creates an inference that a plan is fair, reasonable and economically feasible, and a court should be reluctant to second guess creditors' business assessment of a plan: ***Canadian Airlines*** at para 97; ***Kerr Interior Systems Ltd (Re)***, 2008 ABQB 286 at para 106;

(d) the Plan provides the Plan Entities with the greatest opportunity to repay the outstanding debts to SNDL and continue with a stronger owner. It allows for the continuation of the retail cannabis operations to continue as normal without disruption or further store closures following the Plan, with continuing employment of employees and contractors;

(e) the Monitor's opinion, pursuant to section 23(1)(i) of the *CCAA*, is that "the Plan is fair and reasonable and provides the best available return"; and

(f) there are challenges to restructuring cannabis companies at an operational level. To the Monitor's knowledge, since January 2022 there have been 66 companies in the cannabis industry that have entered insolvency proceedings in Canada and, of those, only five have successfully restructured their operations, with the rest resulting in liquidation.

[38] There was no opposition to the sanctioning of the Plan. CRA raised a concern about ongoing tax remittances between the date of plan sanctioning and implementation, but was satisfied by Delta 9's counsel's explanation that CRA's post-filing claims were unaffected by the Plan and for which the Plan Entities would remain responsible.

[39] I have considered the Plan Releases. I find that the Plan is fair and reasonable with the Plan Releases included, for these reasons:

(a) I am advised they are typical forms of releases in *CCAA* proceedings (although that alone does not justify their inclusion);

(b) the inclusion of the Plan Releases was not opposed by any party (although that alone does not justify their inclusion);

(c) the Plan Releases are rationally connected to the Plan and its purposes. For example, they release claims of the Affected Creditors as part of the consideration for Affected Creditors obtaining partial recovery of their claims under the Plan;

(d) the Plan could not succeed without the releases as Plan implementation relies on the continued participation and involvement of the releasees;

(e) I accept the unchallenged evidence that the proposed releasees contributed to the Plan in precarious circumstances. It is obvious from the cumulative evidence in this matter that the negotiation of the terms of the Plan and the Delta 9 restructuring has been complex, protracted and difficult, involving significant work by Delta 9 Parent, the Chief Restructuring Officer, the Plan Sponsor, SNDL, CRA and the Monitor (and their various consultants, advisors, counsel and representatives);

(f) the Plan Releases are a key component of the Plan, and a condition of Plan implementation which (as discussed above) benefits the debtors and the Affected Creditors and other stakeholders. The Plan Releases ensure that all stakeholders have certainty and finality about their liabilities at the conclusion of the Plan Entities' restructuring;

(g) the terms of the Plan Releases were expressly included in Article 9 of the Plan which was provided to the Affected Creditors; and

(h) the Plan Releases are fair, reasonable and not overly broad. The Plan confirms that the Plan Releases do not apply to (1) unaffected claims (as defined in the Plan); (2) obligations to Affected Creditors under the Plan or under any court order made in these *CCAA* proceedings; (3) SNDL's claim related to the SNDL Dispute; (4) claims finally determined to be based on breach of trust (whether common law or statutory), fraud, wilful misconduct or gross negligence; or (5) claims against directors referred to in section 5.1(2) of the *CCAA*.

[40] For the above reasons, I find that Plan is fair, reasonable and consistent with the *CCAA*'s remedial purpose.

B. Stay Extension Application

1. Legal Framework for Stay Extension Application

[41] The Court may make an order extending a stay, restraint and prohibition of proceedings for any period the Court considers necessary, provided the applicant satisfies the Court that circumstances exist that make the order appropriate, and the applicant has acted (and is acting) in good faith and with due diligence: *CCAA*, sections 11.02(2) and (3). The burden of proof is on the applicant: ***Mantle Materials Group, Ltd (Re)***, 2024 ABKB 19 at para 35. Appropriateness of an extension is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*: ***Re Canada North Group Inc***, 2017 ABQB 508 at para 34, citing ***Century Services*** at paras 15, 70, 71.

2. Should the Court Grant the Stay Extension?

[42] No party opposed the further Stay extension application. I am satisfied that Delta 9 and the Plan Sponsor have, since my last extension order, acted in good faith and with due diligence. This finding is supported by the Monitor's reports. Further, having found that the Plan is fair, reasonable and consistent with the *CCAA's* remedial purposes, I find that an extension is necessary in the circumstances to allow for Plan implementation and the determination of the SNDL Dispute in February 2025, among other things.

[43] The form of proposed stay extension order, extending the Stay until February 28, 2025, is granted.

C. Application to Approve the 659 Transaction

1. Legal Framework for Approval of Asset Sale

[44] A debtor company under *CCAA* protection may not sell or dispose of assets outside the ordinary course of business without court authorization: *CCAA*, section 36(1).

[45] Whether to grant authorization to sell assets is a matter of judicial discretion. It is not a rubber-stamp exercise; it involves the balancing of the interests of stakeholders: ***Bellatrix Exploration Ltd (Re)***, 2020 ABQB 332 at para 30.

[46] The non-exhaustive statutory factors in sections 36(3)-(5) of the *CCAA* that the Court must consider, as well as additional or overlapping factors developed in the common law, do not form a rigid checklist of factors that must be present in every transaction: ***Target Canada Co (Re)***, 2015 ONSC 1487 at paras 14-17; ***Royal Bank v Soundair Corp***, 1991 CanLII 2727 (ON CA), 1991 CarswellOnt 205 [***Soundair***]; ***Long Run Exploration Ltd (Re)***, 2024 ABKB 710 at paras 11-12; ***Sanjel Corporation (Re)***, 2016 ABQB 257 at paras 54-55; ***Acerus Pharmaceuticals Corporation (Re)***, 2023 ONSC 3314 at paras 10-11.

[47] The statutory factors under section 36(3) of the *CCAA*, as augmented by recognized common law factors, are:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances. Common law factors include whether there was sufficient effort made to get the price at issue, whether the debtor or court-appointed officer acted improvidently, whether the process had integrity and was fair, reasonable, transparent and efficient; and whether the interests of all parties were considered: ***Sanjel Corporation (Re)*** at para 56; ***Soundair*** at para 16;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. Common law factors include the weight to be given to the recommendation of the monitor and the business judgment rule, in that the Court will not lightly interfere with the exercise of the commercial and business judgment

of the debtor company and a monitor where the process was fair, reasonable, transparent and efficient: ***Sanjel Corporation (Re)*** at para 57; ***Re AbitibiBowater*** at paras 70-72;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, accounting for their market value.

[48] I consider the 659 Transaction under this framework.

2. Should the Court Approve the 659 Transaction?

[49] The 659 Transaction involves the sale of the Bio-Tech Facility to 659, an arm's length party. It is conditional upon court approval of the proposed SAVO and the execution of a lease for the Facility between 659 (as landlord), SSCL (as tenant) and the Plan sponsor (as indemnifier).

[50] No party opposed the authorization of the 659 Transaction.

[51] Based on the evidence and the factors outlined above, I find it is appropriate to authorize the 659 Transaction, for these reasons:

(a) Sales Process. The sales process followed the court-approved Bio-Tech SISP Order. There was an extensive marketing process, assisted by a professional sales advisor, in which the Monitor solicited offers from many prospective bidders. There was interest from several parties, but only 659 (an arm's length party and previous owner of the land) made an offer. The APA was the result of good faith arm's length negotiations;

(b) Monitor's Recommendation. The Monitor is of the view that the 659 APA is commercially reasonable;

(c) Creditor Consultation. Creditors were provided notice of the application to approve the Bio-Tech SISP;

(d) Effect of the Sale. The effect of the 659 Transaction and the proposed SAVO is, among other things, to vest the Bio-Tech Facility in 659 and replace it with the proceeds for sale, preserving claims and their priority in the proceeds. Under the proposed SAVO, the Monitor shall not make distributions of the net proceeds without further court order;

The Plan Sponsor is the fulcrum creditor in respect of the priority of charges against the Bio-Tech Facility and it supports the sale. Bio-Tech owes significant amounts to CRA for unremitted GST ($657,056 as of July 12, 2024) and unremitted excise tax ($7,831,515 as of July 12, 2024) (together, **Arrears**) – CRA does not oppose authorization of the APA or the proposed SAVO; and

(e) Consideration. The only evidence of the value of the Bio-Tech Facility is the amount in the APA, which followed the extensive marketing process noted above.

[52] I am concerned with the definition of "Excluded Liabilities" and "Liabilities" in the APA as potentially overreaching and affecting future reclamation or remediation obligations which Manitoba Ministry of the Environment and Climate Change (**Ministry**) may later seek to enforce under *The Environment Act*, CCSM c E125 in respect of the Bio-Tech Facility. The Ministry was not served with or provided notice of the Applications. In response to that concern, Delta 9 (with the concurrence of the Plan Sponsor, the Monitor and 659) proposed that the SAVO be amended to give the Ministry the right to file a comeback application to vary the terms of the SAVO in respect of environmental obligations. That is appropriate in the circumstances.

[53] For these reasons, I grant the proposed form of SAVO (as amended).

D. Application to Approve the SSCL Transaction

[54] The application for authorization of the SPA involves the same general legal framework under section 36 of the *CCAA* as discussed above. However, its RVO structure warrants further discussion and analysis.

1. Legal Framework for Reverse Vesting Orders (RVO)

[55] The general structure of RVOs has been explained in J. Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 43 as follows (footnotes omitted) [*Sarra - RVO*]:

> RVO usually involve the sale of an insolvent debtor company's shares to a purchaser in a transaction where unwanted assets and liabilities are excluded in the purchase transaction and are transferred, assigned and vested in a newly-incorporated company ('newco') as part of a pre-closing reorganization, allowing the debtor company to shed liabilities and retain the most valuable assets.
>
> The result of an RVO is to expunge the existing corporate structure of the debtor company of anything the purchaser does not want. The newco is added to the insolvency proceeding and continues in that process while the debtor company exits the insolvency proceeding with broad liability releases; then the newco is liquidated or placed in bankruptcy to be liquidated. The transaction takes place outside of a negotiated and court-approved plan of arrangement or compromise.

[56] See also: ***Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al***, 2022 ONSC 6354 at para 27.

[57] While not expressly contemplated in the *CCAA*, it is now well established that courts have discretionary jurisdiction to authorize transactions involving RVOs, including pursuant to sections 11 and 36 of the *CCAA*: ***Long Run Exploration*** at para 17; ***Invico Diversified Income Limited Partnership v NewGrange Energy Inc***, 2024 ABKB 214 at para 18; ***Southern Star Developments Ltd v Quest University Canada***, 2020 BCCA 364 at para 11; ***Just Energy*** at para 29; ***Fresh City Farms and Mama Earth Organics,*** 2024 ONSC 2016 at para 35; ***Harte Gold Corp (Re)***, 2022

ONSC 653 at paras 24-37; ***Rambler Metals and Mining Limited, Re CCAA***, 2023 NLSC 134 at paras 39-61;

[58] Concerns arise because RVOs lack the claims and creditor voting process contemplated by the *CCAA*, and releases included as part of the transaction may be overly broad, both of which may negatively impact negotiations which could otherwise lead to a more favourable compromise or arrangement: *Sarra-RVO* at 17; 24; ***Invico Diversified*** at para 19.

[59] Therefore, in the *CCAA* context, RVOs should not be routinely granted, must be justified by "compelling", "extraordinary" or "exceptional" circumstances, and should invite "close scrutiny" because they can lead to unfairness or prejudice to creditors or other stakeholders: ***Long Run*** at para 18; ***Harte Gold*** at para 38; ***Invico Diversified*** at para 19; *Sarra-RVO* at 25-31; ***Atlas Global Brands Inc***, 2024 ONSC 5570 at para 35; ***MCAP Financial Corporation v QRD (Willoughby) Holdings Inc***, 2024 BCSC 1654 at para 11; ***Arrangement relatif à Blackrock Metals Inc***, 2022 QCCS 2828 at para 96 [***Blackrock Metals***].

[60] An RVO is not granted merely because it may be more convenient or beneficial for the purchaser; there must be an evidence-based rationale for value in the proposed RVO transaction: ***MCAP Financial*** at paras 11, 18; ***Harte Gold*** at para 38; ***Blackrock Metals*** at paras 114-116; ***Just Energy*** at para 33.

[61] Interrelated, non-exhaustive relevant factors to consider in approving a transaction involving an RVO include:

(a) the statutory basis for an RVO, which in my view includes consideration of whether the RVO furthers the *CCAA's* remedial purposes (as set out ***Callidus*** at paras 40-42 and ***Century Services*** at para 59);

(b) the factors outlined in section 36(3) of the *CCAA* (as noted above), as adjusted for the unique aspects of a reverse vesting transaction, including:

  (i) the reasonableness of the sales process / sales effort;

  (ii) any monitor recommendation;

  (iii) creditor consultation;

  (iv) the effect of the transaction on creditors and other stakeholders; and

  (v) the consideration for the transaction;

(c) the reason why an RVO is necessary;

(d) whether the reverse vesting structure produces an economic result at least as favourable as any other viable alternative;

(e) the interests of all stakeholders, including whether any stakeholders are worse off under the reverse vesting structure than they would have been under any other viable alternative; and

(f) whether the consideration being paid reflects the value of the assets preserved under the reverse vesting structure.

See: ***Harte Gold*** at paras 23, 38; ***Long Run Exploration*** at paras 17-19; ***Fresh City Farms*** at paras 35-39; ***Rambler Metals*** at para 62; ***PricewaterhouseCoopers Inc v Canada Fluorspar (NL) Inc***, 2023 NLSC 88 at para 60; ***Blackrock Metals*** at paras 87-95; ***MCAP Financial*** at paras 11-12; ***Atlas Global*** at paras 50-53.

[62] Where releases are part of an RVO, then the factors noted above are also relevant (as adjusted for this context), namely:

(a) whether the released claims are rationally connected to the purpose of the plan / transaction;

(b) whether the plan / transaction can succeed without the releases;

(c) whether the parties being released contributed to the plan / transaction;

(d) whether the releases benefit the debtors as well as the creditors generally;

(e) whether the creditors have knowledge of the nature and the effect of the releases; and

(f) whether the releases are fair, reasonable and not overly broad. In my view, as illustrated by this case, when considering whether releases are fair it may be appropriate for the Court to consider the conduct of proposed releasees and any potential benefit a proposed releasee may obtain from the restructuring or transaction as a whole. I also find it is appropriate to consider the timelines and nature of the objection to the proposed release, and the effect on stakeholders if the RVO structure (with the proposed releases) is not approved.

[63] I now consider the SSCL Transaction under this framework.

2. Should the Court Approve the SSCL Transaction?

a. The SSCL Transaction

[64] The SSCL Transaction encompasses the SPA and the ARVO, which together involve (among other things):

(a) SSCL acquiring all the shares of Bio-Tech;

(b) the cancellation of any other securities in the capital of Bio-Tech, without consideration;

(c) the payment by SSCL of a deposit and the balance of the purchase price, which will be held by the Monitor for the benefit of Bio-Tech's stakeholders pending further court order;

(d) the potential termination (without compensation) of some Bio-Tech employees that SSCL may identify it does not wish to continue to employ;

(e) the creation of a residual company (**ResidualCo**) to which certain "Excluded Assets", "Excluded Contracts" and "Excluded Liabilities" will be transferred. Among other things, all taxes owing or accrued due by BioTech for the period prior to the *CCAA* filing date will be transferred to or vested in or assumed by ResidualCo;

(f) the release (**RVO Releases**) in favour of releasees (**RVO Releasees**), including Bio-Tech and its current and former directors and officers, legal counsel and advisors; the Monitor and its legal counsel; SSCL and its legal counsel, directors, officers, partners, employees, consultants, advisors and assignees; and any directors or officers of ResidualCo; and

(g) Bio-Tech's retention of all its other assets other than the Excluded Assets and Bio-Tech's cessation as applicant in the *CCAA* proceedings under the court's purview (other than the ARVO).

[65] Although the SSCL Transaction is distinct and requires its own separate authorization and approval, it must be considered in proper context. It is interrelated with the Plan and the 659 Transaction, the sanction, authorization and approval of which were sought at the same time as the SSCL Transaction as part of the overall restructuring of the Delta 9 group.

[66] Only CRA expressed any concern with the SSCL Transaction. Specifically, as noted above, it objects to the release of Bio-Tech's directors, with specific focus on Arbuthnot, from being assessed for personal liability for Bio-Tech's Arrears under the *Excise Tax Act*, RSC 1985 c E-15 and the *Excise Act, 2001*, SC 2002 c 22 (*Excise Act, 2001*). In my view, the RVO Releases must be viewed in context of their role in the SSCL Transaction and, in turn, the overall restructuring of the Delta 9 group.

[67] I turn to relevant factors below, with special attention paid to CRA's objection to the release of Bio-Tech's directors.

b. The Need for an RVO

[68] Reverse vesting transactions have been recognized as appropriate in cases where there are valuable assets which cannot be transferred to a purchaser, including where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to transfer to a purchaser: ***Harte Gold*** at para 71; ***Just Energy*** at para 34; ***Xplore Inc (Re)***, 2024 ONSC 5250 at para 59; ***PaySlate Inc (Re)***, 2023 BCSC 608 at para 80; ***Peakhill Capital Inc v Southview Gardens Limited Partnership***, 2023 BCSC 1476at para 39 aff'd 2024 BCCA 246; ***Atlas Global*** at para 51.

[69] The cannabis industry is one such environment. The Court was advised of numerous examples where RVOs have been approved by courts in cannabis restructurings.[1] As noted in ***Atlas Global*** at para 36:

> It is fair to observe that the setbacks besetting the cannabis industry have in fact in large measure provided the impetus for the recently increased use of the reverse vesting structure. That is because in a highly regulated industry, like the cannabis industry, there are significant implications, for the transfer of a business, if a purchaser would have to start "from scratch" to obtain regulatory approval to operate the business in question rather than assuming the relevant licenses as part of the transaction.

[70] The Monitor's view is that an RVO structure is necessary to maximize value in this case due to the highly regulated nature of the cannabis business, the value of which is dependant on maintaining two non-transferrable licences: a licence with Health Canada under the *Cannabis Act*, SC 2018, c16 that permits BioTech to cultivate, process and sell cannabis and a licence with CRA requiring it to apply cannabis excise stamps to its cannabis products in accordance with the *Excise Act, 2001*.

[71] No party suggested that an RVO was unnecessary in this case or that the justification for an RVO was unreasonable.

[72] I find that there is a legitimate need for an RVO structure for Bio-Tech.

c. The Bio-Tech SISP Process

[73] As noted above, the Bio-Tech SISP process was court-approved in the July 24, 2024 Bio-Tech SISP Order, on notice to interested stakeholders including CRA.

[74] The approved Bio-Tech SISP process provided potential interested purchasers an opportunity to propose a wide range of transaction structures, including "one or more of a restructuring, recapitalization or other form of reorganization of the business and affairs of [Bio-Tech] as a going concern, or a sale of all, substantially all, or one or more component's of [Bio-Tech]'s assets ... and business operations ... as a going concern or otherwise".[2]

[75] Despite the extensive marketing process, SSCL (an arm's length cannabis producer) made the only offer for Bio-Tech's business or shares (whether by a reverse vesting structure or otherwise).

---

[1] Delta 9's Brief cited the following, not all of which have reported decisions: Atlas Global Approval and Reverse Vesting Order granted on October 29, 2024, Court File No. CV-24-00722386-00CL (ONSC); Indiva Limited, et al, Approval and Reverse Vesting Order granted October 21, 2024, Court File No. CV-24-00722044-00CL (ONSC); BZAM Ltd, et al, Approval and Vesting Order, granted October 15, 2024, Court File No. CV-24-00715773-00CL (ONSC); Phoena Holdings Inc, et al, Reverse Vesting Order granted March 21, 2024, Court File No.: CV-23-0069728500CL (ONSC); Fire & Flower, Reverse Vesting Order granted August 29, 2023, Court File No.: CV-23-0070058100CL (ONSC); Aleafia Health Inc., Reverse Vesting Order granted October 30, 2023, Court File No.: CV-2300703350-00CL (ONSC); Trees Corporation, Reverse Vesting Order granted April 5, 2024, Court File No.: CV-2300711935-00CL (ONSC); Eve & Co et al, Reverse Vesting Order granted October 7, 2022, Court File No.: CV-2200678884-00CL (ONSC).

[2] Bio-Tech SISP Order, Schedule A (clause 7).

[76] I find the Bio-Tech SISP process was fair and reasonable.

d. Monitor Recommendation

[77] The Monitor's view is that an RVO is necessary to maximize value in this case. It is of the view that the ARVO, including the proposed releases, is a condition precedent in the SPA which allows Bio-Tech to continue its operations as a going concern. With respect to the RVO Releases, the Monitor is of the view that their inclusion is an "important element to ensure the orderly transaction and transition of the business of Bio-Tech and is supported by the Monitor".

e. Creditor Consultation

[78] Creditors have been on notice about the potential need for an RVO transaction in respect of Bio-Tech, together with releases of Bio-Tech directors, since early in and throughout these *CCAA* proceedings.[3]

[79] In Arbuthnot's second affidavit sworn July 18, 2024, he deposed that Delta 9 had entered into a July 12, 2024 Restructuring Term Sheet with the Plan Sponsor, which provided:

> The Plan Sponsor shall support any request of the Delta 9 Group for the Court to approve third party releases in favour of the board of directors of [Bio-Tech] as part of any approval and reverse vesting order sought in the CCAA Proceedings.

[80] In that same affidavit, Arbuthnot explained the terms of a proposed key employee retention plan (**KERP**) for which Delta 9 sought Court approval. Arbuthnot was one of the key employees. He stated (emphasis added):

> The Key Employees also include directors and officers that are necessary and integral to the business and operations of Delta 9 continuing to operate in the normal course. **A key component, and part of the intended consideration under the KERP, is that releases be sought for the directors and officers as part of any sales transaction and in conjunction with any plan of arrangement that is approved**. I am Bio-Tech's only director and the only person with the necessary security clearance to allow Bio-Tech to operate in compliance with its Health Canada Licence. It would be very difficult, if not impossible, to successfully complete the SISP for Bio-Tech without my continued involvement in the operation of the business and in the SISP.

[81] The Monitor included the proposed KERP terms in its first report dated July 22, 2024 (**First Monitor's Report**). The Monitor noted that "certain Key Employees have indicated that they are considering alternative employment opportunities should the consideration in the KERP not be provided, including both the material retention payment amounts and the traditional director and officer releases in the specified circumstances".[4] The KERP was developed to incentivize and retain the defined "Key Employees" including Arbuthnot.[5]

---

[3] Arbuthnot's Seventh Affidavit, para 52.
[4] First Monitor's Report, para 104(e).
[5] First Monitor's Report, para 100.

[82] The proposed KERP was attached as Appendix E to the First Monitor Report. It provided (emphasis added):

> As part of the enticement and compensation to the D&Os for continuing to provide services and maintain their roles as directors and officers of the D9 Group during their CCAA proceedings, the D9 Group agrees to seek and obtain a release of all **liability as a director and officer of any member of the D9 Group that is subject to a sale of its business and operations by way of a reverse vesting order** and/or a release of all liability as a director and officer of each member of D9 Group that is subject to a plan of arrangement or compromise in the CCAA Proceedings.[6]

[83] Schedule A of the KERP provided further specific references to releases as part of a reverse vesting order process with other specific key employee entitlements.

[84] On July 24, 2024, the Court granted the ARIO (which approved the KERP), and the Bio-Tech SISP. Nobody sought permission to appeal those orders.

[85] On October 22, 2024, the Plan Sponsor applied for an order for a creditor's meeting with respect to its then proposed plan. The evidence and Monitor's report at that time further contemplated the release of the Bio-Tech directors.[7]

[86] As noted above, on December 30, 2024, Delta 9 served unfiled copies of its Applications and Arbuthnot's Sixth and Seventh Affidavits on the parties in the service list, including CRA. These materials include a redacted copy of the SPA for the SSCL Transaction, the specific terms of the RVO Releases, and the form of ARVO for the SSCL Transaction.

[87] CRA argues that it only received relevant details of the benefit Arbuthnot is obtaining from the restructuring process when it received the Sixth Monitor's Report in early January 2025 and the Monitor's Supplement on January 9, 2025.

[88] CRA is correct that the Court is not necessarily bound by the previous disclosed intention of Delta 9 and the Plan Sponsor to seek releases for Bio-Tech directors, or the Court's approval of the KERP which expressly contemplated them. However, they are relevant and important factors. Creditor consultation is a two-way street. By necessity, *CCAA* processes often move quickly and require diligent engagement by the Court and all stakeholders, including creditors. CRA chose to wait and see "how the *CCAA* process unfolded". It never questioned Arbuthnot on any of his affidavits. CRA allowed significant effort and resources to be expended or invested, while awaiting the outcome of the Bio-Tech SISP process, without apparently making it known to all stakeholders that it might object to a director's release if CRA was later of the view the director obtained an unjustified personal benefit out of the restructuring process.

[89] I find that there was reasonable consultation with creditors in respect of the SSCL Transaction. The possibility of an RVO structure, coupled with a requested release for Bio-Tech directors, was flagged very early on in these proceedings. The specific SSCL Transaction could not be proposed until the Bio-Tech SISP process had run its course, and the overall terms of the

[6] First Monitor's Report, Appendix E (clause 13).
[7] Affidavit of Mark Townsend sworn October 21, 2024, paras 42-43; Third Report of the Monitor dated October 29, 2024 (filed October 30, 2024), para 47; Sixth Monitor's Report, para 64.

interrelated restructuring involving the Plan, the 659 Transaction, and the SSCL Transaction were finalized. Although time was compressed, as it often is in *CCAA* proceedings, there was sufficient time for creditors, including CRA, to respond.

f. Effect on Creditors and Other Stakeholders

i. General Effect on Creditors

[90] Bio-Tech creditors have not had the benefit of a creditor vote with respect to the proposed RVO structure, as contemplated by the *CCAA*.

[91] The proposed transactions, including the SSCL Transaction, will not provide sufficient proceeds to pay Bio-Tech's unsecured creditors, including CRA's significant claims against Bio-Tech for the Arrears. The Monitor noted that the lack of proceeds to pay CRA "is a function of the value of Bio-Tech's business, as fully tested under the SISP, and the priority of the CRA claims relative to the claims of the priority creditors".[8] Delta 9 pointed to other cannabis restructurings where releases were approved notwithstanding significant amounts owing to CRA for excise tax and/or GST/HST.

[92] Zero recovery for unsecured creditors is often a function of the financial state of the debtor, not the RVO process: ***Long Run Exploration*** at para 19, citing ***Acerus Pharmaceuticals*** at para 32; ***Just Energy*** at para 57, ***Blackrock Metals*** at para 109; ***CCAA Plan of Arrangement – Clearbeach and Forbes***, 2021 ONSC 5564 at para 27(k). Further, there is no requirement that creditors be treated equally: ***Clearbeach and Forbes*** at para 27(k), citing ***Grafton-Fraser v Cadillac***, 2017 ONSC 2496 at paras 23-24.

[93] The Monitor is not aware of any stakeholder in the *CCAA* proceedings that would be worse off under the RVO structure.

[94] On the other hand, approval of the SSCL Transaction (which includes the RVO Releases) will allow the Bio-Tech business to continue as a going concern under the new ownership of SSCL, for the future benefit of all stakeholders including CRA.

ii. Effect on Future Application of the *Income Tax Act*

[95] CRA raised an issue with the potential effect of approving clause 4.3 of the SPA, which provides (with the language of concern emphasized):

> Pursuant to the Implementation Steps and the Approval and Vesting Order, at the Closing Time, all Taxes owed or owing or accrued due by Bio-Tech in respect of the period prior to the Filing Date shall be transferred to, vested in and assumed by ResidualCo, **including any Taxes related to debt forgiveness arising from or in connection with the consummation of the Transaction and the transfer of the Excluded Assets and Excluded Liabilities to ResidualCo**; provided, however, that the foregoing shall not: (a) relieve the Purchaser from Liability for Taxes arising during and in respect of the period from and after the Filing Date and relating to Retained Liabilities, or arising from audits or reassessments that relate

[8] Sixth Monitor's Report, para 54.

> to Retained Liabilities; or (b) relieve the Purchaser from any obligation to pay Taxes exigible by a purchaser in respect of a transaction like the Transaction in the same or similar circumstances. Any and all obligations and Liabilities arising from any audits or reassessments with respect to any Taxes that relate to a time period occurring, or facts arising, prior to the Closing Date, regardless of when such audit was commenced or completed, shall be transferred to and vest in ResidualCo.

[96] CRA argued that, if applicable, section 80 of the *Income Tax Act*, RSC 1985 c 1 (5th Supp) (*ITA*) operates to include certain forgiven debt amounts as income in the future and the Court cannot approve a provision in a transaction contract that requires the Minister not to apply the *ITA*. CRA relies on ***R v Beach***, 2001 BCCA 7 and ***Proposal of Sail Plein Air inc***, 2024 QCCS 1689 (under appeal) to say that such a court approval would be illegal. Such a provision prohibiting the Minister from including income would be unenforceable: ***Canadian Red Cross Society, Re***, 2006 CanLII 22141 (ON SC) at para 45.

[97] Counsel for the Plan Sponsor provided some proposed language to include in the ARVO to attempt to address CRA's concern, as CRA made it clear it did not intend this "technical issue" (as CRA's counsel described it) to derail the Delta 9 restructuring process. The proposed language, in my view, assists by ensuring that CRA's position is not intended to bind the Minister. However, the proposed language effectively defers the matter in the same way that was rejected as inappropriate by the British Columbia Court of Appeal in ***Beach***. In ***Beach***, at para 18, the Court held that a court could not sanction a bankruptcy proposal that exempts a debtor from section 80 of the *ITA* and imposes that exemption on Revenue Canada. In my view, I must consider whether the SPA can be approved in its current form.

[98] An important rule of contractual interpretation is that if there are two apparently viable interpretations and one of them would result in illegality, the other interpretation should be preferred: ***Calgary (City) v International Association of Fire Fighters (Local 255)***, 2008 ABCA 77 at para 32. I interpret clause 4.3 of the SPA such that it was not objectively intended by the parties to the SPA to include a provision that would be illegal for the Court to approve.

[99] Accordingly, and based on the specific wording used by the parties to the SPA, I do not interpret any inclusion of *income* based on the operation of section 80 of the *ITA* to be part of "Taxes related to debt forgiveness arising from or in connection with the consummation of the Transaction" which are transferred to and vest in ResidualCo, under clause 4.3. At this time, it is unknown exactly how or whether section 80 of the *ITA* may be engaged or, if it is engaged, whether it would necessarily lead to taxes payable in any event.

[100] The proposed ARVO must be amended to include the language proposed by the Plan Sponsor in argument, as well as language that makes it clear that clause 4.3 does not apply to any future inclusion of income to Bio-Tech pursuant to section 80 of the *ITA*. As this matter was only briefly argued at the Hearing, I leave it to counsel to draft appropriate agreeable language based on these reasons. If issues arise in doing so, or if my decision has unintended consequences not raised in argument, counsel may seek my further direction.

iii. Effect on Future Environmental Obligations

[101] Although it was not raised by any party, it is incumbent on the Court to be vigilant about attempts to shed environmental remediation and reclamation obligations in an RVO: *Sarra-RVO* at para 24. RVO structures that retain environmental remediation and reclamation obligations, and which avoid attempting to usurp the regulatory enforcement of environment remediation and reclamation obligations, are factors cited in support of (or required for) the approval of RVOs: ***Long Run Exploration*** at para 23; ***Re Mantle Materials Group, Ltd***, 2023 ABKB 488 at paras 10-11; ***Rambler Metals*** at para 105; ***Harte Gold*** at para 83.

[102] It is also incumbent for applicants seeking approval of RVOs to ensure that all parties interested in or affected by the RVO are served and given notice: ***Validus Power Corp et al and Macquarie Equipment Finance Limited***, 2023 ONSC 6367 at para 119. Whenever real property is involved in a transaction, it is best practice to ensure that the applicable Crown office or environmental regulatory agency is given notice.

[103] I raised a concern with the definition of "Excluded Liabilities" in the SPA as potentially overreaching and affecting future reclamation or remediation obligations the Ministry may seek to enforce in the future in respect of the Bio-Tech Facility. Section 2.2 of the SPA provides (emphasis added):

> 2.2 Excluded Liabilities
>
> (a) Pursuant to the Approval and Vesting Order, save and except for the Retained Liabilities, **all** debts, **obligations**, Liabilities, Encumbrances, indebtedness, Excluded Contracts, leases, agreements, undertakings, Claims, rights and entitlements **of any kind or nature whatsoever** (whether direct or indirect, **known or unknown, absolute or contingent, accrued or unaccrued**, liquidated or unliquidated, **matured or unmatured or due or not yet due**, **in law or in equity and whether based in statute or otherwise**) **of or against Bio-Tech**, the Bio-Tech Shares, or against, **relating to or affecting any of the Retained Assets**, or any Excluded Assets or Excluded Contracts, including, *inter alia*, the non-exhaustive list of Liabilities set forth in Schedule "C" (collectively, the "**Excluded Liabilities**") **shall be excluded and will no longer be binding on Bio-Tech**, the Bio-Tech Shares (or the holders thereof), Retained Assets, Employees, Permits and Licenses or Books and Records following the Closing Time.

[104] In argument, I was advised that there are no known environmental concerns with the Bio-Tech Facility, although that was not in evidence. I understood the position of Delta 9 to be that the definition of Excluded Liabilities was not intended to include the Ministry's right to take steps to protect the environment (including to issue environmental protection orders) in the future (which I took to mean whether any adverse environmental conditions arose before or after the *CCAA* filing). SSCL did not participate in the Hearing.

[105] As it did with the SAVO, following the Hearing, Delta 9 (with the concurrence of the Plan Sponsor, the Monitor and SSCL) proposed an additional term to the ARVO which would provide

the Ministry 21 days upon service of a granted ARVO to apply to come back to vary its terms in respect of environmental liabilities. That is appropriate in the circumstances, if necessary, to allow appropriate language to be included to ensure that the ARVO does not have unintended consequences related to the future statutory discretion of the Ministry.

g. Viable Alternatives and Recovery Under Liquidation

[106] I find that there are no viable alternatives to the SSCL Transaction. According to the Monitor, if the SSCL Transaction were not to close and the ARVO is not granted, this would result in an immediate shut-down and liquidation of Bio-Tech. The Monitor is not aware of any viable alternative that would produce a more favourable result in the proceedings.[9] I accept the Monitor's unchallenged evidence.

[107] CRA is potentially worse off if the RVO Releases are included in the ARVO. CRA has not adduced evidence of what, if any, likely recovery it might obtain from Arbuthnot or former Bio-Tech directors if the RVO Releases are not approved.

[108] There is no specific evidence of what the liquidation of Bio-Tech alone would likely generate, however, given that the only interest in the Bio-Tech business was from SSCL based on the assumption that required licences would be available and operations would continue, it can be inferred that recovery for creditors overall would be materially less.

[109] Further, as noted elsewhere in these Reasons, the SSCL Transaction is intertwined with the 659 Transaction and the Plan (both of which CRA agrees with or did not oppose). A liquidation of the Delta 9 businesses would result in Affected Creditors receiving no recovery, reduced recovery for the priority secured creditor SNDL, the shut-down of retail outlets and the Bio-Tech manufacturing business, the loss of jobs, and increased fees and bankruptcy costs.

[110] Based on the evidence before me, I find that the proposed RVO structure produces an overall economic result better than liquidation.

h. Consideration

[111] The consideration to be paid by SSCL in the SSCL Transaction is the only evidence of value of the assets preserved under the RVO structure. SSCL negotiated at arm's length pursuant to the Bio-Tech SISP. There is no evidence that the consideration is unreasonable. CRA appears to acknowledge that "the market has spoken".

i. The RVO Releases

[112] As noted, CRA's objection is not to the SSCL Transaction, *per se*, but the Bio-Tech directors or former directors being included in the RVO Releasees relating to the Arrears.

[113] I consider relevant factors below.

[9] Sixth Monitor's Report, paras 49-52.

i. Rational Connection?

[114] I find that the RVO Releases, including the release of Arbuthnot, are rationally connected to the SSCL Transaction. Arbuthnot will be involved in the implementation of the SSCL Transaction and is the only person with the necessary security clearance to allow Bio-Tech to operate in compliance with its Health Canada Licence. Releasing Arbuthnot is part of the *quid pro quo* for his continued participation in the implementation of the SSCL Transaction, the 659 Transaction and the Plan. Further, the releases may avoid director indemnity claims or future litigation about director indemnity claims.

[115] CRA's argument that the release of Arbuthnot and former Bio-Tech directors in respect of the Arrears is not rationally connected to the SSCL Transaction or the Plan is based, at least in part, on its premise that their release is not necessary to the SSCL Transaction. I address that argument below.

ii. Can the SSCL Transaction or the Plan Succeed without the Releases?

[116] CRA stated that "mere assessing of directors does not impact the plan going forward". Unfortunately, CRA's statement is based on speculation and not evidence and I must base my decision on evidence. CRA has not contradicted the evidence filed by Delta 9, including Arbuthnot's affidavits, or the opinion and advice of the Monitor.

[117] I find that, based on the undisputed evidence, the release of Arbuthnot is integral to the success of the SSCL Transaction. CRA acknowledged that he was the "lynchpin" for the Health Canada licence. If that licence is not available to Bio-Tech, its business would be immediately disrupted and would likely result in an immediate shut-down and liquidation of Bio-Tech, which would garner a lower purchaser price.[10]

[118] As noted above, in the early phases of these proceedings, Arbuthnot and other directors were considering their options and the KERP, which contemplated their later release, was approved by the Court to incentivize their retention. It can be reasonably inferred that the contemplated releases, now coming to fruition, were important for Arbuthnot to continue to be involved.

[119] Without approval of the RVO Releases, one of the conditions to the SSCL Transaction would not be fulfilled. I agree with CRA that the Court should not accept releases simply because they have been packaged together as a condition precedent to a transaction or restructuring, and that "strong-arm tactics" of incumbent directors should be resisted: ***Green Relief*** at para 52. Success of the transaction or plan should be assessed with regard to factors other than potential strong-arming: ***Green Relief*** at para 53.

[120] However, in my view, the Court's assessment of whether requiring releases even constitutes director "strong-arming" in the *CCAA* process must be based on the evidence available. In this case, the concept of proposed releases was in the Restructuring Term Sheet and supported by the Plan Sponsor before the *CCAA* process even began.

[10] Sixth Monitor's Report, para 50.

[121] CRA speculates that, without the releases, SSCL would nonetheless proceed with the transaction. In my view, without the protection of the RVO Releases, there would be considerable uncertainty for SSCL as to whether Arbuthnot would agree to stay involved or on what terms. Without Arbuthnot's involvement, the entire nature of the SPA would be different and whether SSCL would waive the release condition or renegotiate another transaction is unknown. For example, if SSCL had to indemnify Arbuthnot or former Bio-Tech directors for their potential personal liability for the Arrears, it would materially change the economics of the SSCL Transaction. The best evidence I have is that the RVO Releases were made a condition of the SPA and the RVO structure because they were required and important, and that without them the closing of the SSCL Transaction would be at serious risk.

[122] If the SSCL Transaction were not to close, I find there would likely be a harmful ripple impact on the overall Delta 9 restructuring. In that event, the lease required for the 659 Transaction to close would not be signed, and the conditions of the 659 Transaction would be unfulfilled. It is unlikely that 659 would close the 659 Transaction at the same price, if at all, without a locked-in and operating tenant. In turn, then, conditions of the Plan would be unfulfilled, and the implementation of the Plan would be at risk. The Plan Sponsor may withdraw the Plan if the Plan's conditions, including the approval of the SSCL Transaction, are not met.[11] The Plan Sponsor explained that the SSCL Transaction, with the RVO Releases, is critical to the Plan Sponsor because it is legally unable to acquire Bio-Tech due to its own regulatory restrictions.

[123] The best evidence before me is that the loss of Arbuthnot's cooperation and involvement could potentially cause the entire restructuring of Delta 9 to fail, or to have to restart the process over again, all of which would likely lead to less recovery, increased costs, and the loss of time and expense incurred to date by the Plan Sponsor and other stakeholders.

[124] It is fully open to creditors, like CRA, to argue that director's releases, that are made a condition precedent to transactions in restructurings, are not actually necessary for the transaction or plan to succeed, but they must provide the Court the evidentiary foundation to support those arguments. CRA did not do that, and, on balance, I find that the evidentiary record does not support CRA's position.

iii. Releasee Contribution

[125] The undisputed evidence is that the RVO Releasees, including Arbuthnot, contributed significantly to the SSCL Transaction, and they will continue to do so until the transaction closes and is implemented as part of the overall Delta 9 restructuring. CRA's argument that Arbuthnot was not the only one that contributed is true but is not a persuasive reason to reject the RVO Releases in this case.

iv. Benefit to Debtors and Creditors

[126] CRA argues that the RVO Releases do not benefit the creditors, but rather simply prevent CRA from potentially collecting against Bio-Tech's directors for amounts that Bio-Tech misappropriated when it failed to pay for excise duties and GST.

[11] Fifth Monitor's Report dated November 26, 2024, paras 36-37.

[127] CRA's position is again based on the premise that the RVO Releases are not necessary for the success of the SSCL Transaction or the Plan. For the reasons above, I find that premise to be unsupported and find that the RVO Releases benefit Bio-Tech and creditors generally.

v. Creditor Knowledge of the Nature and Effect of the Releases

[128] For the reasons above, including under the heading "creditor consultation", the creditors (including CRA) have had knowledge of the nature and effect of the proposed RVO Releases.

vi. Fair, Reasonable and Not Overly Broad?

[129] The proposed ARVO provides the RVO Releasees a broad release of all present future claims, liabilities and other matters based on any act, omission transaction, dealing or other occurrence existing or taking place prior to the "Closing Time" or arising in connection with or relating in any manner whatsoever to the SPA, the SSCL Transaction, or the conduct of these *CCAA* proceedings.

[130] However, there are exceptions: the RVO Releases as treated under the proposed ARVO:

(a) do not release any claim not permitted to be released pursuant to section 5.1(2) of the *CCAA*, namely claims that relate to contractual rights of creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors;

(b) do not release any claim or liability arising out of any gross negligence or wilful misconduct on the part of the released directors and officers of Bio-Tech and ResidualCo;

(c) do not apply to or prevent any person from commencing or continuing actions for an "Insured Claim" under any insurance policy maintained by Bio-Tech, which can be a mitigating factor to the loss of claims: ***Atlas Global*** at paras 92-93;

(d) do not apply to performance of obligations under the SSCL Transaction; and

(e) do not affect certain CRA set-off rights against Bio-Tech for pre and post *CCAA* filing amounts owed.

[131] Other than CRA, no creditor or stakeholder opposed the releases as being unfair or overly broad.

[132] CRA's core position is that the release of Arbuthnot from assessment for the Arrears renders the RVO Releases unfair. CRA appears to suggest that Arbuthnot has intentionally and by design orchestrated the Delta 9 restructuring to his personal benefit, and that Arbuthnot has already received benefits that more than compensate him for his involvement and continued involvement in the restructuring. CRA describes the further release related to assessment for Arrears as a "gratuitous benefit".

[133] CRA argues the following:

(a) although Arbuthnot was integral to Bio-Tech due to his security clearance related to Health Canada licence, that should not excuse his mismanagement and his causing the effective misappropriation of funds owed to CRA for GST and Excise remittances;

(b) Arbuthnot obtained the benefit of the KERP program. CRA argues that this already compensated him for remaining involved and assisting the restructuring process and that he does not need the further benefit of the RVO Release for staying involved;

(c) Arbuthnot will remain employed by Bio-Tech moving forward, after SSCL becomes its owner;

(d) Arbuthnot and his father (Bill Arbuthnot) created for themselves an employment agreement which provided them each a right to $5,000,000 upon a change of control of Bio-Tech, for which they both filed claims in the *CCAA* proceedings in August 2024 (**Arbuthnot Claims**). CRA argues that the Arbuthnot Claims, which have been accepted as contingent claims, inflated the creditor pool which decreased potential recovery for other creditors and, further, gave those claims significant voting power on the Plan; and

(e) Arbuthnot and Bill Arbuthnot assigned the Arbuthnot Claims to another creditor (Uncle Sam's Cannabis Ltd), in return for a release of their personal liabilities to that creditor. CRA argues that Arbuthnot should not be able to obtain the benefit of those releases and then also release from potentially liability for the Arrears.

[134] CRA asserts that many of these details were not previously available and, therefore, CRA did not have an opportunity to provide comments earlier. I reject that notion. The Arbuthnot proofs of claims based on their employment agreements were filed in August 2024 as part of the claims process. The proposed release of Bio-Tech directors was known before and since that time. The quantum of claims was reported in the Fifth Report of the Monitor's dated November 26, 2024. It was open to CRA to seek more information about the claims of directors, or to question Arbuthnot on his affidavits, if CRA wanted to know more information about their claims or how they are affected by Delta 9's financial situation or its restructuring.

[135] Arbuthnot's employment agreement was executed in 2021, by a different director on behalf of Delta 9, long before the *CCAA* proceedings. There is no evidentiary basis to suggest it was improper when executed. Delta 9 Parent is a public company and Arbuthnot and others owed fiduciary obligations to ensure they acted in the best interest of the corporations. Delta 9 Parent had public reporting obligations that likely disclosed terms of his employment agreement. In my view, without more, Arbuthnot cannot be blamed for advancing claims in the *CCAA* proceedings he is contractually entitled to claim, or from assigning those claims to another party.

[136] Further, Arbuthnot cannot be blamed for the creation or use of the regulatory regime which makes his participation integral to a restructuring.

[137] I agree with CRA that, in appropriate cases, as part of considering the fairness of a release, other benefits connected to a restructuring obtained by a proposed releasee, and the proposed releasee's circumstances and conduct in the context of a restructuring, may be relevant in

approving releases within an RVO structure. This could include whether the proposed releasee has acted in good faith: *CCAA*, section 18.6; ***Bellatrix Exploration Ltd (Re)***, 2020 ABQB 809 at para 105; ***Razor Energy Corp, Razor Holdings Gp Corp, and Blade Energy Services Corp (Re)***, 2025 ABKB 30 at paras 49-51.

[138] In my view, however, a party seeking to oppose a release on these grounds should engage and advise of its position early in the process and build an evidentiary record to allow the Court to reasonably assess those factors. That might include (among other things) evidence about the alleged net benefits already received by the proposed releasee, the economic benefits of the transaction overall, the potential value of the release to the releasee, the potential economic impact of not approving the release, the actual prejudice to the creditor, and whether the proposed releasee is acting in good faith.

[139] CRA has not done these things. While it is true that Delta 9 misused funds owed to CRA for other purposes, it appears to have been to attempt to maintain the business as a going concern during tumultuous times in a new industry. This is not an excuse but is a relevant factor, particularly given that the Arrears appear to have accumulated over an extended period and CRA did not strictly enforce its rights. In the *CCAA* proceedings, CRA waited to see how things unfolded, including whether the Bio-Tech SISP process might garner a qualifying bid that would generate CRA better recovery. Then, at the last possible moment, CRA asked the Court to reject the Bio-Tech directors' release and lift the Stay in its favour without a filed application or supporting evidence. CRA has not proven, on this record, that Arbuthnot or former directors did not act in good faith contrary to section 18.6 of the *CCAA*. The evidence and arguments from other Hearing participants, including the Monitor as court officer, suggests Arbuthnot has been acting in good faith.

[140] A creditor's approach and timeliness in advancing its position against a proposed release is also a relevant factor in assessing whether to approve an RVO structure with releases. I find that if I were to accede to CRA's position and grant the relief it seeks, it would be inconsistent with this Court's supervisory role to ensure that the *CCAA* process unfolds in a fair and transparent manner: ***Delta 9*** at para 64, citing ***Target Canada 2016*** at para 72. It would be unfair to the other *CCAA* stakeholders, particularly the Plan Sponsor (who has provided significant funding to Delta 9 for this *CCAA* process), SNDL (the priority secured creditor that stands to lose its full recovery if the restructuring is frustrated), and Arbuthnot (whose personal intentions and conduct is the target of CRA's assertions).

[141] Ultimately, in addition to these concerns, CRA essentially asks the Court to deny the proposed release of Bio-Tech's directors as unfair, on the speculative assertion or hope that doing so will allow CRA to collect more of the Arrears while not destroying the hard-earned benefits of the overall complex Delta 9 restructuring (which CRA otherwise supports). I am not satisfied it is appropriate to take that risk on the evidentiary record before me.

[142] In the circumstances, I am unable to agree with CRA that RVO Releases are unfair based on Arbuthnot's conduct or due to other benefits he may or may not have received. I find that, based on the record before me, that the RVO Releases are fair, reasonable and not overly broad.

j. Effect of Not Approving the RVO

[143] As noted above, I find that the effect of not approving the RVO, with the RVO Releases, at this juncture puts the benefits of the SSCL Transaction, the 659 Transaction and the Plan at serious risk.

k. Remedial Purpose of *CCAA*

[144] The remedial purpose of the *CCAA* favours approving the SSCL Transaction for the benefit of allowing Bio-Tech to continue as a going concern for the general benefit of stakeholders, including the Plan Sponsor, SNDL, Bio-Tech employees and others (including CRA). This is not overridden in this case by CRA's position, or the fact that Arbuthnot and other Bio-Tech Directors are released from being assessed for the Arrears.

l. Conclusion re SSCL Transaction

[145] For the reasons set out above, I find that the approval of the SSCL Transaction, including the RVO Releases is appropriate. I grant the form of proposed ARVO with the noted amendments noted above.

IV. Conclusion

[146] I grant the proposed "Order – Sanction of Plan and Stay Extension", the proposed SAVO and the proposed ARVO, as amended as noted above.

Heard on the 10th day of January 2025.
Dated at the City of Calgary, Alberta this 29th day of January 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Ryan Zahara, Molly McIntosh and Chris Nyberg, MLT Aikins LLP
for Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc. and Delta 9 Cannabis Store Inc.

James Reid and Matthew Cressatti, Miller Thomson LLP
for 2759054 Ontario Inc. operating as Fika Herbal Goods

Ashley Bowron, McCarthy Tetrault LLP
for SNDL Inc.

David LeGeyt, Burnet, Duckworth & Palmer LLP
for the Monitor, Alvarez & Marsal Canada Inc.

Howard A. Gorman, K.C., Norton Rose Fulbright Canada LLP
for the directors and officers of Delta 9 and Bio-Tech

Daniel Segal and David Smith, Department of Justice Canada
for the Canada Revenue Agency

Corrigendum of the Reasons for Decision
of
The Honourable Justice M.A. Marion

Docket number corrected on cover page.

TAB 3

Court of King's Bench of Alberta

Citation: Long Run Exploration Ltd (Re), 2024 ABKB 710

Date: 20241129
Docket: 2401 09247
Registry: Calgary

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 Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp

Corrected judgment: A corrigendum was issued on December 6, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on November 29, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Justice Douglas R. Mah

Table of Contents

A. Background

[1] The applicant is the Court-Appointed Monitor of Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp acting under the ***CCAA***.[1] The Monitor seeks transaction approval and a Reverse Vesting Order (RVO) in order to give effect to a stalking horse bid in the form of a Subscription Agreement for the shares of Long Run.

[2] The stalking horse bid is advanced by Hiking Group Shandong Jinyue Int't Trading Corp as part of a Court-approved sale and investment solicitation process (SISP). It was the only qualified offer that emerged from the SISP. Hiking also provided debtor-in-possession or DIP financing in the ***CCAA*** proceeding to the extent of $7 million under previous Court Order.

[3] The stalking horse Subscription Agreement was subsequently slightly amended for tax planning purposes. Subsequent mention of the Subscription Agreement in these Reasons refers to the amended Subscription Agreement (identified as the A & R Subscription Agreement in the application materials).

[1] ***Companies' Creditors Arrangement Act***, RSC, 1985, c C-36 as am.

[4] Reduced to its basics for the purposes of this decision, the Subscription Agreement contemplates:

- Cancellation of the existing common shares of Long Run and issuance of new shares to Hiking's nominee (a new wholly owned subsidiary created for that purpose), which shares would be free and clear of any existing liabilities of Long Run other than those expressly retained.
- Long Run would continue as a going concern with its retained assets, retained liabilities and retained contracts.
- The retained liabilities include the indebtedness owing by Long Run to senior secured creditors, as represented by China Construction Bank Toronto Branch (CCBT) as collateral agent, in the approximate amount of $350 million, as well as environmental liabilities of about $453 million.
- Apart from assumption of the senior secured debt, the cash component of the purchase price consists of an approximate $17.5 million to deal with priority payables, another much smaller amount ($100,000) to fund the Trustee's expenses for the Creditor Trust to be created and set-off of the $7 million DIP financing already advanced.
- Assets, liabilities and contracts not retained would be transferred to a Creditor Trust to be administered by the Monitor, and all of Long Run's liabilities except those expressly retained would be discharged so far as Long Run is concerned.
- Court approval of the Subscription Agreement and granting of an RVO are necessary to create the Creditor Trust. Creditors whose claims are transferred to the Creditor Trust would have further recourse only to the Creditor Trust, which is expected to be negligible. It is not anticipated that unsecured creditors would receive any payment.

[5] The transaction, if approved, enables Long Run to continue operations with a new owner "cleansed" of unwanted liabilities while retaining desired assets, contracts and liabilities.

[6] The Monitor submits that approval of the Stalking Horse Subscription Agreement with the RVO represents the best outcome for the financial stakeholders here.

[7] Two creditors of Long Run object to approval of the Stalking Horse Subscription Agreement and granting of the RVO as presented by the Monitor, on the basis of unfairness. The first objector is Henenghaixin Corp (H Corp) who has been engaged in litigation with Long Run, Calgary Sinoenergy and other defendants since February 2020. H Corp as plaintiff alleges fraud and misrepresentation against them in the action and in this proceeding claims a proprietary constructive trust to the extent of $44 million against the assets of Long Run.

[8] As it presently stands, H Corp's claim is a transferred liability whose claim against Long Run would be in effect extinguished upon closing of the transaction. H Corp asserts that the transaction must be amended so that its proprietary constructive trust claim is preserved and adjudicated upon.

[9] The second is Mr. Neufeld, a landowner and lessor under a surface lease agreement with Long Run who at one time was owed rent. Mr. Neufeld is not currently owed any rent and all outstanding surface lease rentals will carry over as retained liabilities. He did, however, constitute himself as representative plaintiff in a lawsuit for damages commenced in June

2022 proposing a class action on behalf of all Long Run's Alberta surface lease lessors. No application to certify a class action has ever been brought. Mr. Neufeld contends that any outstanding rentals owed to landowners should be paid up front and the lawsuit claim should be categorized by the Court as a retained liability for the purposes of the transaction.

[10] Mr. Neufeld also complains about a settlement letter sent last month by the Monitor to landowners offering to resolve outstanding surface lease claims on the basis of fifty cents on the dollar. Some 41 landowners accepted the offer. He asks the Court to rescind the letter.

B. Legal Test for Approval of a Sale or Disposition under the *CCAA*

[11] In approving (or not) the disposition of assets outside the ordinary course under the ***CCAA***, the Courts in Alberta and elsewhere have applied an amalgam of the factors set out in section 36(3) and those developed in ***Royal Bank v Soundair Corp***, 1991 CanLII 2727 (ONCA) applicable to a sale within a receivership: ***Sanjel Corporation (Re),*** 2016 ABQB 257 at paras 54-55 & ***Acerus Pharmaceuticals Corporation (Re)***, 2023 ONSC 3314 at paras 10 & 11:

[12] In the result, the consolidated factors consist of:

- The reasonableness, efficacy and integrity of the sales solicitation process;
- Whether the Monitor approved that process, and filed with the Court its opinion as to the benefit to creditors of the proposed transaction versus the alternative;
- Whether there was unfairness in the implementation of the solicitation process;
- The extent to which creditors were consulted;
- The effects of the transaction on creditors and the interests of other financial stakeholders;
- The fairness and adequacy of the proposed consideration.

[13] The Monitor also submits that the Court should not lightly interfere with the commercial and business judgment of the debtor company and the Monitor where the solicitation process has been fair, reasonable and transparent, and should give deference to the Monitor's recommendation: ***Sanjel*** at para 57. This is particularly so where the Monitor conducted itself in accordance with the SISP Order, a Court-supervised process: ***Acerus*** at para 25.

[14] With references to its 5th Report, the Monitor says:

- The SISP process leading to the proposed transaction was prescribed by Court Order (2nd Amended & Restated Initial Order of July 30, 2024) and therefore reasonable and fair;
- The SISP was executed according to its terms and therefore the process had efficacy and integrity (5th Report, paras 24-33);
- The Monitor made sufficient efforts to obtain the best price and has not acted improvidently (5th Report, paras 24-33);
- The Monitor expresses its opinion that the transaction is more beneficial to creditors than a sale or disposition under a bankruptcy (5th Report, paras 41-42 &47);

- Creditors (and specifically CCBT as collateral agent for the senior secured creditors) were consulted and the impact of the transaction on other stakeholders was considered (5th Report, pars 40-41 & 48-49);
- The consideration is reasonable and fair (5th Report, paras 29, 35-36, 41-42 & 50-51);
- The SISP process was fair, reasonable, transparent and efficient (5th Report, paras 24-33); and
- The Monitor recommends that the transaction and the RVO be approved (5th Report, para 42).

[15] During argument, the Monitor's counsel stressed that Hiking was only prepared to proceed with the transaction as presented to the Court and that in the event it is not accepted, then the only remaining alternative is bankruptcy. In such a scenario, Long Run's assets would basically be turned over to the Orphan Well Association to address environmental liabilities with little to no recovery for any creditor of any type.

[16] The Monitor submits that the appropriate legal criteria for approval of the transaction have all been satisfied on the evidence.

C. Legal Test for Approval of an RVO

[17] The ***CCAA*** at sections 11 and 36 combine to give the Court authority to approve a transaction using an RVO. Judicial discretion in this regard must be exercised in furtherance of the ***CCAA***'s purposes: ***Century Services Inc v Canada (Attorney General),*** 2010 SCC 60 at para 59 and ***Harte Gold Corp (Re),*** 2022 ONSC 653 at para 32 and be guided by the baseline considerations of appropriateness, good faith and due diligence: ***Harte Gold*** at para 31.

[18] The request for an RVO should not be routine and should invite "close scrutiny": ***Harte Gold*** at para 38. Accordingly, these additional questions are apposite:

- Why is the RVO necessary in this case?
- Does the RVO structure produce an economic result that is at least as favourable as any other viable alternative?
- Is any stakeholder worse off under the RVO structure than they would have been under another viable alternative? and
- Does the consideration being paid reflect the value of the intangible assets being preserved under the RVO?

[19] To address the questions, the Monitor asserts:

- In terms of necessity of an RVO, Long Run operates in a highly regulated environment where existing permits, licenses or other rights including as party to certain key agreements are difficult or impossible to assign to a purchaser. The transaction is only viable when combined with an RVO and certain attributes otherwise lost in a traditional vesting order transaction are preserved. The attributes are recognized by the Courts as a basis for granting an RVO: ***Acerus*** at para s 16, 21 & 35 and ***Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al***, 2022 ONSC 6354 at para 34.

- The transaction with RVO provides more benefits to Long Run's stakeholders than realization under a bankruptcy. Long Run continues as a going concern in oil and gas under a new owner who assumes substantial liabilities including all of those of an environmental nature. The transaction and RVO advance the remedial objectives of the ***CCAA*** of rehabilitating an insolvent business and avoiding the social and economic cost of large business failure: ***Acerus*** at para 43**; *Rambler Metals and Mining Limited, Re CCAA***, 2023 NLSC 134 at para 67; and ***CannaPiece Group Inc v Marzilli***, 2023 ONSC 3291 at para 19.
- No stakeholder is worse off due to the RVO. While RVO transactions often result in unsecured claims being transferred to a residual trust, resulting in zero recovery for those creditors, that is function of the insolvent state of the debtor, not the RVO process: ***Acerus*** at para 32; ***Just Energy*** at para 57; ***Arrangement relatif à Blackrock Metals Inc***, 2022 QCCS 2828 at para 109.
- With regard to the adequacy of consideration, Hiking's stalking horse bid out of the multiple LOIs submitted was the only qualified bid, represents the best price for the debtor's assets and was the only proposal that enables Long Run to continue as a going concern.

[20] The Monitor submits that the ***Harte Gold*** test sets out the recognized legal criteria in Canada for approving an RVO and that the test is met in this case.

D. Releases

[21] As part of the transaction and RVO approval, the Monitor also seeks Court-ordered releases in respect of the Monitor, Hiking, the purchasers, Long Run and Calgary Sinoenergy and their respective current and former directors, officers, employees, contractors, agents, representatives and financial and legal advisers for any and all claims related to the transaction, Long Run and its insolvency (except the retained liabilities) and the ***CCAA*** proceedings.

[22] There is specific authority for release of the debtor's directors at section 5.1 of the ***CCAA***. But for others, the Monitor says the plenary authority residing in section 11 allows such releases. The Monitor cites ***Tacora Resources Inc (Re)***, 2024 ONSC 4436 at paras 17-25 and ***Lydian International Limited (Re)***, 2020 ONSC 4006 at para 54 for the applicable legal criteria:

- whether the parties being released were necessary and essential to the restructuring of the debtor;
- whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it;
- whether the restructuring could succeed without the releases;
- whether the parties being released contributed to the restructuring; and
- whether the releases benefit the debtors as well as the creditors generally.

[23] The Court in ***Tacora*** says at para 17 that releases should be carefully scrutinized. The Monitor submits that the releases should be granted because the legal test set out above is satisfied, as follows:

- The proposed releasees were instrumental in all steps of the ***CCAA*** proceedings, including negotiating the DIP financing, operating Long Run as a going concern, preparing and conducting the SISP and will be involved in implementing the transaction and post-closing obligations.
- The proposed releases are rationally connected to and necessary for the transaction because they will reduce indemnification claims against the administration charge and directors' charge (refer to ***Harte Gold*** at para 82 and ***Tacora*** at para 25), provide certainty and finality to the transaction and the closing of the transaction is conditional upon the granting of the releases (***Harte Gold***, para 84).
- Regulatory and environmental liabilities are retained.

[24] After scrutinizing the rationale behind the releases, I am satisfied there is a critical connection between the releases and the generation, advancement and ultimately the culmination of the transaction.

[25] Before making a ruling on whether I approve the transaction with RVO (including the releases) as presented, I must deal with the objections of H Corp and Mr. Neufeld.

E. H Corp Objection

[26] H Corp's claim is designated as a transferred liability in the proposed transaction/RVO.

[27] The background to the H Corp lawsuit against Long Run, Calgary Sinoenergy and others is fully recounted in ***Henenghaixin Corp v Deng,*** 2021 ABQB 168 and ***Henenghaixin Corp v Deng***, 2022 ABCA 271. In essence, it alleges that some individuals, while acting as directors and officers of the ***CCAA*** debtors, improperly induced the transfer of some $44 million of H Corp's funds to either Long Run or Calgary Sinoenegy by fraud or misrepresentation, including presentation of false financial statements, bank records and a false shareholder declaration. Long Run reportedly received $150,000 of these funds directly and a further $11.5 million through Calgary Sinoenergy. I will briefly summarize the history here.

[28] The investment agreements among the general partners of the Chinese entities that funded H Corp show that the purpose of the investment was to acquire the assets of Twin Butte Energy Ltd in a receivership sale through H Corp's wholly owned subsidiary, West Lake Energy Corporation. West Lake did acquire those assets in March 2017.

[29] At the material time, Mr. Deng was one of four members of the H Corp board of directors and also a director of West Lake, Calgary Sinoenergy and Long Run. Ms. Deng, his daughter, was a director of West Lake and Long Run. Mr. Lam was a business associate of the Dengs.

[30] In early 2018, two of the Chinese investor parties became concerned that Mr. Deng would not be able to fund the acquisition of their equity interests and sent Mr. Zhang and two others to investigate West Lake's operations. At an October 2018 meeting in Calgary, with

Ms. Deng and Mr. Lam, the representatives were shown West Lake financial statements and bank statements that overstated West Lake's position.

[31] PricewaterhouseCoopers (PwC) prepared a forensic report indicating that H Corp received $354 million from the investment funds, of which $276 million was used for the Twin Butte purchase and related operational costs, and that $77 million in net payments not related to the Twin Butte assets were made to various other entities including Calgary Sinoenergy and Long Run.

[32] Mr. Lam is said to be individual who caused the impugned transfers. He later produced a shareholders' declaration from H Corp and an investment agreement between Calgary Sinoenergy and a lender that purported to clothe him with proper authority. Both documents are alleged by H Corp to be falsified.

[33] H Corp began its action in February 2020 and obtained a without notice Mareva Injunction/Attachment Order from this Court in April 2020 against the individuals, Long Run and Calgary Sinoenergy. The Order was vacated in March 2021 in respect of Long Run and Calgary Sinoenergy because the putative rogue individuals were no longer involved as directors and officers (at paras 94, & 96-97). The Court of Appeal then allowed the appeal in August 2022 in respect of the individuals on the basis that the evidentiary record consisted primarily of hearsay (at para 45).

[34] At one point, H Corp asked the Court to direct a trial of an issue with respect to the falsification of records but was not successful. The litigation continued until it was stayed as a result of the Initial Order on July 4, 2024.

[35] H Corp asserts in the ***CCAA*** proceedings that it has a *prima facie* case for unjust enrichment that results in a proprietary trust claim against the assets of Long Run and Calgary Sinoenergy. Relying on the classic formulation of unjust enrichment, H Corp says that Long Run was enriched by the wrongfully transferred funds, H Corp has been thereby deprived and there is no juristic reason to deny recovery: ***Becker v Pettkus,*** [1980] 2 SCR 834 at pg 848 and ***Kerr v Baranow***, 2011 SCC 10 at para 36.

[36] While H Corp does not oppose either the transaction or the RVO in principle, it submits that relegating H Corp's claims to the realm of transferred liabilities extinguishes its claim, which, being a constructive trust claim, is of a higher order. Justice cannot be done, says H Corp, unless its constructive trust claim is adjudicated on the merits. And since that cannot be completed in advance of the transaction closing, the claim must be preserved. That would be achieved, in H Corp's estimation, by the Court amending the transaction to designate the H Corp claim as a retained liability and securing that claim in one of two ways:

- Increasing the cash consideration payable by the Purchaser by $44 million, to be held in trust pending adjudication; or
- Alternatively, if H Corp is ultimately successful, the secured lender (as represented by CCBT), either advances the value of H Corp's claim or reduces its secured claim by the same amount, in either event with payment to H Corp of its claim as adjudicated.

[37] H Corp's theory is that if constructive trust is proven then the assets comprising the trust were never Long Run's property, never secured to CCBT's principals and cannot be sold unless the trust claim is paid, i.e. the *nemo dat* rule.

[38] Since the trust assets are unidentifiable at this point, H Corp proposes a "tracing exercise" to determine if and how H Corp's money turned into assets of Long Run. H Corp says the broad discretion under section 11 allows the Court to alter the transaction as requested by H Corp.

[39] Initially, H Corp had two further objections regarding aspects of the Subscription Agreement/RVO that it felt were detrimental and unfair to H Corp. The first was that the Subscription Agreement preserves as a retained asset the Third Party Claim against H Corp which, says H Corp, severs mutuality of debts and prejudices its rights of set-off. The Monitor and Hiking have voluntarily amended the Subscription Agreement so as not to impair any set-off rights that H Corp would otherwise have.

[40] The second further objection relates to the scope of the proposed Releases which, in H Corp's submission, encompasses the three individual defendants in the H Corp action. H Corp submits that this purported release of liability in favour of the three individuals is contrary to section 5.1(2) off the ***CCAA*** (which excepts from a compromise or arrangement any claim against directors based on allegations of misrepresentation or wrongful or oppressive conduct by the directors) and further that ***Lydian*** factors do not apply to these individuals.

[41] The Monitor disagrees that the Releases can bear this broad an interpretation but in any event, and for greater certainty, has amended the Releases to specifically exclude the three individuals.

[42] As to H Corp's main objection, the Monitor responds:

- H Corp's claim cannot succeed as a constructive trust claim. First, there are no identifiable trust assets which are a legal requirement for a constructive trust: ***Peter v Beblow***, [1993] 1 SCR 980, 1993 CarswellBC 1258 at para 24. The simple "knowing receipt" of funds is not sufficient to establish a constructive trust if specific property cannot be identified which is the subject of the enrichment. The failure to identify specific property effectively turns the claim into a request for a floating charge, which the Monitor says the Courts have consistently rejected.

- Moreover, there is a high threshold for recognition of constructive trust claims in the insolvency context that is not met here. The Monitor submits that the claimant must exhibit compelling or extraordinary grounds: ***Credifinance Securities Limited v DLSC Capital Corp***, 2011 ONCA 160 at paras 32-33.

- Second, there is a juristic reason for not recognizing the claim, being its negative impact on other creditors within the ***CCAA*** proceeding, upsetting the priority scheme established by law and defeating the remedial objectives of the ***CCAA***.

- This latter ground hinges on the fact that the SISP only produced Hiking's Stalking Horse Bid as a qualified bid and, further, that Hiking is only prepared to enter into the transaction on the terms negotiated with the Monitor and presented to the Court, and not an amended transaction as suggested by H Corp or any other transaction: ***Supplement to the Monitor's Fifth Report***, Appendix H. The alternative then is bankruptcy, or the surrender of Long Run's assets to the Orphan Well Association: ***Supplement to the Monitor's Fifth Report*** at para 56.

- H Corp has incorrectly framed the issue as a "priority dispute" between H Corp and CCBT. The Monitor asserts that unless H Corp can prove its claim takes precedence over the DIP fund (which it has not attempted to do), there is no basis to require Hiking (the stalking horse bidder) to retain it, even if H Corp's claim holds the same or higher priority than the CCBT debt.
- Accordingly, the feature that distinguishes the present case from the authorities cited by H Corp (where contingent property claims were either adjudicated on a summary basis[2] or preserved by funds in trust pending adjudication[3]), is that Hiking has made a credit bid by way of its DIP Fund (not at the secured creditor level as in H Corp's authorities) and has chosen to retain some liabilities and shed others.
- Regardless, strictly on a timing basis, CCBT has priority over any subsequent claims by H Corp against the Debtors. CCBT perfected its security on January 26, 2017, before the first impugned transfer of funds by H Corp to the Debtors on April 13, 2017.
- There is no viable alternative to the Subscription Agreement with RVO advanced by Hiking. Hiking has staked its ground by saying that it will not proceed with the transaction if H Corp's claim becomes a retained liability. The only other scenario is bankruptcy and the resulting loss for all stakeholders: ***Invico*** at para 26.

[43] CCBT by its counsel supported the Monitor's approval application by arguing:

- CCBT's security is first in time. Recognizing H Corp's constructive trust claim would in effect confer upon H Corp a super-priority for its unproven claim, notwithstanding that CCBT fulfilled all statutory obligations to register and perfect its security.
- H Corp has nothing more than an unsecured claim. That there is no statutory distribution scheme within the ***CCAA*** does not entitle unsecured creditors to obtain enhanced security over secured creditors for pre-filing obligations. It is essential in Court-supervised proceedings to give due consideration to the priority rights of secured creditors: ***Windsor Machine & Stamping Limited (Re)***, 2009 CanLII 39771 (ONSC) at para 43.
- H Corp has failed in four years of litigation to present any substantial evidence to support its claim.

[44] The Monitor's application was supported by TC Energy and Nova Gas Transmission Ltd and Canadian Natural Resources Limited, whose contracts with Long Run are on the retained list, by the Orphan Well Association who would take on abandonment and reclamation obligations in the event of Long Run's cessation of operations, by the municipalities of Birch Hills County, Big Lakes County and Lac Ste Anne County whose unpaid tax levies are proposed to be retained, and by Long Run and Calgary Sinoenergy themselves.

F. Analytic Framework for H Corp Claim

[45] H Corp took issue with the notion of the Monitor and the Purchaser "picking winners and losers" in terms of which liabilities are retained and which are transferred. However, the Monitor submits that Alberta law recognizes that a purchaser may choose which liabilities to

[2] ***Invico Diversified Incom Limited Partnership v NewGrange Energy Inc***, 2024 ABKB 214 at para 19.
[3] ***Bison Properties Ltd (Re)***, 2016 BCSC 793 and ***American Iron v 1340923 Ontario***, 2018 ONSC 2810.

keep or disclaim in a credit bid context, as part of the advancement of the ***CCAA***'s remedial objectives: ***Canadian Overseas Petroleum Limited (Re),*** 2024 ABCA 190 (***COPL*** case) at paras 24 & 38.[4]

[46] As stated in ***Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc***, 2019 ONCA 508 at para 101, many cases (cited therein) in Canada have considered the equities to determine whether a third-party interest should be extinguished. There is no prescribed list of factors and every case is contextual and fact-dependent.

[47] Having regard to the caselaw referred to immediately above, I conclude that a constructive trust claimant, such as H Corp in this case, must meet some kind of threshold on the merits in order for the Court to order that the claim survive the transaction/RVO in the manner suggested by H Corp. There has been an assessment of sorts found in the Monitor's Supplement to the Fifth Report. H Corp on the one hand and the Monitor and CCBT on the other were all content to have me consider the merits for the purposes of this application.

[48] Accordingly, in deciding whether I implement either of H Corp's proposals to amend the Subscription Agreement in order to preserve its constructive claim for later adjudication, I employ this analytic framework:

1. What standard must be met in terms of the strength of the fraud or misrepresentation claim?
2. Has the standard been met in this case?
3. Is this an appropriate case for the remedy of constructive trust?
4. What is the role of the equities?

[49] In effect, I am engaging in a form of summary adjudication that is necessitated by the circumstances of this case.

G. Standard to be met in terms of the strength of the fraud or misrepresentation case

[50] A standard is necessary because the mere assertion of a constructive trust claim should not be enough to derail or frustrate ***CCAA*** proceedings.

[51] When this question of threshold was posed during the hearing, counsel for the Monitor argued that a standard equal to that required of a Plaintiff in a summary judgment application, i.e. proof on a balance of probabilities, was necessary to control unmeritorious claims that could upset ***CCAA*** proceedings. The Monitor contends that given the factual ambiguity of the case and that H Corp cannot even point to any identifiable trust property mean that H Corp's claim is no where near that standard.

[52] H Corp says that the standard of *prima facie* case applies, that this standard was met for the purposes of a Mareva Injunction/Attachment Order as found by Romaine J and that this finding has never been assailed.

[4] Note this is a leave decision. Justice Yamauchi had countenanced the credit bidder's selective assumption approach. Justice de Wit denied leave.

[53] The cases state that the threshold for establishing constructive trust claims in the bankruptcy context is high: ***Credifinance*** at para 13; ***Hoard (Re),*** 2014 ABQB 42 at para 23. It should be no different in the case of an insolvency where the ***CCAA*** applies.

[54] The Monitor relies on Chief Justice Morawetz's decision in ***Laurentian University of Sudbury***, 2022 ONSC 3013 for the proposition that the standard to be met is proof on a balance of probabilities. In that case, a plaintiff sought to have an historical claim for sexual abuse adjudicated outside of the claims process that had been established under the ***CCAA***. At issue was the interpretation of s 19(2) of the ***CCAA*** which exempts certain types of claims from compromises or arrangements under the ***CCAA***, including civil judgments resulting from sexual assault claims and, notably, any debt or liability resulting from obtaining property by false pretences or fraudulent misrepresentation.

[55] The University's counsel had argued that (at para 29 of ***Laurentian University***):

> … It would mean that any claim of the types mentioned in s. 19(2) – which is a broad category of claims including fraud, misappropriation, and misrepresentation – would not be capable of being determined in the ***CCAA*** claims process and could proceed in ordinary litigation. This would create chaos and is precisely what the Supreme Court of Canada stated the ***CCAA*** was designed to prevent when it said that "the single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 22).

[56] In assessing the standard of proof to be met, Chief Justice Morawetz in turn relied on the Supreme Court of Canada's decision in ***Montreal (City) v. Deloitte Restructuring Inc***, 2021 SCC 53 in relation to claims of fraud and misrepresentation. The Supreme Court stated at paras 24 & 25:

> [24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which is analogous in every respect to s. 19(2)(d) of the ***CCAA***. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes "for[m] part of an integrated body of insolvency law" (para. 78; see also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 74).
>
> [25] To discharge its burden of proving that its claim relates to a debt "resulting from obtaining property or services by false pretences or fraudulent misrepresentation", a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006;

> D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the ***CCAA*** applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the ***CCAA*** must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, 2004 CanLII 30445 (QC CA), [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).
>
> (emphasis appears in the ***Laurentian University*** case.)

[57] Chief Justice Morawetz considered the above ruling by the Supreme Court of Canada to be determinative and found that since the claimant had only asserted a claim of historical sexual assault (as opposed to having proven it on a balance of probabilities), the claim would not be separately adjudicated. He says at paras 44-46:

> [44] The foregoing analysis sets out the proper framework for analyzing the issue before the Court. In my view, it confirms the argument put forth by LU and is a complete answer to the submissions of both BR and US.
>
> [45] Simply put, the exception to the general scheme established by s. 19(1) of the ***CCAA*** must be interpreted narrowly and the elements of the exception set out in s. 19(2) must be proved.
>
> [46] It is not sufficient to infer liability (*Montreal* para. 21). The burden of proof to establish a debt or liability and an award of damages for sexual assault is on the claimant (*Montreal*, para. 24, 25 and 28).

[58] There are no statutory restrictions on the form, structure or content of a plan of compromise or arrangement. The RVO is a relatively new and still novel structure in Canada. As stated earlier, the Court's authority for approving the Subscription Agreement/RVO derives from section 11. Even if the transaction/RVO in this case does not, strictly speaking, form a compromise or arrangement under Part I of the ***CCAA***, a Subscription Agreement with RVO is a recognized and legitimate vehicle for salvaging a business under the ***CCAA***. Accordingly, either section 19(2) itself applies or its underlying logic as set out in ***Montreal (City)*** applies. This necessarily flows from the notion expressed in ***Century Services*** and ***Callidus*** that the ***BIA***[5] and ***CCAA*** comprise a complete code with regard to insolvency law in Canada.

[59] Here, H Corp is doing the same thing that the applicant was seeking in ***Laurentian University***, namely, to have an as-yet unproven claim preserved for later adjudication outside the ***CCAA*** regime. I appreciate that H Corp's claim is in a more advanced state. But there is no reason for me to apply a different standard than that established by the Supreme Court of Canada because a Subscription Agreement coupled with a RVO is the structure in this case. Consistent standards must be applied so that the ***CCAA*** regime overall has integrity and stability.

[5] ***Bankruptcy and Insolvency Act***, RSC 1985, c B-3 as am.

[60] I therefore conclude that H Corp must meet the standard of proof on a balance of probabilities, based on the record presented to the Court. In this case, the record includes the latest affidavit of Mr. Zhang which, with exhibits, comes in at 1051 pages.

H. Has the standard been met in this case?

[61] It was Mr. Zhang who provided the affidavit evidence for the original Mareva Injunction/Attachment Order application. As described by the Court of Appeal in 2022 ABCA 271 at para 32, he was "an employee of the general partner of one of limited partnerships, several entities removed from H Corp in the ownership chain." The Court of Appeal determined at para 45 that his evidence was entirely hearsay and therefore an inadequate foundation for establishing the allegations to the required standard. The Mareva Injunction/Attachment Order was thus vacated by the Court of Appeal in respect of the individuals as well.

[62] Mr. Zhang, as of the date of the swearing of the more recent September 13, 2024 affidavit for this application, is the President of H Corp. This more recent affidavit revisits some of the evidence he gave in his previous affidavits in the H Corp action but also recounts in detail events subsequent to the Court of Appeal vacating the Injunction/Attachment Order.

[63] However, Mr. Zhang's most recent affidavit does attach Mr. Neu's affidavit from the H Corp action sworn May 21, 2021 as an exhibit. The submission of this affidavit, along with an affidavit from Mr. Middleton, is discussed at para 90 of 2021 ABQB 168 and paras 46 & 47 of 2022 ABCA 271. H Corp suggests in this application that Mr. Neu's affidavit shores up any evidentiary deficiency found by the Court of Appeal and establishes a strong *prima facie* case of fraud.

[64] Mr. Neu was a director of H Corp and says he was, on paper at least, the President and CEO of H Corp. He worked for different companies "under the Calgary Sinoenergy umbrella" in the field as well as in the office of Long Run and affiliated companies as an engineering consultant. Mr. Neu's affidavit supports H Corp's claim in several respects:

- He believes that the companies under the Calgary Sinoenergy umbrella were affiliated and managed and controlled by Mr. Deng.
- He confirms the transfers that total some $93 million between April 13, 2017 and September 5, 2017 from H Corp to Calgary Sinoenergy. Mr. Lam, one of the Defendants in the H Corp action, was described by Mr. Neu as the CFO of both H Crop and Calgary Sinoenergy. Mr. Lam set up Mr. Neu as a co-signor for H Corp's bank account with ATB.
- He says that he did not believe Mr. Lam required his approval for any of the transfers. He confirmed the payments with ATB because he believed they were intercompany transfers authorized by Mr. Lam.
- He indicates that, contrary to what is stated in Mr. Lam's affidavit in the H Corp action, he never gave instructions to Mr. Lam to conduct any transfers nor did Mr. Lam seek his approval to do so.
- He was never aware of the shareholder declaration and loan agreement, empowering Mr. Lam to do banking and transactions as H Corp's "special representative".

- Mr. Neu was asked in December 2018 by Mr. Lam to sign backdated indemnity agreements for Mr. Deng, Ms. Deng and Mr. Lam. One of the signatures on one of the agreements looked like a forgery to him. He was also asked by Mr. Lam to sign an authorization letter. He signed none of these. Mr. Lam later claimed that Mr. Neu had written the authorization letter.

[65] Mr. Neu's evidence primarily implicates Mr. Lam and to a lesser extent the two Dengs. It does not expressly implicate Long Run except to the extent it may have been used as an instrument in the same way H Corp was. I accept that Mr. Neu's evidence lends direct support to a case of fraud or misrepresentation but that is in respect of the individuals. While it is true that Mr. Deng and his daughter Ms. Deng were directors of Long Run at the time of the impugned transfers, Mr. Deng was also a director of H Corp. It is live issue as to the capacity in which they were acting, their own or as directors of H Corp, Long Run or some other entity.

[66] The Monitor notes from its review of H Corp's claim that:

- H Corp obtained $352 million in funds from York City Enterprises Limited to acquire the assets of Twin Butte Energy Ltd in a receivership sale.
- H Corp alleges from approximately January to September 2017, Mr. Deng, while he was a director of H Corp and the Debtors, and assisted by Ms. Deng and Mr. Lam, wrongfully diverted net funds of $43,765,669 from H Corp to the Debtors. H Corp further claims that the diversion of the funds was not discovered by H Corp until January 2019.
- The forensic report by PwC, an exhibit to Mr. Zhang's recent affidavit, outlines a complicated series of transactions whereby H Corp, York City, the Debtors and other related and unrelated entities advanced and received payments (or benefits) back and forth which net out to the aforesaid $44 million.
- Of the $77,006,491 in net advances, H Corp alleges that $76,956,491 was made to Calgary Sinoenergy and $150,000 to Long Run. H Corp acknowledges that because the Debtors made payments towards a deposit for the Twin Butte assets and interest payments against a York City loan, the net outflow from H Corp is the amount of the claim.
- The date of the transfers from H Corp is after the date of which CCBT's security was perfected and after the date of funds were advanced under the CCBT credit facilities.
- Calgary Sinoenergy and Long Run filed their Statement of Defence on February 11, 2021. Rather than the funds in question being wrongfully diverted, they say that if the claimed funds were paid, they were governed by contracts in place between Calgary Sinoenergy and Long Run, or with H Corp or York City.
- The Monitor refrains from commenting on whether fraudulent documents were uttered to support the impugned payments but notes in its review of the Calgary Sinoenergy financial statements the amounts received from H Corp are recorded as intercompany loans.
- The classification of the advances from H Corp is clearly a complicated issue that has resulted in protracted litigation since H Corp's claim was filed on February 28, 2020. A further complicating factor is that H Corp and the Debtors had common directors including the individual Defendants who appear to have been controlling finances and intermingling funds as among H Corp and the Debtors.

- PwC's forensic report contains a specific limitation that it cannot verify the completeness of payments made by "unrelated entities" (which include Calgary Sinoenergy and Long Run) on behalf of the two parent partnerships of which H Corp is an indirectly wholly owned subsidiary.

[67] The Monitor's special counsel, appointed to deal with H Corp's claim, argues:

- The H Corp allegations are focused on fraudulent actions attributed to the individual defendants, acting within their roles at H Corp or its affiliates, including West Lake. The financial documents, especially the bank records and statements, said to be falsified relate to West Lake, not Long Run.
- Long Run is a distinct entity from both H Corp and West Lake. It is unreasonable to assume that the individual defendants were acting as agents of Long Run when presenting documents pertaining to West Lake. There is no factual basis on which to suggest that Long Run, on its own account, made any representations to H Corp in connection with the documents.
- Moreover, the motive behind whatever actions the individual defendants took was not to benefit Long Run, but rather for personal gain or some other business reason.
- H Corp has asserted but has not proven to the required standard of proof on a balance of probabilities, that the representations made were false. No Court has made that finding. As the Rule 7.1 application was denied, the factual issue of fraud (or not) remains unresolved.
- H Corp itself says that it was the individuals pretending to have authority that allowed them to effect the unauthorized transfers:

> (from H Corp's Statement of Claim at para 7)
>
> Both Ms. Deng and Mr. Lam represented themselves as having authority to direct the affairs of H Corp. and West Lake as delegates of Mr. Deng. They held out Mr. Deng as being the ultimate owner of controller of H Corp. As outlined below, they had no such authority. However, under the pretenses of having such authority, Ms. Deng, Mr. Lam, and Mr. Deng wrongfully removed tens of millions of dollars from H Corp, as detailed below.

and

> (from Mr. Zhang's September 13, 2024 affidavit at paras 24-25)
>
> Mr. Neu indicated he was a Calgary Sinoenergy employee who, at the direction of a cousin of Mr. Deng, accepted a role as a director of H Corp and was then appointed President and CEO. Further, at the direction of Mr. Lam, he stated he would confirm, if asked by the bank, transfers from H Corp to West Lake that Mr. Lam initiated via ATB. He assumed H Corp was one of the corporations controlled by Deng and that Mr. Lam had authority to initiate such transfers.

[68] Further to this last point, I note that the presentation of the supposedly false financial statements and bank records to H Corp's representatives occurred in October 2018 and the supposedly false shareholders' declaration and the investment agreements were presented by

Mr. Lam some time after that. The indemnity agreements were presented by Mr. Lam to Mr. Neu in December 2018. The last of the impugned transfers was made in September 2017. Therefore, the false documents did not induce the transfers. Rather, they were more in the nature of cover-up or attempts at after-the-fact justification.

[69] The facts support the Monitor's contention that it was the misrepresentations of status by the individuals in respect of H Corp, and not Long Run, that induced the transfers. It is not apparent on the record that the Individual Defendants made any supposed representations, either verbal or documentary, about or on behalf of Long Run.

[70] Even if Mr. Zhang's latest affidavit in this proceeding, which includes Mr. Neu's 2021 affidavit from the H Corp action, has the effect of remedying the evidentiary lacuna identified by the Court of Appeal in 2022 ABCA 271, the evidence of wrongdoing is on the part of the individual defendants. There is a clear, important and unresolved issue regarding on whose behalf the individuals were acting, given the multiplicity of "hats" they were wearing. There are credibility issues to be determined. The Court previously ruled in a Rule 7.1 application brought by H Corp that the determination of liability for fraud required a trial.

[71] In summary, H Corp has not met the threshold of the balance of probabilities set out in the Supreme Court of Canada's interpretation of section 19(2) in ***Montreal (City)***.

I. Is this an appropriate case for the remedy of constructive trust?

[72] The imposition of a constructive trust is a remedy that the Courts consider only after a valid restitutionary claim has been made out: ***Lac Minerals Ltd. v International Corona Resources Ltd***, [1989] 2 SCR 574 at page 678. This Court also said in ***Bellatrix Exploration Ltd (Re)***, 2020 ABQB 809 (Romaine J) at paras 77-78:

> [77] The onus of proving a constructive trust rests with the claimant. It is a discretionary remedy that will not be imposed without taking into account the interest of others who may be affected by granting the remedy: ***Re Hoard,*** 2014 ABQB 426 at para 26.
>
> [78] As noted at para 23 of ***Hoard***, given that the ***BIA*** provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust. The same reasoning applies to the ***CCAA***.

[73] Further, the Supreme Court of Canada has stated there are two broad categories of cases where constructive trusts may be recognized. In ***Soulos v Korkontzilas***, 1997 CanLII 346 (SCC), [1997] 2 SCR 217 at para 43, McLachlin J as she was then writing for the majority, stated:

> I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as

in ***Pettkus v Becker***, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

[74] According to ***Soulos*** at para 45, there are four prerequisites for a constructive trust based on wrongful conduct:

- The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[75] For recent Alberta application, see ***Hillsboro Ventures Inc v Ceana Development Sunridge Inc***, 2024 ABKB 658 at para 89 and ***Zerbin v Vrbanek***, 2020 ABQB 797 at para 170, aff'd 2021 ABCA 317, leave to appeal ref'd 2022 CanLII 21684 (SCC).

[76] The wrongful conduct that engages the conscience of the Court must be that of the insolvent person, such that retention of the property by that person (or the creditors of that person) would be against conscience, as was the case in ***Soulos*** and ***Credifinance***. It is not established on this record that Long Run received H Corp's funds on its own behalf or from Calgary Sinoenergy knowing the funds had been misappropriated from H Corp. That is an available inference from the evidence based on the fact that the Dengs, father and daughter, were directors of Long Run but it is also an equal inference that Long Run, along with H Corp, were merely the vehicles by which their machinations were carried out. I say that because H Corp's Statement of Claim at para 26 suggests that Calgary Sinoenergy and Long Run have siphoned H Corp's money elsewhere, as do paras 36 – 38 which allege fraudulent conveyance of the funds to payees unknown. By its own pleading, H Corp says it does not know whether Long Run even has the money. In other words, Long Run could also be a corporate dupe.

[77] H Corp posed its constructive trust claim on the basis of a wrongful act that results in unjust enrichment. It is not a case where the unjust enrichment is the result of gratuitous services provided by the plaintiff that increases the value of the defendant's assets in the vein of ***Becker v Pettkus*** or ***Kerr v Baranow***. It is not a case where the defendant misappropriated a corporate opportunity that belonged to the plaintiff that resulted in the defendant acquiring a valuable property as in ***Lac Minerals***. The latter case poses the important question about the *type* of case that ought to be recognized with a constructive trust. At page 678, La Forest J for the majority of the Supreme Court of Canada states:

- In the "vast majority" of cases, a constructive trust will not be the appropriate remedy. There is no need to award a constructive trust if the plaintiff's claim can be satisfied by a monetary award.
- A constructive trust should only be awarded if there is a reason to grant the plaintiff additional rights that flow from a recognition of proprietary rights. One of the most important is the priority accorded to a property holder in a bankruptcy. Another is the change in value of the specific asset in question. The third is the taking by the defendant of a "specific and unique property" that the plaintiff would have otherwise acquired.

[78] Here, H Corp's claim would be satisfied by a monetary judgment but for the fact that Long Run is insolvent. The fact that Long Run is insolvent cannot be a reason for awarding a constructive trust, particularly when there are other interests at stake: ***Barnabe v Touhey***, 1995 CanLII 1672 (ONCA). Moreover, there is no specific fund in Long Run's possession that H Corp can point to as being H Corp's funds. There may have been comingling at one point and the transferred funds may or may not be within Long Run's existing assets.

[79] The ***Soulas*** case involved the defendant realtor misappropriating an opportunity to acquire a certain piece of real estate from a client. The finding that a constructive trust is appropriate is founded upon recognized situations of equitable obligation, the existence of a duty of loyalty and the breach of that duty through the misappropriation of an opportunity to acquire a specific property. At paras 34-35, the Court notes:

> [34] It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.
>
> [35] Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

[80] It is true that H Corp and Long Run are connected by a common director (Mr. Deng). The missing funds came from a $352 million investment put together by H Corp to enable West Lake to acquire and operate the Twin Butte assets. Calgary Sinoenergy and Long Run were unrelated to the Twin Butte assets: 2022 ABCA 271 at para 12.

[81] In this case, where are the ***Soulas*** elements of a recognized situation of equitable obligation, the existence of a duty of loyalty and the breach of that duty? There is a legal (versus equitable) duty on all residents of Canada to not knowingly possess proceeds obtained by or derived from the commission of an offence (of which fraud and false pretences are an example): ***Criminal Code***, section 354. No other particular situation of recognized equitable obligation between H Corp and Long Run nor duty by Long Run to H Corp are alleged, except that Long Run was the recipient or even only the conduit of the funds.

[82] The ***Soulas*** case gives an example of "intervening" creditors in a bankruptcy whose claims would be defeated by recognition of a constructive trust for wrongful conduct. It is named as a factor that prevents such recognition. A prior creditor, such as CCBT in this case, would be an equal example. See also ***Barnabe v Touhey*** where the Ontario Court of Appeal says:

> While a constructive trust, if appropriately established, could have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that purpose. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

[83] In summary, I find that the reasons for denying that a constructive trust as a remedy here are:

- Insufficient proof that Long Run knowingly received funds obtained by fraud or misrepresentation, or played a role on its own account in perpetrating a fraud or misrepresentation against H Corp;
- Insufficient proof that the funds, formerly comingled, are still in Long Run's possession;
- A monetary judgment would be sufficient, but for Long Run's insolvency;
- The insolvency of Long Run is not a reason to award a constructive trust;
- There is no specific and unique, or even identifiable, property claimed by H Corp that engages the constructive trust concept;
- H Corp has not established a situation of recognized equitable obligation and breach of a corresponding duty that renders Long Run's continued possession of the funds (if that is indeed the case) contrary to conscience.

J. The Role of the Equities

[84] Consideration of the equities of this case is the confluence point of all the theories for determining whether a constructive trust is indicated. Those theories in totality present these questions:

- Whether there is a juristic reason that negates an unjust enrichment claim;

- Whether there are factors (including the interests of other creditors) that would render imposition of a constructive trust unjust (the 4th ***Soulas*** factor);
- Whether it would be contrary to good conscience not to recognize a constructive trust in these circumstances.

[85] These may be variations of the same question of the role of the equities.

[86] Even where the strength of the case for wrongful conduct is established to the required standard, it would still be necessary to have regard to the equities to determine whether the claimant's claim should be preserved where there are ***CCAA*** proceedings. That is not the case here. Admittedly, in the case before me, the strength of H Corp's claim against Long Run features prominently in equitable considerations.

[87] In looking at the equities, I first ask myself the question of whether it is advisable or even legally possible to amend the transaction as suggested by H Corp?

[88] The authority to do so, says H Corp, lies in section 11 which gives a wide discretionary power to the Court to make any Order it considers appropriate in the circumstances. While making the requested Order may be theoretically possible, the question is whether I *should* make it. I am guided by the ***CCAA***'s objective, summarized in the ***COPL*** case at para 17 as:

> The objective of the ***CCAA*** is to attempt to avoid the social and economic losses which result from the liquidation of an insolvent company. The typical ***CCAA*** case involves an attempt to facilitate the reorganization and survival of a prefiling debtor company so that it can remain in an operational state. Where such a goal cannot be accomplished liquidation, receivership or the ***Bankruptcy and Insolvency Act*** regime will apply. The ***CCAA*** also has the objectives of maximizing creditor recovery, the preservation of going concern value, the preservation of jobs and communities, and the enhancement of the credit system generally. See ***9354-9186 Québec Inc v Callidus Capital Corp***, 2020 SCC 10 at paras 40-42.

[89] I need to be realistic about what would happen if I were to purport to change the transaction as H Corp asks that I do. I see these consequences:

- The Subscription Agreement is a comprehensive, complex and detailed series of inter-related promises and obligations, meticulously and intensely negotiated between sophisticated arms-length parties. I would be forcing those parties into a business arrangement that they did not agree to and do not want. The changes could have consequences, unforeseen by me, that adversely affect either or both parties or the viability of the transaction itself. I would be interfering with the right of parties to freely enter into commercial agreements. The Court should not step in here and rewrite the agreement.
- I would be forcing either Hiking or CCBT's principals to become unwitting (and unwilling) indemnitors of Long Run and Calgary Sinoenergy with regard their putative liability to H Corp, an unfair result when neither had anything to do with the transactions between H Corp and the Debtors giving rise to H Corp's action.

[90] Hiking states in no uncertain terms that it will not enter into a transaction that is not the one presented to the Court. It is a reasonable position to take. The parties have negotiated in good faith so far. Hiking is taking on a lot of risk as it is.

[91] The other equities that come into play are:

- The strength of H Corp's case: H Corp may have a triable issue but has not proven fraud or misrepresentation on a balance of probabilities based on the record. The facts are too ambiguous at this point. There are credibility issues to be tested.
- H Corp must meet the summary judgment standard. Otherwise, most any allegation of fraud or misrepresentation could have the effect of stopping a ***CCAA*** proceeding in its tracks. The integrity of the ***CCAA*** regime could be thereby compromised.
- There is no identifiable trust property. The amount of the trust claim is uncertain. H Corp's own forensic expert recognizes that not all outflows made by Calgary Sinoenergy and Long Run are necessarily accounted for.
- Neither Hiking nor CCBT (or its principals) are tainted by any alleged wrongdoing on the part of the Individual Defendants and it would be unjust to scuttle the transaction for them or make them indemnitors for wrongdoing yet to be proven.
- CCBT is not enriched by a failed (or in this case, disclaimed constructive trust claim) but is merely recovering (or in this case, continuing to be secured for) what it is owed: ***3 Eau Claire Developments Inc (Re)***, 2015 ABQB 208 at para 51.
- While I concede that the Individual defendants did and said some suspicious things that suggest fraud on their part, H Corp has not shown that Long Run, either on its own or through the agency of the individuals, is responsible for the suspicious things and that it would therefore be unconscionable for H Corp not to recover its claim from the assets of Long Run. Compelling or extraordinary grounds have not been shown.
- In greater context, I would be violating the "single proceeding model" espoused in ***Century Services*** and ***Laurentian University*** by permitting the constructive trust claim to be separately litigated, potentially destabilizing Canada's insolvency regime.

[92] The main counterbalancing factor is the interests of Long Run's secured creditors, the Purchaser and the other financial stakeholders such as contractual parties, the municipalities owed taxes, the employees, suppliers and so on. The interests of the creditors and others, as represented in the Subscription Agreement and RVO, can be characterized in any of these ways:

- as a juristic reason for denying unjust enrichment;
- a factor that negates a constructive trust based on wrongful conduct, or
- as aligning with good conscience in a constructive trust analysis.

[93] However characterized, the same conclusion is reached. The equities favour approval of the Subscription Agreement/RVO in the present form, without amendment. I can stretch my imagination and contemplate amending the Subscription Agreement as H Corp requests under the authority granted by section 11. But I am not going to actually do it. I am not satisfied that is fair or not harmful to do so.

[94] Chief Justice Morawetz cautions at para 33 of ***Harte Gold***:

> The SCC in ***Callidus*** made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the ***CCAA*** and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[95] Is H Corp being treated fairly and equitably by not preserving its claim? For all the reasons set out above, I conclude that its case is not proven to the required standard and that the circumstances do not give rise to a remedy of constructive trust. H Corp is then left with an unsecured claim. The fact that unsecured claims will not be paid is a function of Long Run's insolvency, not the Subscription Agreement and RVO. The same outcome would arise if Long Run were simply to go into bankruptcy.

[96] As stated, the ***BIA*** and ***CCAA*** are deemed to comprise a complete insolvency code in Canada. In a bankruptcy, H Corp would face the same issues of having to meet the required standard of proof and establishing the constituent elements of a constructive trust when its claim is adjudicated in a bankruptcy. H Corp is no further ahead but CCBT and other financial stakeholders are adversely affected in a severe way.

[97] While I say the test in ***Harte Gold*** is met, the equities also favour approval of the Subscription Agreement/RVO without amendment.

K. Neufeld Objection

[98] Abe Neufeld is a rural landowner who is the lessor under a registered surface lease with Long Run as lessee. The previous owner of the property had commenced Action # 2204 00354 in June 2022 against Long Run that purported to be a class action on behalf all Alberta Long Run lessors. In that action, the plaintiff claimed (as a representative plaintiff) that Long Run was in default of rentals under the surface leases and sought not just the unpaid rentals but also a further $30 million in consequential damages, and then punitive damages. The statement of claim (paraphrasing here) accuses Long Run of deliberately withholding the rental payments as a corporate strategy to the financial detriment of the landowners.

[99] In August 2022, Mr. Neufeld was substituted as the representative plaintiff in an amended statement of claim. The claim for the additional $30 million was clarified as consisting of damages for loss of investment opportunity. The plaintiff estimates that there are 6,415 members in the proposed class and says Long Run has been unjustly enriched by the use of money otherwise payable to the class members.

[100] No statement of defence has yet been filed and no certification application has been made.

[101] The outstanding rental payments are already shown in the Subscription Agreement as a retained liability in the amount of $6.5 million. Mr. Neufeld himself has been fully paid.

[102] The law firm KMSC Law LLP says in its brief on behalf of Mr. Neufeld that it also represents 54 different landowners with, in total, 140 surface locations where Long Run is lessee. The brief says these clients, unnamed, support the relief sought by Mr. Neufeld and adopt his submissions. In the brief, "the Neufeld Claim" is defined as "outstanding lease rentals and interest Long Run knowingly withheld from Albertan landowners since 2020."

[103] In this proceeding, Mr. Neufeld asks that the Subscription Agreement be amended to designate the Neufeld Claim as a retained liability and that the Purchaser be made to front additional cash of $7.5 million (for outstanding rentals and interest) to be paid to landowners upon closing. During the hearing, counsel for Mr. Neufeld also suggested that the claim for consequential damages was also part of the Neufeld Claim sought to be retained. He described the claim for consequential damages as an "open question" and argued that the Neufeld Claim should be retained so that certification can proceed, and the question of consequential damages adjudicated.

[104] Mr. Neufeld's grounds for this relief are:

- Making the Neufeld Claim a transferred liability is logically inconsistent with making the outstanding surface lease rentals a retained liability.
- Making the Neufeld Claim a retained liability is more favorable to the landowners.
- Should the Subscription Agreement with RVO not close, landowners will not be materially worse off than if the transaction proceeds in its current form.
- Designating the Neufeld Claim as a retained liability discourages exploitation of landowners and the land itself by O & G operators.

[105] The Monitor responds:

- KMSC Law has not disclosed who its other 54 clients are, so it is impossible for the Monitor to assess the validity of their claims. Furthermore, the class has not been certified and therefore the law firm cannot purport to speak on behalf of all Alberta landowners dealing with Long Run.
- The ***Surface Rights Act***, which governs rights and obligations between landowners and operators, does not provide for the payment of interest and damages and so the claimed losses are not recoverable.
- Furthermore, recovery of surface lease rentals falls within the exclusive jurisdiction of the Surface Rights Board under section 36.
- The Court should not rewrite the Subscription Agreement.
- Mr. Neufeld's suggested revisions will have adverse impact on the secured creditor.

[106] I find that:

- There is no logical inconsistency in making the Neufeld Claim a transferred liability while recognizing the outstanding rental arrears as a retained liability. The Purchaser is entitled to make the choice of which liabilities are necessary to be retained. The legal character of

the consequential damages portion of the claim and the contractual right to receive rent payments are essentially different such that separating them is not illogical.

- The Monitor is correct that the ***Surface Rights Act*** does not provide for interest or damages. Neither does the lease agreement between Mr. Neufeld and Long Run (both as successors) except for property damage. I assume the agreement is a prototype.
- I should not amend the Subscription Agreement for the same reasons cited earlier in this decision. Requiring the additional injection of cash from the Purchaser not only rewrites the agreement but allows landowners to jump the priority-queue, over CCBT's principals.
- Mr. Neufeld's claim of unjust enrichment fails on the basis that there has been no deprivation since the outstanding rentals are carried over as retained liabilities and, moreover, ultimately guaranteed by the Province under section 36 of the ***Surface Rights Act***. While the claims for interest and consequential damages are not preserved, they are speculative and legally uncertain. Those latter claims fail for the same reason that H Corp's does in that they are not proven on a balance of probabilities.
- That the landowners are prepared to accept a "scorched earth" approach by allowing Long Run to go into bankruptcy or fall to the Orphan Wells Association because the landowners would not be worse off than under the Subscription Agreement runs counter to any and all objectives of the ***CCAA***.
- That the oil and gas industry should stop exploiting landowners and blighting Alberta's agricultural landscape is not a message for this Court to deliver within a ***CCAA*** context. Such a message is political in nature and should be addressed by government, regulators, policymakers and lobby groups.

[107] Accordingly, Mr. Neufeld's requested to amend the Subscription Agreement is denied.

[108] Mr. Neufeld's final concern relates to a letter sent by the Monitor to landowners dated October 22, 2024 which, in contemplation of presenting the Subscription Agreement (with outstanding surface rentals designated as a retained liability) to the Court for approval, asks them if they are prepared to accept fifty cents on the dollar. The letter stipulates payment within 10 days of closing of the Subscription Agreement. Mr. Neufeld asks that I rescind the letter as part of my section 11 authority.

[109] Counsel for Mr. Neufeld expressed these objections about the letter:

- It is exploitative and seeks to gain an unfair advantage of a 50% discount for Long Run and the Purchaser, at the expense of the landowners.
- It was sent to represented clients (represented by KSMC LLP in the class action lawsuit) without directing them to seek independent legal advice.

[110] As of the date of the Third Supplement to the Monitor's Fifth Report (November 14, 2024), some 41 landowners had accepted the offer.

[111] I do not find the letter offensive for these reasons:

- The letter made a straightforward business proposal. It gave each recipient over a month to think it over or do something about it. It did not prevent any landowner from seeking independent legal advice.

- The class has not been certified. The Monitor at the time of sending the letter could not have known which landowners are clients of KSMC LLP. The law firm did not disclose the identity of any of its landowner clients apart from Mr. Neufeld prior to the letter being sent. After the letter was sent, the only further known client is a numbered company who was a recipient and whose letter was attached to a November 13, 2024 affidavit filed on behalf of Mr. Neufeld.
- As a Court-appointed officer, the Monitor presumptively acts in good faith. Acting in good faith is now a statutory element for consideration in ***CCAA*** proceedings: section 18.6; ***Bellatrix*** at para 99. I asked Mr. Neufeld's counsel if he felt the letter exhibited bad faith. He said he did not.
- It is within the Monitor's duty and function to attempt to compromise the Debtor's liabilities at any time before final disposition in ***CCAA*** proceedings. Nothing untoward occurred here.

[112] It is wrong for me to second-guess the Monitor's actions here. If such a thing as rescinding the letter is possible within section 11, I decline to do so for the reasons given.

L. Restricted Access Order

[113] The Monitor requests a Restricted Access Order (also known as a Sealing Order) over Confidential Appendix "A" to the Fifth Report of the Monitor (the "Confidential Appendix"). Since the Transaction has yet to close, and the Confidential Appendix contains confidential information regarding the bids received in the SISP, the Monitor submits that the disclosure of the information contained in the Confidential Appendix could prejudice any further efforts to market and sell the business and assets of the Debtors should the transaction fail to close. Such an outcome would be prejudicial to the Debtors and the public interest inherent in the sale of distressed companies and their assets via an insolvency process.

[114] The request for a Restricted Access Order, Sealing Order or any compromise of the open Courts principle is governed by ***Sierra Club of Canada v Canada (Minister of Finance***), [2002] 2 SCR 522, 2002 SCC 41as refined by ***Sherman Estate v Donovan***, 2021 SCC 25.

[115] The applicant must show on a balance of probabilities that:

- normal Court openness presents a serious risk to an important interest;
- the order is necessary to prevent the risk because alternative measures are inadequate; and
- as a matter of proportionality, the benefits outweigh the negative effects.

[116] It is recognized in Alberta and elsewhere that commercial interests, particularly in the context of Court supervised insolvency proceedings, are an important interest deserving of protection: for example, see ***Alberta Treasury Branches v Elaborate Homes Ltd***, 2014 ABQB 350 at para 54.

[117] The risk here is that if the sale falls through or the information in the confidential appendix is disclosed, disclosure will adversely affect the value of the assets to the detriment of the stakeholders.

[118] The form of Order appears to be the least intrusive means of managing the risk, being specific in scope and limited in time (3 months after the date of hearing). The Court's process

for giving notice to the media has been complied with and no contrary representations have been presented.

[119] Accordingly, I find the legal test is met and I grant the order.

M. Summary of Rulings

[120] In the result, and to summarize:

- I accept the Monitor's submissions (Sections B & C above) that the Subscription Agreement/RVO as presented by the Monitor represents the optimal outcome for Long Run and its stakeholders, best advances the remedial objectives of the ***CCAA*** and meets the test and expectations set out in ***Harte Gold***. I therefore grant approval of the Subscription Agreement and RVO in accordance with the form of Order presented to the Court on November 14, 2024.
- In so doing, I approve the Releases as requested by the Monitor as part of the transaction, for the reasons set out in Section D above.
- Necessarily implicit in my approval of the transaction, I deny the relief sought by H Corp and Mr. Neufeld to vary the transaction as they respectively requested, for the reasons set out in Sections E to J (H Corp) and Section K (Neufeld) above.
- I also deny Mr. Neufeld's request to rescind the Monitor's letter to landowners of October 22, 2024 as set out in Section K above.
- The Restricted Access Order (or Sealing Order) as requested is granted.

[121] Should the parties or some of them wish to address costs of this application, they may do so by January 3, 2025 by each submitting a letter no more than 3 single-spaced pages in length, excluding exhibits and authorities, and supported by a draft Bill of Costs.

Heard on the 14th day of November, 2024.
Dated at the City of Calgary, Alberta this 29th day of November, 2024.

Douglas R. Mah
J.C.K.B.A.

Appearances:

Kelsey Meyer, Michael Selnes and Kaamil Khalfan, Bennett Jones LLP
for the Monitor, FTI Consulting Canada Inc.

Kyle Kashuba and Bilal Qureshi, Torys LLP
for the Monitor, FTI Consulting Canada Inc.

Dustin Olver and Brett Wilson, FTI Consulting Canada Inc
for the Monitor

Kelly Bourassa, Warren Nishimura, Farrukh Ahmad, Blake Cassels & Graydon LLP
for China Construction Bank, Toronto Branch

John Regush, Dentons Canada LLP
for Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp.

Wendy Barber, Interim Chief Executive Officer
for Long Run Exploration Ltd

Trevor Batty, Field LLP
for Henenghaixin Corp.

Ryan Zahara, MLT Aikins
for Orphan Well Association

Kristian Toivonen, KMSC Law LLP
for Abe Neufeld and unnamed surface lessors

Michael E. Swanberg, Reynolds Mirth Richard & Farmer
for Birch Hills County, Big Lakes County and Lac Ste Anne County

Jessica Cameron, Fasken Martineau Dumoulin LLP
for TC Energy and Nova Gas Transmission Ltd.

Alexander W. Yiu, Ackroyd LLP
for Paddle Prairie Metis Settlement

Curtis Auch, Brownlee LLP
for Mackenzie County, Flagstaff County, Lamont County, the Municipal District of Smoky River, and Sturgeon County (collectively, the “Municipalities”)

Randal Van de Mosselaer, Osler, Hoskin & Harcourt LLP
for Canadian Natural Resources Limited

Colin LaRoche, Department of Justice Canada
for Indian Oil and Gas Canada

Chase Van Sant, Burnet, Duckworth & Palmer LLP
for Obsidian Energy

Danielle Marechal and Danica Jorgenson, Cassels, Brock & Blackwell LLP
for Hiking Group Shandong Jinyue Int’t Trading Corporation and for the Purchaser

Peng Zuo, Genesis Law Professional Corp.
for Bank of China (Qingdao Branch)

Kristopher Lensink, Government of Alberta
for Alberta Energy and Minerals Energy Team

George Wong,
for Alberta Energy Regulator

Corrigendum of the Reasons for Decision
of
The Honourable Justice Douglas R. Mah

Errors have now been corrected as follows:

- page 3, last bullet point, should be "<u>are</u> necessary" not "is"
- page 5, para 14, third bullet, should be "5th report" not "5h";
- page 7, para 27, second last line, insert "Calgary" before "Sinoenergy";
- page 15, para 66, second bullet, last line, insert the word "funds" between "the" and "was";
- page 16, para 67, fourth bullet, should be "No Court" not "No Court<u>s</u>";
- page 17, para 69, first line, insert the word "support" between "facts" and "the";
- page 17, para 72, end of first line, should be "the Courts consider" not "the Courts consider<u>s</u>";
- page 20, para 80, last line, should be "para 12" not "paras 10 & 13",
- Counsel's first name corrected to "Farrukh" from "Farruk".

Corrigendum of the Reasons for Decision
of
The Honourable Justice Douglas R. Mah

List of counsel have been updated as follows:

Kelsey Meyer, Michael Selnes and Kaamil Khalfan, Bennett Jones LLP
for the Monitor, FTI Consulting Canada Inc.

Kyle Kashuba and Bilal Qureshi, Torys LLP
for the Monitor, FTI Consulting Canada Inc.

TAB 4

CITATION: Triple-I Capital Partners Limited v. 12411300 Canada Inc., 2023 ONSC 3400
COURT FILE NO.: CV-22-00684372-00CL
DATE: 20230606

SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

RE: Triple-I Capital Partners Limited, Applicant

AND:

12411300 Canada Inc., Respondent / Debtor

BEFORE: Peter J. Osborne J.

COUNSEL: Kevin Sherkin and Monica Faheim, for Crow Soberman Inc., Receiver

Hans Rizarri, for Crow Soberman Inc., Receiver

Avi Freedland, for the Respondent / Debtor

HEARD: June 6, 2023

ENDORSEMENT

1. Crowe Soberman Inc., in its capacity as Receiver, moves for approval of the Third Report of the Receiver dated January 4, 2023, and the activities set out therein, approval of the statement of receipts and disbursements, approval of fees and disbursements of the Receiver and its counsel, and discharge.

2. The Respondent, 12411300 Canada Inc. (the "Debtor"), does not oppose approval of the Third Report or the activities, but it does oppose approval of the fees and disbursements of the Receiver and its counsel. Neither the Lender Applicant, Triple-I Capital Partners Limited (the "Applicant"), nor the Second Mortgagees (defined below) appeared.

Chronology of This Matter

3. The Applicant advanced to the Debtor $6,400,000 in December 2021, to purchase an industrial property in Brampton, Ontario, secured by a mortgage registered against title to the property. The maturity date of the mortgage was May 1, 2022. The Debtor failed to repay the principal and interest owing, and the Applicant commenced this proceeding.

4. The Receiver was appointed by order of Cavanagh J. dated July 22, 2022 (the "Receivership Order"). It is not disputed that the primary asset of the Debtor is that piece of industrial land and a building located on that land of approximately 18,200 ft.².

5. As of the date of the Receivership Order, the Debtor was indebted to the Applicant in the amount of $6,865,154 plus additional interest and accrued expenses.

6. Eight individuals who hold mortgages in second position subordinate to Triple-I, (collectively, the "Second Mortgagees"), were owed $2 million, although on October 10 the Debtor made a payment to them in the amount of $410,000, with the result that the principal amount owing to them was in the amount of $1,590,000. There were no other significant creditors.

7. After being appointed, the Receiver took certain steps, in accordance with the Receivership Order by which it was appointed, to prepare for the implementation of a sales process to market and sell the property.

8. The Receiver then brought a motion for approval of a sales process.

9. Following the service and filing of those motion materials, the Receiver was advised that the Debtor was in the process of finalizing an imminent refinancing of the property.

10. On October 14, 2022, Cavanagh J. issued a sale process approval order and an ancillary order, which had the effect of pausing the implementation of the sales process by the Receiver as approved, pending refinancing efforts being undertaken by the Debtor.

11. That ancillary order also approved the First Report of the Receiver dated August 8, 2022, the Second Report of the Receiver dated October 7, 2022, and the activities of the Receiver as described in both Reports.

12. On October 21, 2022, the Court extended the temporary pause for an additional four days until October 25, to permit the Debtor additional time to complete the closing of the refinancing transaction.

13. On October 28, 2022, this Court issued an order directing the payment of certain funds, by the Debtor to the Applicant and the Receiver, discharging various charges on the property, and addressing other steps to be taken in connection with the closing of the Debtor's refinancing transaction.

14. That same day, funds in the amount of $6,861,223.16 were paid by the Debtor to the Applicant and Receiver (through counsel), for the purpose of satisfying the secured debt owed by the Debtor to the Applicant.

15. The payment was made in two tranches given the dispute that underlies this motion. The first tranche of $6,464,232.96 represented the net amount owing with respect to the principal loan and interest to October 26, together with taxes owing to the municipality. The second tranche in the amount of $396,990.20 represented the portion that the Debtor disputes related to professional fees and disbursements of the Receiver, its counsel and counsel to the Applicant.

Should the Fees of the Receiver and its Counsel be Approved?

Material Filed and Positions of the Parties

16. The Receiver relies on all of its Reports, but principally the Third Report and appendices thereto, including fee affidavits of the Receiver and its counsel.

17. The Debtor relies on an affidavit from its own counsel who argued the motion sworn in support of its position. This practice is not to be preferred, particularly for matters that are contentious. Here, the Receiver submits that the affidavit should not be relied upon. In the main, it appears to contain a summary of the chronology of certain key events and other statements that are more in the nature of argument or submissions and therefore more properly belong in a factum.

18. Today, the Receiver seeks approval of fees of $106,722.25 plus disbursements of $32,851.56 and HST in the amount of $17,364.40, together with fees for its counsel (inclusive of HST and disbursements) of $91,014.94. That would bring the total amount of fees and disbursements charged by the Receiver together with those of its counsel since its appointment to $247,953.15.

19. The Receiver submits that the fees are fair and reasonable in the circumstances and have been properly incurred in respect of activities undertaken all in accordance with the Receivership Order.

20. The Respondent submits that the fees are unreasonable, the Receiver has duties to all stakeholders, including the Debtor, and that the receivership itself was opposed by both the Debtor and the Second Mortgagees.

21. The Respondent submits that this Court ought to approve 50 percent of total fees ($53,361.13 instead of $106,722.25) and 80 percent of disbursements ($26,281.25 instead of $32,851.56), plus HST in each case. The Respondent submits that the Receiver's counsel fees and disbursements (inclusive of HST) also ought to be approved at a rate of 50 percent ($45,507.47 instead of $91,014.94). That would bring the total amount of fees and disbursements for the Receiver and its counsel to $125,149.85.

22. The Debtor notes that this motion addresses only the fees of the Receiver and its counsel, and states that the Debtor is disputing the fees of the Applicant and mortgage charges through an assessment officer.

The Test

23. The factors to be considered have been sent out by the Court of Appeal for Ontario: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, 327 O.A.C. 376, at para. 33:

    a. the nature, extent and value of the assets;

    b. the complications and difficulties encountered;

    c. the degree of assistance provided by the debtor;

d. the time spent;

e. the receiver's knowledge, experience and skill;

f. the diligence and thoroughness displayed;

g. the responsibilities assumed;

h. the results of the receiver's efforts; and

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

24. The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive: *Diemer*, at para. 33, citing with approval *Confectionately Yours Inc., Re* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460.

25. The Court of Appeal went on to observe that the cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. While observing that it is not for the court to tell lawyers and law firms how to bill, the Court noted that proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to legal fees, the court must ensure that the compensation sought is indeed fair and reasonable.

26. While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership (*Diemer*, at para. 45).

Application of the Test to This Case

27. In this case, the Receivership Order provides that the Receiver and its counsel shall pass their accounts from time to time. For this purpose, the accounts of the Receiver and its counsel are referred to a judge of the Commercial List. Accordingly, the issue is properly before this Court.

28. The Receiver submits that its work consisted of two phases: lead up and preparatory work; and possession of the premises and preparation for the sales process.

29. The Receiver further submits and the Record reflects, that the activities of the Receiver as set out in its First and Second Reports have already been approved. The sales process approval order of Cavanagh J. dated October 14, 2022 approving the first two reports and the activities described therein, was not opposed. Moreover, there was no reservation of rights by the Debtor (or any other party such as the Second Mortgagees) to seek to challenge the fees associated with those activities in the future.

30. The Receiver submits, therefore, that the Debtor cannot challenge the fees related to those activities. In my view, that does not follow. While I agree that it is too late for the Debtor to challenge the activities that have already been approved by this Court (and therefore the

fair and reasonable fees and disbursements in respect thereof), nothing in Cavanagh's J. October 14 sales process approval order approved any fees or disbursements in respect of the activities set out in the first two Reports. Indeed, there was no request for such relief and none of that material was before the Court. The issue of approval of all of the fees and disbursements of the Receiver and its counsel are now before the Court for the first time.

31. The Receiver submits that the fees and disbursements are fair and reasonable in what was a challenging receivership. Detailed invoices from the professionals involved are appended to the Third Report. Rates charged are consistent with rates charged by law firms practising in the insolvency and restructuring area in the Toronto market, and the time spent is reasonable.

32. The accounts submitted meet the technical requirements and disclose in detail the name of each professional who rendered services, the applicable rate, the total charge, and the date on which services were rendered. The accounts of both the Receiver and its counsel are verified by a sworn affidavit from and on behalf of each.

33. The Receiver submits that this receivership proceeding was not simple or straightforward, and a number of the complications arose specifically due to the conduct of the Debtor. These include, for example, what appeared to the Receiver to be a break and enter at the premises of the Debtor and the removal of locks, which ultimately turned out to have been done by the Debtor, who submitted that it was unaware that it was not entitled to show the property to prospective purchasers or investors. The Receiver was therefore obliged to arrange for a bailiff to change the locks, replace fence chains and secure equipment.

34. Most substantively, the Receiver and its counsel had to prepare a sale and marketing process to prepare for the implementation of a process to market and sell the property, and engage a commercial real estate broker. The Receiver argues that the fact that the sale process never ultimately proceeded does not make the work completed in the course of preparing for the sale, in accordance with the sales process already approved by the Court (and not challenged by the Debtor at that time), non-compensable and nor does it make the fees automatically unfair or unreasonable. That assessment must focus on the circumstances as they existed at the time the fees were incurred.

35. At that time, as submitted by the Receiver, the Debtor did not have, contrary to its promises, the "imminent refinancing", and the Receivership Order was in full force and effect.

36. The Receiver further submits that the Receiver and the Debtor, through counsel, spent significant time and effort negotiating the terms of proposed orders in advance of numerous hearings before this Court, including in particular the October 13 motion. The Debtor was to a large extent uncooperative and therefore increased the challenges of the work carried out by the Receiver which are now under attack. It submits that the Disbursements are reasonable, and included such necessary expenses as insurance premiums for the property which were necessary to preserve the asset of the value for the estate.

37. The fees claimed by the Receiver are supported by the Affidavit of Hans Rizarri sworn January 4, 2023. Mr. Rizarri is a Licensed Insolvency Trustee with the Receiver firm. His affidavit states that he has reviewed the detailed statement of account and considers the

time expended and the fees charged to be reasonable in light of the services performed and the prevailing market rates for such services.

38. As Exhibit 1 to his affidavit, Mr. Rizarri sets out the Billing Worksheet Report which in turn reflects individual docket entries for all of the time spent by the Receiver.

39. The fees claimed by counsel to the Receiver are supported by the Affidavit of Monica Faheim sworn January 3, 2023. Ms. Faheim is a lawyer with the firm of counsel to the Receiver. The exhibits to her affidavit set out true copies of the detailed invoices for fees, and a schedule including a summary of the invoices, itemizing fees charged, disbursements and HST, and a further schedule summarizing billing rates, year of call, total hours and total fees charged, organized by billing professional (lawyer or law clerk), together with an estimate for remaining fees to complete all work not to exceed $5000 including HST. Ms. Faheim states that to the best of her knowledge, the rates charged are comparable for the provision of similar services to the rates charged by other law firms in the Toronto market.

40. The Debtor challenges the quantum of fees and disbursements. It relies on the affidavit of counsel sworn January 23, 2023. No other evidence is filed in support of its position on this motion. Notwithstanding that counsel who swore the affidavit appeared to argue this motion, I heard the submissions.

41. The Debtor submits, essentially, that the receivership was straightforward because the Debtor had only one major asset, being the real property and building referred to above. The value of that property is dependent upon the premises being used for the production of cannabis. That in turn required the cannabis licence referred to above.

42. Boiled down, the Debtor argues that the receivership only came about in the first place since the Debtor was unable to obtain refinancing prior to maturity of a mortgage in turn because it was in the final stages of obtaining the cannabis licence but that had not yet been issued.

43. In my view, this argument does not advance the position of the Debtor. The facts as submitted may well be accurate but do not change certain key facts. The mortgage went into default. This Court concluded that the test for the appointment of a receiver was established by the Applicant. This Court then concluded that a sale process should be approved, with a view to monetizing and maximizing the recovery in respect of the sale of the one key asset: the land and building.

44. The argument of the Debtor really amounts to another version of the argument advanced earlier in this proceeding that implementation of the Receivership Order should be delayed to permit imminent refinancing. None of that changes the fact that a receivership was appropriate, just as this Court previously concluded.

45. The Receiver submits, and I accept, that its efforts undertaken with respect to the sale process were appropriate, in accordance with Court approval, and the fact that ultimately, a refinancing was concluded such that a sale was not necessary, does not render, retroactively, those efforts unnecessary nor the fees in respect of those efforts inappropriate and unrecoverable.

46. The Debtor submits that the receivership did not take an extended length of time, noting that the hearing for the Receivership Order took place less than two months after the mortgage default. The Debtor submits in its materials (and in argument on this motion) that given the dates in respect of which the stay period was in effect, there were a very limited number of days, or "workdays" when the receiver and its counsel could have been actually working on the file (and the amounts charged for those periods of time are excessive).

47. Counsel for the Debtor submits in his affidavit the hearsay evidence that he received advice from the broker that represents the Second Mortgagees (whom, I pause to observe again, did not take a position on this motion or file any evidence on this motion) that the Receiver's work over that period of time [late July and early August, see para. 18 of the Debtor's factum] "brought no value to the Corporation or its creditors, including the Second Mortgagees". I cannot give any weight to this submission based on that evidence.

48. The Debtor then, in the same manner, challenges as unreasonable the fees of the Receiver and its counsel charged for the period from late September until mid-October 2022 [factum, paras. 18-19], submitting that once the Health Canada licence was issued in late September, a commitment for mortgage refinancing was finalized shortly thereafter, resulting in the request by the Debtor for an extension of the stay or pause of the receivership until November 4, 2022.

49. The Debtor made vigourous submissions to the effect that the Applicant acted unreasonably in refusing to consent to extensions to the stay, to allow for the refinancing and pay out in full of the mortgage loan owing to the Applicant.

50. The position of the Debtor is in large part summed up in paragraphs 42 and 43 of its Factum, and these submissions were repeated in oral argument. The Debtor argues:

> Lastly, all hearings and preparation conducted by the Receiver and its counsel could have been avoided if the Receiver had acted reasonably and allowed for the Refinance to take place. Instead, the Receiver booked, attended and forced counsel for the Lender to attend unnecessary hearings while it knew the Refinance was imminent.
>
> The Refinance closed without any input or aid from the Receiver or Lender whose only interest, it seems, was forcing counsel for the Corporation to attend unnecessary hearings and meetings to incur expenses with respect to the Receivership, which are dubious at best.

51. The source for this submission is the lawyer's own affidavit at paragraphs 29 – 32 (CaseLines B-1-17).

52. The affidavit states at paragraph 53 that certain amounts have been charged by the Receiver and its counsel as set out in chart form. At paragraph 54, the affidavit states that: "I believe that it [attending court and reviewing court documents] brought no value to the Corporation or its creditors and was wasteful. Further, I doubt the necessity of any of …. the work …..".

53. In my view, it is not the role of the Court to attempt to undertake a lawyer by lawyer, line by line, forensic analysis of the invoices for professional fees. Nor is it the role of the Court

to attempt to evaluate each docket entry and attempt to come to a determination, particularly on a record like this, as to whether each individual activity on a certain day by a certain professional added demonstrable value.

54. Rather, the Court of Appeal was clear in *Diemer* that such an item-by-item evaluation is what should not be undertaken, in favour of a more holistic review of the constellation of all relevant factors, each of which is an input into the ultimate analysis of whether the fees are fair and reasonable in the circumstances of this particular case.

55. Here, I accept that the professional fees of the Receiver and its counsel were not immaterial. Total fees and disbursements of approximately $248,000 were significant, even considered as against the amount of the outstanding mortgage loan in default of approximately $6.5 million. However, in my view they were not unreasonable, given the circumstances and the steps that were required to be undertaken. I am not persuaded that they should be reduced as submitted by the Debtor to approximately $125,000.

56. Again, there is no issue about the loan and the default. There can be no issue about the propriety or necessity of the receivership proceeding or the sales process, both of which were approved by the Court. In the same way and as noted above, there can be no issue about the activities of the Receiver and its counsel as set out in the First and Second Reports, which were also previously approved. The issue is whether the fees and disbursements are fair and reasonable.

57. Just as it is inappropriate to consider each individual docket entry independently, I think caution should be exercised when undertaking a retrospective analysis about whether steps taken in a proceeding were reasonable, at the time they were taken. In practical terms, it is not appropriate in a receivership proceeding such as this, to effectively argue that refinancing was imminent from the outset, even prior to the Receivership Order being granted, then argue vigourously for extensions and delay throughout the proceeding because the refinancing was imminent, and then, only following a sale process order being made, actually finalize that refinancing and then submit that none of the intervening steps ought to have been necessary or reasonable at the time they were taken. The opposite is also accurate: if the refinancing had not been obtained, and the sale process and receivership continued, such facts would not automatically make the preceding steps and the fees in respect thereof necessary, fair and reasonable. In each case, all of the factors need to be considered.

58. I am satisfied that while the receivership property consisted largely of one piece of land and the building thereon, it does not follow that the issues confronting the Receiver were necessarily straightforward or uncomplicated. As admitted and indeed emphasized by the Debtor, the value of the asset reflected its unique and single-purpose: operation of a cannabis facility. That in turn required a Health Canada licence which was not issued until later in the process.

59. The chronology of Court attendances and orders does not persuade me that any of them were improper, unnecessary or duplicative. Indeed, a number of them were brought about expressly at the request of the Debtor in the course of its continued and repeated pleas,

effectively, for more time within which it could arrange replacement financing and pay out the mortgage debt owing to the Applicant.

60. In oral argument, counsel for the Debtor made three main submissions: i) the Receiver has duties to all stakeholders, including the Debtor; ii) the receivership proceeding itself was opposed by the Debtor and by the Second Mortgagees; and iii) the fees charged are unreasonable.

61. As stated above, neither of the first two submissions assists the Debtor at all, in my view. The only issue on this motion is whether the fees and disbursements are fair and reasonable.

62. The Receivership Order already made provides that the reasonable fees and disbursements of the Receiver and its counsel are authorized to be paid at the applicable standard rates and charges, unless otherwise ordered.

63. As noted above, the fee affidavits and exhibits (i.e., the invoices) are sworn or affirmed statements. I am satisfied that the fees are standard and reasonable. I am satisfied that the steps taken as reflected in the detailed time entries, were reasonable and consistent with the mandate given to the Receiver and its counsel through the Receivership Order. I am unable to conclude that the fees and disbursements charged were excessive or unreasonable.

64. The fees and disbursements of the Receiver and its counsel are approved in the aggregate amount of $247,953.15.

Approval of the Third Report and Activities

65. While approval of the Third Report and the activities described therein are not challenged by the Debtor (save to the extent described above), I have reviewed them and am satisfied they are appropriate. As observed by Morawetz R.S.J. (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574, 31 C.B.R. (6th) 311, at para. 22, there are good policy and practical reasons for the Court to approve of the activities of a Monitor.

66. The same observations apply to the activities of a court-appointed Receiver. It should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.

67. The Third Report and the activities described in it are approved.

Costs

68. Each of the Receiver and the Debtor submitted a bill of costs, and seeks partial indemnity costs of this motion in the event it is successful. The Receiver seeks the amount of $18,569.72, inclusive of fees, disbursements and HST. The Debtor seeks the amount of $10,719.18 on the same basis.

69. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that the costs of any step in a proceeding are in the discretion of the Court. The Receiver was successful and is entitled to its costs.

70. Having considered the factors set out in r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as they apply to this matter, in my view an appropriate award of costs is $12,500 inclusive of fees, disbursements and HST, which amount is payable by the Debtor to the Receiver within 60 days.

71. Order to go in accordance with these reasons.

P.J. Osborne J.

Date: June 6, 2023

TAB 5

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.**

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz* and *Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and *S. Richard Orzy*, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and *Alan Mark*, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> "provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

> … in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

> (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
>
> (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
>
> (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
>
> (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
>
> (e) provides protection for the monitor, not otherwise provided by the CCAA; and
>
> (f) protects creditors from the delay in distribution that would be caused by:
>
> a. re-litigation of steps taken to date; and
>
> b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "… prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "… prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> …
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > ….
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

> test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> …
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

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

(ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

_____

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015