COURT FILE NUMBER:	1201-05843
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c-36, AS AMENDED
	AND IN THE MATTER OF UBG BUILDERS INC., ALBERTA BUILDERS CAPITAL INC., ALPINE HOMES (2006) INC., AMERICAN BUILDERS CAPITAL (US) INC., EDGEWATER AT GRIESBACH INC., ELITE HOMES (2006) LTD., EVOLUTION BY GREENBORO INC., GREENBORO COMMUNITIES (2006) INC., GREENBORO ESTATE HOMES (2006) LTD., GREENBORO HOMES (2006) LTD., GREENBORO LUXURY HOMES INC., HIGH POINTE INC., MOUNTAINEERS VILLAGE (2006) INC., MOUNTAINEERS VILLAGE II INC., ORIGINS AT CRANSTON INC., SOUTH TERWILLEGAR VILLAGE INC., THE BRIDGES MANAGEMENT INC., THE LEDGES INC., TIMBERLINE LODGES (2006) INC., TODAY'S COMMUNITIES (2006) INC., TODAY'S HOMES (2006) INC., TUSCANY DEVELOPMENTS (2006) INC., UBG ALBERTA BUILDERS (2006) INC., UBG ALPINE HOMES (2006) LTD., UBG BRIDGES INC., UBG BUILDERS (USA) INC., UBG COMMERCIAL INC., UBG LAND INC., UBG LOT DEPOSIT CORP., UBG 4500 CALGARY INC., UBG 75 CANMORE INC., UBG 808 CALGARY INC., UNITY INVESTMENTS (2012) INC., VALMONT AT ASPEN STONE INC., VALOUR PARK AT CURRIE INC., VILLAGE AT THE HAMPTONS INC., VILLAGE ON THE PARK INC., WILDERNESS HOMES BY RIVERDALE INC., WILDERNESS RIDGE AT STEWART CREEK INC. (COLLECTIVELY, THE "UBG GROUP OF COMPANIES")
DOCUMENT	**BRIEF OF ARGUMENT OF ERNST & YOUNG INC. AS CCAA MONITOR OF THE UBG GROUP OF COMPANIES**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

BENNETT JONES LLP
Barristers and Solicitors
4500 Bankers Hall East
855 – 2nd Street SW
Calgary, Alberta T2P 4K7

Attention: Chris Simard
Telephone No.: 403-298-4485
Fax No.: 403-265-7219
Client File No.: 57529-10

Commercial List Application scheduled on June 3, 2015 at 10:00 a.m.
Before The Honourable Madam Justice K. M. Horner

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. Evidence 2

B. Background Facts 2

III. ISSUES 15

IV. POINTS OF LAW 15

A. Introduction 15

B. No Obligation to Pay Back-End Commissions Arose under the Agreements 16

C. The "Non-Completion" Clause in the Agreements does not Apply in the Circumstances 18

D. Square Foot's Back-End Commission Claim Is a Collateral Attack on the August 30, 2013 Sale Approval and Vesting Order 20

E. Square Foot's Back-End Commission Claim Was Filed Late 22

F. ALTERNATIVELY, IF SQUARE FOOT'S BACK-END COMMISSION CLAIM IS ALLOWED, IT MUST BE REDUCED 23

G. THE FRAUDULENT PREFERENCE CLAIM AGAINST SQUARE FOOT 24

V. RELIEF SOUGHT 24

VI. TABLE OF AUTHORITIES 25

I. INTRODUCTION

1. Ernst & Young Inc. as CCAA Monitor (the "Monitor") of the UBG Group of Companies ("UBG") files this written Brief of Argument with respect to the application scheduled to be heard at 10:00 a.m. on June 3, 2015 regarding the claim of Square Foot Real Estate Corporation ("Square Foot") for "back-end commissions".

2. Square Foot was a party with Valmont at Aspenstone Limited Partnership ("Valmont") to a number of agreements. The essence of the arrangement between the parties was that Square Foot acted as the sales agent who marketed units in the Valmont at Aspenstone Condominium Project (the "Project") to prospective purchasers. Square Foot was responsible for signing up unit purchase and sale agreements with and collecting deposits from prospective unit purchasers.

3. Square Foot signed up 79 prospective unit purchasers. Square Foot received substantial "front-end" commission payments from Valmont and the Monitor with respect to those potential unit sales. Under the operative agreements, Square Foot was also entitled to receive "back-end" commissions on the same prospective sales, but only after the closing of the sales in which Valmont sold the units to the purchasers and the purchasers paid the full purchase price to Valmont.

4. Valmont never closed the unit sales to the purchasers, and never received the full purchase price for the units. In August 2013, this Honourable Court approved the sale of the entire Project by Valmont to a third party. It was that third party who proceeded to complete the Project and close (or not close) sales to unit purchasers.

5. Thus, the facts that would have had to occur to trigger Valmont's obligation to pay back-end commissions to Square Foot, simply never occurred. Square Foot had legal representation throughout and was very knowledgeable about the progress of the CCAA proceedings. It could have taken steps prior to the Claims Bar Date, or at the time this Honourable Court approved the sale of the Project, to attempt to protect any claim to back-end commissions. It did not, and it has no valid claim against Square Foot.

II. STATEMENT OF FACTS

A. Evidence

6. The relevant evidence on this application is set out in the following materials:

(a) Affidavit of Tim Taylor filed on April 8, 2015 (the "Taylor Affidavit");

(b) Transcript of Questioning of Mr. Taylor held on May 7, 2015, including the Exhibits marked at such questioning, filed on May 19, 2015 (the "Taylor Transcript"); and

(c) the Third Report of the Monitor with respect to the Valmont Project, filed on May 28, 2015 (the "Monitor's 3rd Valmont Report").

B. Background Facts

1. The Agreements

7. During the course of the parties' relationship, Square Foot and Valmont entered into three different agreements, in series. The first agreement (Exhibit "A" to the Taylor Affidavit) was effective from August 30, 2010 until its term ended on August 31, 2011. The second agreement (Exhibit "B" to the Taylor Affidavit) was effective from September 1, 2011 until September 28, 2011. The third agreement (Exhibit "C" to the Taylor Affidavit) was effective from September 8, 2011 and it expired at the end of its term on December 31, 2013.

- Taylor Affidavit at Exhibits "A", "B" and "C"; Taylor Transcript at page 8, line 17 – page 10, line 23

8. While the third agreement was still in effect, the CCAA proceedings regarding Valmont and the other UBG debtor companies commenced, on May 9, 2012.

- Taylor Transcript at page 10, line 17 – page 12, line 2

9. The contractual provisions that are relevant to this application changed only minimally, if at all, as between the three different agreements. Those provisions, as they existed in the third agreement that was in effect when the CCAA proceedings commenced, are found in Section 6 (entitled "Commission and Remuneration of Square Foot"). The third

agreement, being Exhibit "C" to the Taylor Affidavit, is attached in its entirety in **[TAB 1]** to this Brief for ease of reference.

2. Unit Sales Signed Up by Square Foot and Front-End Commission Payments Received by Square Foot

10. Mr. Taylor described the process that was followed by Square Foot and Valmont with respect to unit sales at the Project:

(a) if there was a successful marketing to a unit purchaser, the purchaser would sign an Offer to Purchase (or an "OTP");

(b) at the time the prospective unit purchaser signed the OTP, it would be required to pay a deposit;

(c) Square Foot received the deposits and forwarded them to Valmont;

(d) a representative of Valmont would sign the OTP;

(e) the OTP would contain any conditions to closing;

(f) when the "subject to" period ended and a deal became "firm" Valmont would pay Square Foot the corresponding "front-end" commission;

(g) after any closing conditions were satisfied or waived, a closing would occur, at which time the purchaser would pay the balance of the purchase price and Valmont would transfer title in the unit to the purchaser; and

(h) in the context of this process, a sale would be "completed" when the closing occurred and the full purchase price was paid in exchange for the transfer of title.

- Taylor Transcript, page 16, line 6 – page 21, line 2

11. In conjunction with these sale procedures, the practice that Square Foot followed with respect to issuing invoices to Valmont was:

(a) after closings occurred on units (Building "B" was completed and closings occurred on units therein prior to the CCAA proceedings. In contrast, all of Square Foot's claims in these CCAA proceedings relate to buildings "C" and "D", which were only partially completed when the CCAA proceedings commenced and on which no closings had taken place), Square Foot then issued invoices to Valmont for back-end commissions;

(b) with respect to the back-end commissions that are the subject of the disputed claim in this application (for buildings "C" and "D") Square Foot did **not** issue invoices to Valmont **at any time**, because closings had not occurred and Square Foot's counsel advised it that the invoicing could not be done because the back-end commissions "were not yet earned because the closing had not occurred yet"; and

(c) it was Square Foot's intention with respect to building "C" and "D" sales that if there had been a closing in which Valmont was transferring title and receiving the purchase price, the time of closing is when Square Foot would have issued its invoices for the back-end commissions.

- Taylor Transcript, page 24, line 8 – page 25, line 10

12. By May 9, 2012, the day on which the CCAA proceedings commenced, Square Foot had signed up 73 OTPs with prospective unit purchasers in Buildings "C" and "D" in the Project. However, none of those sales had closed. Six additional OTPs were signed between May 9, 2012 and July 19, 2012, for a total of 79 OTP's. In this application, Square Foot seeks to establish a claim for back-end commissions with respect to all 79 of those OTP's.

- Taylor Affidavit, paras. 5 and 9; Taylor Transcript, page 13, line 11 – line 14

13. Exhibit "AA" to the Taylor Affidavit is Square Foot's back-end commission claim that is the subject of this application. The final two pages of Exhibit "AA" are a table setting out Square Foot's back-end commission claim on a unit-by-unit basis. That table contains references to the 73 units on which OTPs were signed prior to the commencement of the CCAA proceedings and the 6 OTPs that were signed after the commencement of the CCAA

proceedings. Under the column titled "At Firm" are the front-end commissions that have in fact been received by Square Foot. Those amounts were paid by Valmont to Square Foot (or, for the six OTPs signed after the commencement of the CCAA proceedings, by the Monitor) after the OTPs were signed by the purchasers in Valmont and the conditions under those OTPs were satisfied or waived. The total amount paid to Square Foot with respect to those front-end commissions was $399,601.19.

- Taylor Affidavit, Exhibit "AA"; Taylor Transcript, page 19, line 8 – page 21, line 2

14. In the schedule attached at the back of Exhibit "AA", the amounts listed under the "At Closing" column are the back-end commissions being sought by Square Foot in its disputed proof of claim. By the time the CCAA proceedings commenced, there had been no closings of the sales of the units listed in that Schedule "A" to Exhibit "AA".

- Taylor Transcript, page 21, line 3 – line 19; Taylor Affidavit, para. 13

15. Further, none of the unit sales in Schedule "A" to Exhibit "AA" had closed by the time that the entire Project was sold by Valmont to a third party purchaser in a Court-approved sale in these CCAA proceedings in September 2013 (as discussed in greater detail below).

- Taylor Transcript, page 21, line 15 – page 22, line 7

3. The Claims Procedure, the CCAA Proceedings and Square Foot's Knowledge of and Involvement Therein

16. Square Foot has had legal counsel advising it with respect to these CCAA proceedings, from the outset. Shortly after the proceedings were commenced, Square Foot retained Borden Ladner Gervais LLP ("BLG"). Sometime after early December 2013, Square Foot replaced BLG with Macleod Law LLP as its counsel with respect to these proceedings. But until that time, BLG had been continually acting as Square Foot's counsel. So Square Foot always had the benefit of legal advice throughout these proceedings.

- Taylor Transcript, page 25, line 11 – page 28, line 18

17. In addition to being represented by legal counsel throughout the proceedings, Mr. Taylor personally checked the Monitor's website and familiarized himself with the documents posted there from time to time. He checked every Monitor's report and the other documents that were posted, on a relatively frequent basis.

- Taylor Transcript, page 28, line 26 – page 29, line 11

18. This Honourable Court granted a Claims Procedure Order in these proceedings on June 15, 2012, under which the Claims Bar Date was established as July 30, 2012. Mr. Taylor admitted that sometime prior to July 30, 2012, he was aware of the Claims Bar Date.

- Taylor Affidavit, para. 49; Taylor Transcript, page 28, line 19 – line 25

19. In fact, Square Foot filed a proof of claim (respecting front-end commissions) on the Claims Bar Date (see Exhibit "R" to the Taylor Affidavit).

20. By July 30, 2012, Square Foot knew not only about the Claims Bar Date, but it knew what back-end commission claims it could or would assert with respect to all 79 OTPs that had been signed. This information can be seen by reference to the table in the final two pages of Exhibit "AA" to the Taylor Affidavit (Schedule "A"). Mr. Taylor confirmed that the "Contract Date" in that table is the date on which the prospective purchaser signed the OTP (for 73 of the 79 units listed on that table, the OTP was signed by the purchaser prior to May 9, 2012 and the final six OTPs were all signed between May 9, 2012 and July 19, 2012). Mr. Taylor confirmed that in each of the OTPs, the total purchase price was specified, with the result that Square Foot was able to calculate the back-end commission that it could claim under each of those OTPs, on the date the OTPs were signed.

- Taylor Transcript, page 29, line 12 – page 30, line 16

21. Therefore, prior to July 30, 2012, being the Claims Bar Date herein, Square Foot had all the information necessary to fully calculate and assert the back-end commission claims that are the subject of this application.

22. As described in the Taylor Affidavit and confirmed in Mr. Taylor's cross-examination, Square Foot proceeded to file a number of additional proofs of claim after the Claims Bar Date:

(a) a November 18, 2013 "Supplemental" Proof of Claim with respect to additional front-end commissions (Exhibit "S" to the Taylor Affidavit);

(b) an October 7, 2013 "Amended" Proof of Claim, adding a new secured claim in the amount of $143,710.03 with respect to the "Sales Centre" (Exhibit "W" to the Taylor Affidavit);

(c) an April 11, 2014 Proof of Claim with respect to the back-end commissions (Exhibit "AA" to the Taylor Affidavit); and

(d) a July 21, 2014 "Supplemental" Proof of Claim with respect to back-end commissions (Exhibit "CC" to the Taylor Affidavit).

- Taylor Transcript, page 30, line 17 – page 31, line 24

4. The Progress of the Project in the CCAA Proceedings

23. As was reported to this Court at the time, Valmont's intention with respect to the Project for approximately the first year of these proceedings, was to secure ongoing construction financing from its existing lender Scotiabank, and complete the Project and sell the units. Valmont and the Project lender Scotiabank entered into an Amended Scotiabank Protocol, which was approved by this Court on December 14, 2012, to allow for continued construction financing and completion of the Project. However, as reported in the 11th Report of the Monitor, filed July 5, 2013, certain trades refused to return to the Project and Valmont had to re-tender certain portions of the work which resulted in increased costs and breaches of the Amended Scotiabank Protocol.

24. By the time of the Monitor's 11th Report, Scotiabank had advised that it wished to exit the Project on a timely basis. Because certain third parties had expressed interest in purchasing the Project by July 2013, the original plan (to complete the Project) changed and Valmont began marketing the Project *en bloc* to prospective purchasers. Square Foot became aware of this new strategy on or about July 9, 2013, and became aware around the same time

that Valmont would be attempting to sell the Project by use of a stalking horse sales process. The stalking horse sale process was approved by this Court on July 10, 2013, with a bid deadline of August 9, 2013.

- Taylor Transcript, page 31, line 25 – page 32, line 11

25. During the period in which Valmont was marketing the Project, Square Foot was positioning itself and hoping that it might be retained by the new owner of the Project, to continue its role as marketing and sales agent. However, Square Foot knew that it might not be retained by the new Project owner.

- Taylor Transcript, page 33, line 17 – page 35, line 16

26. While the stalking horse sales process was playing out during the summer of 2013, Square Foot was also aware that potential bidders on the Project might purchase not only the Project itself but also the OTPs. Square Foot had this knowledge prior to Valmont applying to the Court for the approval of the sale of the Project.

- Taylor Transcript, page 35, line 17 – line 26

27. Square Foot had a very detailed knowledge of the stalking horse sales process, as that process proceeded toward the Court's approval of the successful bid on August 30, 2013. Mr. Taylor confirmed that he was aware of the following materials, on about the dates they were filed:

(a) Monitor's Report with respect to the Valmont sales process filed August 26, 2013 (Exhibit "1" to the Taylor Transcript);

(b) Application of Valmont for approval of the sale of the Project to 771280 Alberta Ltd. ("771") filed August 26, 2013 and returnable August 29, 2013 (Exhibit "3" to the Taylor Transcript");

(c) Affidavit of Robert Friesen filed August 26, 2013, in support of the application approving the sale to 771 (Exhibit "2" to the Taylor Transcript); and

(d) Order approving the sale and vesting title in the Project to 771, filed August 30, 2013 (Exhibit "4" to the Taylor Transcript).

28. In the Vesting Order granted on August 30, 2013 (Exhibit "4" to the Taylor Transcript), the Project was sold to 771 and title thereto was vested in 771 "free of all estate, right, title, interest, royalty, rental, and equity of redemption of UBG and all persons who claim by, through or under UBG in respect of the Property...". Further, the Vesting Order stated that:

> UBG and all persons who claim by, through or under UBG in respect of the Property, save and except the Permitted Encumbrances, shall stand absolutely barred and foreclosed from all estate, right, title, interest, royalty, rental and equity and redemption of the Property...

29. When Mr. Taylor reviewed the August 26, 2013 Application and supporting Affidavit, he understood that an application was being made to approve the sale of the entire Project to 771. He also understood that if that sale was approved and the transaction closed, the entire Project would transfer to 771.

- Taylor Transcript, page 40, line 1 – line 15

30. Square Foot knew at that time that the sale of the Project meant that it would not be Valmont that would close unit sales to prospective purchasers, but instead it would be the new owners of the Project, 771, who would close unit sales.

- Taylor Transcript, page 44, line 10 – line 16

31. When Mr. Taylor reviewed the August 26, 2013 sale approval application materials, he was aware that the prospective purchaser 771 was not assuming the existing agreement between Valmont and Square Foot. He was also aware that there was no agreement in place between 771 and Square Foot, to retain Square Foot as a marketing or sales agent for 771.

- Taylor Transcript, page 45, line 8 – page 46, line 17

32. Despite all its knowledge about the consequences of the sale of the Project, Square Foot did not instruct its counsel to appear at the application to approve the sale. It did not instruct its counsel to write letters to clarify or confirm the status of the sales, or Square

Foot's back-end commission claim. It did not object to the sale approval and vesting order being sought on August 30, 2013. It did not seek to have any conditions attached to the court approval of the sale or to the order.

- Taylor Transcript, page 43, line 3 – page 44, line 9, page 46, line 18 – line 27

5. Square Foot's Evidence Regarding its Communications with UBG with respect to its Back-End Commissions

33. Square Foot has tendered a great deal of evidence regarding communications between it and UBG during the CCAA proceedings, that Square Foot asserts to have consequences with respect to its back-end commission (see, generally, the Taylor Affidavit at paras. 21 – 47). All of this correspondence was between Square Foot and various representatives of UBG entities. Mr. Taylor confirmed that all the correspondence between Square Foot and UBG with respect to the back-end commissions that was in writing, is included in his Affidavit (Taylor Transcript, page 43, line 15 – page 44, line 4).

34. In the Monitor's view, these communications can be summarized at a high level as follows:

(a) Square Foot forwarded to UBG representatives certain spreadsheets or tables that showed its calculations of both front-end and back-end commissions with respect to the OTPs that had been signed;

(b) certain UBG representatives, including Mr. Larry Scammell, advised Square Foot that they would pass that information on to the Monitor (the Monitor, in the Monitor's 3rd Valmont Report (at para. 25), has confirmed that it never assured Square Foot that its back-end commissions would be paid and it did not even know prior to receiving Square Foot's April 11, 2014 Proof of Claim, that Square Foot was asserting a claim with respect to back-end commissions);

(c) Square Foot and/or the UBG representatives appear to have shared the assumption that, if Valmont continued to own the Project, successfully obtained financing to allow it to complete construction, completed

construction and then actually closed the existing OTPs with prospective purchasers, Valmont would pay Square Foot the back-end commissions with respect to those OTPs (see, for example, para. 33 of the Taylor Affidavit); and

(d) when it became clear in July 2013 that Valmont would not in fact retain and complete the Project nor would it close any unit sales under the OTPs, Square Foot took no steps to seek any confirmation with respect to the back-end commissions, or assert any rights with respect to the back-end commissions, or seek Court protection with respect to the back-end commissions.

35. In para. 53 of his Affidavit, Mr. Taylor asserts that the Monitor represented that the back-end commission claims of Square Foot would be approved. That is not correct (as described in para. 25 of the 3rd Valmont Report), and a careful review of Mr. Taylor's evidence demonstrates this to be so. First, Mr. Taylor admitted in cross-examination that his statement in para. 53 that "we were also assured by a representative of the Monitor" referred to a communication not between the Monitor and Square Foot, but between Square Foot's counsel, Ms. Gurofsky of BLG, and someone at the Monitor's office. Mr. Taylor was not a participant in that conversation and admitted that he knows nothing about it, other than what Ms. Gurofsky told him.

- Taylor Affidavit at para. 53; Taylor Transcript, page 49, line 10 – page 50, line 5

36. The communication between Ms. Gurofsky and someone at the Monitor's office was memorialized by her in a November 22, 2013 email that she sent to Square Foot, which is attached as Exhibit "V" to the Taylor Affidavit. By the date on which that email was sent, November 22, 2013, Square Foot had only filed its July 30, 2012 original Proof of Claim (Exhibit "R"), its October 7, 2013 "Amended" Proof of Claim (Exhibit "W") and its November 18, 2013 "Supplemental" Proof of Claim (Exhibit "S"). Those claims dealt only with Square Foot's front-end commission claim and its Sales Centre claim. Those claims did not contain any claim for or reference whatsoever to back-end commissions (the first time Square Foot filed a Proof of Claim with respect to its back-end commission claims was in April 2014).

37. It is clear from Ms. Gurofsky's November 22, 2013 email that she was speaking **only** about the proofs of claim actually submitted by Square Foot prior to that date, and the claims actually asserted therein (*i.e.* the front-end commission claims and the Sales Centre claim). This is apparent from her summary of her discussion with the Monitor. Notably, in the second bullet in her email, she stated:

> The Monitor will be accepting all of the claims filed for unpaid sales contract invoices dated prior to the CCAA, including those in the original proof of claim, amended and supplemental proof of claim. [emphasis added]

- Exhibit "V" to the Taylor Affidavit

38. That Ms. Gurofsky was only talking about "claims filed" (*i.e.* the claims actually set out in Square Foot's proofs of claim filed by that time) is reinforced by the fact that she referred specifically to the three proofs of claim that had been filed by that date, the original proof of claim, the "Amended" proof of claim and the "Supplemental" proof of claim. The only "claims filed" in those three proofs of claim for "unpaid sales contract invoices dated prior to the CCAA" were for **front-end** commissions. With respect, Mr. Taylor's statement in para. 33 of his Affidavit that this statement by Ms. Gurofsky's somehow assured him that the Monitor "would be accepting all of the Claims filed for unpaid sales contract Invoices dated prior to the CCAA, which Invoices we understood to include the Invoices for the "back-end commissions which had been provided to Mr. Scammell on December 5, 2012" is just not supportable.

39. Further, there was absolutely no discussion in Ms. Gurofsky's November 22, 2013 email (Exhibit "V") of any back-end commission claims at all. This is not surprising, given that Square Foot had filed no proof of claim by that date regarding its back-end commission claims and had taken no steps in connection with the Vesting Order application to protect or assert any rights with respect to back-end commission claims. The only discussion in her email about the impact of the sale of the Project to 771, clearly related only to front-end commissions:

> The Monitor is also working with its legal counsel to determine whether Valmont or the new purchaser are responsible for the post-CCAA sales invoices and again, should be in a position to advise us late next week regarding this. The Monitor has advised that if it determines that the post-

> petition invoices are payable by the purchaser, they will be making arrangements with them directly to provide that these amounts will be paid out of the deposits held by FMC (now Dentons). The purchaser's counsel is from BDP and we will be in contact regarding the post-petition payables. If the post-petition invoices are payable by the CCAA company, the Monitor will make arrangements to have these paid.

- Exhibit "V" to the Taylor Affidavit

40. In fact, as admitted by Mr. Taylor, the Monitor did arrange for payment of the front-end commissions with respect to all six OTPs that were dated after the commencement of the CCAA proceedings. As Ms. Gurofsky had reported on November 22, 2013, the Monitor considered that matter and on or about December 3, 2013, made full payment to Square Foot for these front-end commissions.

- Taylor Affidavit at para. 52

41. Notably, as well, Mr. Taylor admitted that by the date of Ms. Gurofsky's November 22, 2013 email, Square Foot had never even issued any invoices to Valmont for the back-end commissions on any of the 79 OTPs. That establishes conclusively that Ms. Gurofsky's repeated reference to the term "invoices" in her email could only have been a reference to Square Foot's front-end commission claims.

- Taylor Transcript, page 55, line 2 – line 17; Taylor Affidavit at Exhibit "V"

42. With respect, Mr. Taylor's lengthy justifications (in the Taylor Transcript at page 55, line 18 – page 63, line 19) to attempt to assert that Ms. Gurofsky's conversation with the Monitor's office, was in fact some form of approval of Square Foot's back-end commissions for which it had never filed a proof of claim or issued an invoice, is, at best, a complete misinterpretation of Ms. Gurofsky's email.

43. As set out in para. 25 of the Monitor's 3rd Valmont Report, the Monitor never provided any assurances that back-end commissions would be paid.

6. What Happened to the OTPs After 771 Purchased the Project

44. In the Monitor's 3rd Valmont Report (at para. 22), the Monitor has reported on the current status of the 79 OTPs:

(a) the unit purchase contracts relating to $175,166 of the back-end commissions claimed by Square Foot were cancelled, and 771 fully refunded the deposits to the prospective unit purchasers, from 771's own funds; and

(b) the unit purchase contracts relating to $269,326 of the back-end commissions claimed by Square Foot were amended as between the unit purchaser and 771 and each unit was then sold to the prospective purchaser for a higher purchase price, or the prospective purchaser bought a different unit, many of which had never previously been sold.

7. The Preferential Payment to Square Foot

45. The Monitor learned, for the first time upon its review of the Taylor Affidavit, that Square Foot received two substantial payments totaling $111,991.28 from Valmont on the eve of these CCAA proceedings.

46. This matter is disclosed in paras. 25 – 27 of the Taylor Affidavit. In those paragraphs, Mr. Taylor has admitted that:

(a) the items marked in green in the table in Exhibit "F" to his Affidavit make it appear that Square Foot was paid the back-end commissions that corresponded to certain pre-CCAA OTPs (the payments were received on March 16, 2012 and April 5, 2012, in both cases less than three months prior to the commencement of these proceedings, and totaled $111,991.28);

(b) however, it was "not in fact the case" that those were back-end commission payments (the closings with respect to those OTPs had not in fact occurred, as described above);

(c) in fact, the payments made by Valmont were simply invoiced by Square Foot as back-end commissions when in reality they were payments owed to Square

Foot not by Valmont but by another UBG entity, The Bridges Management Inc. ("Bridges"), pursuant to a totally separate agreement on a totally separate project (Exhibit "F" to the Taylor Affidavit); and

(d) as noted by Mr. Taylor, in that other agreement, Bridges and Square Foot agreed that the retainer respecting the Bridges project would be paid to Square Foot by Valmont. However, Valmont was not a party to the Bridges Agreement.

- Taylor Affidavit, paras. 25 – 27 and Exhibit "F"

47. As reported at para. 27 of the Monitor's 3rd Valmont Report, the Monitor has reviewed the Valmont Project bank accounts as well as numerous other UBG bank accounts. No funds were ever paid by Bridges to Valmont in respect of the $111,991.28 payment Square Foot received from Valmont. It is the Monitor's view therefore that this payment to Square Foot was likely a fraudulent preference and the Monitor intends to bring an application to deal with this matter in the near future.

III. ISSUES

48. There are two issues for determination on this application:

(a) is Square Foot entitled to the claim it has asserted, in whole or in part, regarding back-end commissions; and

(b) if Square Foot is entitled to a claim for back-end commissions, what is the impact on that claim what the Monitor believes is the $111,991.28 fraudulent preference payment.

IV. POINTS OF LAW

A. Introduction

49. It is the Monitor's position that Square Foot's claim for back-end commissions has no merit and the Monitor's disallowance thereof was proper. Alternatively, if this Court finds that Square Foot has a provable claim for back-end commissions, that claim should be reduced by the amount of any fraudulent preference established against Square Foot in a

subsequent application by the Monitor, and/or the amount of front-end commissions paid on OTPs that were not sold at all to the prospective purchasers (as discussed below).

B. No Obligation to Pay Back-End Commissions Arose under the Agreements

50. The primary reason that Square Foot's application should be dismissed is that, under the three agreements between the parties, Valmont's obligation to pay back-end commissions was simply never triggered.

51. As noted above, the relevant contractual provisions (Section 7 in the first two agreements, renumbered Section 6 in the third agreement) are substantially identical in their description of the parties' rights and obligations regarding commissions. The relevant provisions state as follows (in this case, quoted from the third agreement which is at **[TAB 1]**):

> **6. Commission and Remuneration of Square Foot**
>
> (A) The remuneration of Square Foot for successfully selling units in the Building is based purely on performance with no retainers, draws or guarantees given by the Principal [*i.e.* Valmont]. The Principal agrees to pay Square Foot the following sums:
>
> (1) for Units sold by the Salespeople working for Square Foot which are assigned to the Building, a Commission equal to the following shall be paid, plus applicable GST.
>
> **Base Commission per deal 2.75%**
>
> . . .
>
> (B) In respect of every Unit sold for which a Contract exists and for which a Commission is payable to Square Foot under Clause 6(A)(1) ... the Principal shall pay to Square Foot:
>
> (1) fifty percent (50%) of the applicable Commission on the Principal's subsequent cheque run following invoicing from the later of a Purchaser's subject removal or the date of execution of the Contract for the Unit and payment by the Purchaser of the initial deposit. . .
>
> (2) the balance of the Commission ("Balance Commission") of fifty percent (50%), upon completion of the sale and purchase of the Unit and receipt by the Principal of the balance of purchase price for the Unit. Square Foot will invoice the

> Principal once a month for all commissions owing and payment will be payable on the Principal's subsequent cheque run following invoicing;

. . .

52. In the Monitor's view, the proper interpretation of this clause is that Valmont only became obligated to pay a back-end commission upon all the things listed in Section 6(B)(2) actually occurring (which they never did). The Monitor comes to this conclusion for the following reasons.

53. Section 6(B) is the provision which sets out Valmont's specific payment obligation with respect to both the front-end and back-end commissions. The opening language in Section 6(B) uses the mandatory language "the Principal [*i.e.* Valmont] **shall pay**" and then goes on to describe the circumstances in which Valmont "shall pay". Those circumstances differ as between front-end commissions and back-end commissions. For front-end commissions, Section 6(B)(1) stipulates that Valmont "shall pay" "on the Principal's subsequent cheque run following invoicing from the later of a Purchaser's subject removal with a date of execution of the Contract for the Unit and payment by the Purchaser of the initial deposit . . .". Therefore, Valmont's mandatory obligation to pay the front-end commission was triggered by:

(a) Square Foot invoicing Valmont;

(b) after the later of:

(i) a Purchaser's subject removal and payment of the initial deposit; or

(ii) the date of execution of the Contract for the Unit and payment of the initial deposit.

54. Those factual things all occurred in the case of each of the OTPs in issue. That is why Valmont and then the Monitor paid Square Foot front-end commissions, totaling $399,601.19.

55. However, the factual events that had to occur to trigger Valmont's mandatory obligation to pay the back-end commissions never in fact took place. For back-end

commissions, Section 6(B)(2) stipulates that Valmont "shall pay" "upon completion of the sale and purchase of the Unit and receipt by the Principal of the balance of purchase price for the Unit. Square Foot will invoice the Principal once a month for all commissions owing and payment will be payable on the Principal's subsequent cheque run following invoicing." Therefore, Valmont's mandatory obligation to pay the back-end commission was triggered by:

(a) completion of the sale of a unit (as admitted by Mr. Taylor, this would have involved transfer of title by Valmont in exchange for the full purchase price);

(b) receipt by Valmont of the balance of the purchase price for the unit;

(c) Square Foot invoicing Valmont for the back-end commission; and

(d) Valmont having a subsequent cheque run.

56. With respect to the 79 OTPs, none of these triggering events actually occurred. As a result, Valmont never became obligated to pay Square Foot any back-end commissions.

57. The Monitor submits that the opening words of Section 6(A) reinforce this interpretation of Section 6(B)(2). Those opening words are "[t]he remuneration of Square Foot for successfully selling units in the Building is based purely on performance with no retainers, draws or guarantees given by the Principal [*i.e.* Valmont]". While there was "successful" achievement of the signing up of 79 OTPs, there were no "successful" closings of sales of those units by Valmont.

58. After the Court-approved sale of the entire Project to 771, it was 771 and not Valmont who would have closed unit sales.

C. The "Non-Completion" Clause in the Agreements does not Apply in the Circumstances

59. In Section 6(C) of the third agreement (which is substantially identical to section 7(C) in the first two agreements), Valmont and Square Foot contemplated two specific circumstances in which unit sale transactions might not close, and the consequences that would follow. Section 6(C) states:

In the event the sale and purchase of a Unit for which a Commission is payable is not completed, the following shall occur:

(1) where the failure to complete the transaction is by reason only of the default of the Purchaser, the Balance Commission shall be forfeited by Square Foot and Square Foot shall have no further claim against the Principal for the Balance Commission. In addition, in the event that the initial portion of the Commission for the Unit has been paid to Square Foot, then Square Foot shall refund the Commission to the Principal one month following completion date for the sale provided that:

(a) all or a portion of any deposit paid in respect of the Unit has not been forfeited to the Principal in an amount in excess of the initial portion of the Commission;

(b) in the event that the Purchaser has not forfeited all or a portion of their deposit, that the Principal diligently pursue its legal remedies to both complete the sale retention of the Purchaser's deposit in the case of non completion; and

(2) in the case of default by the Vendor, the Balance Commission shall be payable by the Principal to Square Foot on the earlier of the date of completion contemplated in the Contract and thirty (30) days from the issuance of an occupancy permit for the Unit unless the Vendor's default arises in whole or in part from the Purchaser alleging that the Vendor is in breach of the Contract as a result of an act or misrepresentation made on the part of Square Foot.

60. Thus, the parties agreed to provide contractual consequences in only two circumstances in which closing of unit sales might not be completed: default by a unit purchaser; or default by Valmont. They did not contemplate the circumstance that actually occurred and resulted in closings not occurring between Valmont and the prospective unit purchasers that had signed the OTPs: the Court-approved sale of the entire Project to 771. The parties could have provided for a broader range of circumstances and consequences, but they did not. As a result, neither of the two consequences agreed to in Section 6(C), repayment of front-end commissions by Square Foot (in the event of a purchaser default) or payment of back-end commissions by Valmont (in the event of a Valmont default) were triggered.

61. The Monitor submits that wording of Section 6(C) provides another reason why Square Foot's back-end commission claim has no validity. The parties expressly turned their

minds to and agreed upon a single circumstance in which Valmont would be obligated to pay back-end commissions despite there being no closing of a unit sale: where the unit sale failed to close because of a default by Valmont. That circumstance did not occur in this case.

62. It is not at all uncommon in real estate listing agreements, for the listing agent and the owner to agree to a "tail" provision that entitles the agent to receive its commission in the event of a sale that occurs after the term of the agreement, but to a purchaser who was identified or marketed by the agent. Square Foot and Valmont could have agreed to include an equivalent provision in their three agreements, but they did not. The Court should not re-write the agreement to insert such a provision now.

63. It is notable that the non-application of Section 6(C) does not only have the effect of precluding Square Foot's claim, it also operates equally to provide a substantial windfall to Square Foot. Square Foot is entitled to retain the front-end commissions (totaling $399,601.19) that it was paid with respect to the 79 OTPs, despite the fact that Valmont never closed the sale of those 79 units. This is the concurrent result of the fact that neither specific circumstance contemplated in Section 6(C) (default by the unit purchaser or default by Valmont) took place.

D. Square Foot's Back-End Commission Claim Is a Collateral Attack on the August 30, 2013 Sale Approval and Vesting Order

64. The evidence is clear that Square Foot had ample notice of, and opportunity to, address any claim it wished to advance for back-end commissions, at the August 30, 2013 hearing for the Sale Approval and Vesting Order. Square Foot knew that an order was being sought that would to two things:

(a) transfer title to the Project, including the OTPs, to 771 (thereby meaning that 771, not Valmont, would be the party who would close sales under the OTPs); and

(b) transfer that title free and clear of all claims by or against Valmont.

65. Square Foot also knew, despite its best efforts and hopes, that it had no contract in place with 771, so it would not continue as marketing agent.

66. Therefore, Square Foot was aware or ought to have been aware that:

(a) the Court would be ordering relief on August 31, 2013 that would:

(i) make it impossible for Valmont to receive the balance of the purchase price from unit purchasers and transfer title in units to those purchasers; and

(ii) absolve 771, the party who would be receiving the balance of the purchase price from unit purchasers and transferring title in units to those purchasers, from any liability to Square Foot.

67. In the circumstances, if Square Foot wished to protect its claim to back-end commissions, it was incumbent on Square Foot to seek to have protective terms granted in the Sale Approval and Vesting Order. Square Foot did not do so.

68. Square Foot's assertion of its back-end commission claim constitutes an attempt to revise (or ignore) the facts created and authorized by the August 30, 2013 Sale Approval and Vesting Order. Square Foot is attempting to enforce provisions in an agreement with Valmont when it stood idly by while the Court authorized the transfer to a third party, 771, of the property (the Project and the OTPs) that Valmont would have had to retain, to be able to perform its obligations under its agreement with Square Foot.

69. The doctrine of collateral attack applies where a party, bound by an order, seeks to avoid compliance with that order by challenging the order itself and its enforceability indirectly in a separate forum. The main elements of the doctrine of collateral attack can be summarized as follows:

(a) a valid and binding judgment or order, in that the court had jurisdiction to make it; and

(b) the validity and binding nature of that judgment or order is challenged indirectly in a separate forum, rather than directly by (i) appealing or quashing the judgment, (ii) application to the court under the rules of civil procedure to

vary the judgment, or (iii) separate action to set aside the judgment on the basis of fraud.

- Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (Markham, ON: Butterworths, 2010) at 463 **[TAB 2]**

70. This is exactly what Square Foot is trying to do in its back-end commission claim.

E. Square Foot's Back-End Commission Claim Was Filed Late

71. *Re: Blue Range Resources Corp.*, 2000 ABCA 285 is the leading case on when claims should be permitted to be amended or filed in CCAA proceedings.

- *Re: Blue Range Resources Corp.*, 2000 ABCA 285 **[TAB 3]**

2. The *Blue Range* Criteria

72. In *Blue Range*, *supra*, the Court of Appeal considered the existing jurisprudence on the issue, and enunciated the following criteria to apply to late claims (at para. 26):

1. was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. if relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

3. Applying the *Blue Range* Criteria

(a) Inadvertence and Good Faith

73. The Monitor submits that, on the basis of this first factor alone, Square Foot's back-end commission claim ought not to be allowed. Simply put, Square Foot's failure to file its back-end commission claim by the Claims Bar Date was not inadvertent. As noted above, Square Foot had legal representation prior to the Claims Bar Date and had all the requisite knowledge to calculate and file its claim for back-end commissions at that time.

74. Square Foot has tendered no evidence to suggest that its failure to file the claim on time was inadvertent.

75. Rather, the evidence indicates that Square Foot's failure to file the claim was the choice to take a calculated risk. Square Foot voluntarily and knowingly assumed that Valmont would finish the Project and close the sales to the prospective purchasers under the OTPs. This calculation turned out to be incorrect.

76. It is telling to consider what Square Foot's back-end commission claim would have looked like if it had filed that claim prior to the Claims Bar Date. At that time, it would have been a contingent claim, contingent on the future occurrence of the following events:

(a) completion of the sale of the 79 units under the OTPs;

(b) receipt by Valmont of the balance of the purchase price for the units;

(c) Square Foot invoicing Valmont for the back-end commission; and

(d) Valmont having a subsequent cheque run.

77. Had Square Foot filed such a contingent claim, the Monitor would have had to defer ruling on the claim, while waiting to see if those contingent events in fact occurred. By September 2013, however, the Monitor would have disallowed Square Foot's contingent claim because by then it was conclusively established that the contingent events required to make the claim valid, would never occur. It would be perverse to accept a claim filed by Square Foot **after** it has been conclusively established that the contingencies entitling Square Foot to a valid claim cannot occur, when a contingent claim filed on time by Square Foot would have been disallowed upon such facts being established.

F. ALTERNATIVELY, IF SQUARE FOOT'S BACK-END COMMISSION CLAIM IS ALLOWED, IT MUST BE REDUCED

78. As noted above, a large proportion of the prospective unit sales under the OTP's have been terminated, 771 has refunded the full deposits to the prospective purchasers, and those closings will never occur. This fact pattern applies to $175,166 of the $444,492 being claimed by Square Foot.

79. For all the reasons set out above, the Monitor is of the view that the entirety of Square Foot's claim should be disallowed. If, however, this Honourable Court finds that Square Foot's claim is valid, the Monitor submits that the claim should be reduced by $175,166. With respect to the OTPs corresponding to that amount, not only did Valmont not close sales with the purchasers, no one did. Square Foot's marketing efforts which led to those OTPs benefitted no one (other than Square Foot itself, because it received front end commissions on those OTPs, even though 771 then had to refund the full deposits to prospective purchasers).

G. THE FRAUDULENT PREFERENCE CLAIM AGAINST SQUARE FOOT

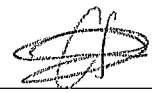
80. If this Honourable Court finds that any portion of Square Foot's claim is valid, the Monitor seeks a term in the Order resulting from this Application, directing that the Monitor need not make a distribution to Square Foot until the resolution of the fraudulent preference application to be brought by the Monitor (or that in any distribution to Square Foot, the Monitor can hold back the amount of the alleged fraudulent preference payment, $$111,991.28, pending the determination of that application).

V. RELIEF SOUGHT

81. The Monitor respectfully requests that Square Foot's application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 29th day of May, 2015.

BENNETT JONES LLP

Per: 

for Chris Simard
Counsel for Ernst & Young Inc. as CCAA
Monitor of The UBG Group of Companies

VI. TABLE OF AUTHORITIES

1. Exhibit "C" to the Taylor Affidavit

2. Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (Markham, ON: Butterworths, 2010)

3. *Re: Blue Range Resources Corp.*, 2000 ABCA 285

TAB 1

SALES MANAGEMENT AGREEMENT

THIS AGREEMENT is made this 28 day of September, 2011.

BETWEEN:

VALMONT AT ASPEN STONE LTD.
an Alberta company care of, 808 – 55 Avenue NE
Calgary, Alberta, T2E 6Y4, Canada,
(hereinafter referred to as the "Principal")

OF THE FIRST PART

AND

SQUARE FOOT REAL ESTATE CORPORATION
an Alberta company located at
227 Sierra Morena Close SW
Calgary, Alberta T3H 3G3
(hereinafter referred to as "Square Foot")

OF THE SECOND PART

THIS IS EXHIBIT " C "
Referred to in the Affidavit of
Tim Taylor
Sworn before me this 7th
day of APRIL 20 15
V. Philippe Lalonde
A Commissioner of Oaths in and for
the Province of Alberta

Philippe (Phil) Lalonde
Barrister and Solicitor

RECITALS:

(A) The Principal wishes to begin selling the second phase (Buildings C and D) of a multi-phase residential condominium project (the "Building") consisting of 120 homes in total in Calgary, Alberta, Valmont at Aspen Stone, that is located at 25 and 15 Aspenmont Heights SW, Calgary, Alberta (the "Land");

(B) The Principal desires to appoint Square Foot as its sole and exclusive agent to promote and sell all of the remaining units in the second and third phases, herein (the "Units") and Square Foot accepts such appointment on the terms and conditions set out herein.

NOW IT IS HEREBY AGREED as follows:

1. Sole and Exclusive Agency

(A) The Principal agrees to appoint Square Foot to be its sole agent with exclusive rights to act as the promotion and sales representative of the Principal for the sale of the Units for the duration and in accordance with the terms and conditions set out herein.

(B) During the term of this Agreement, the Principal agrees not to appoint any other agent(s) for the sale of the Units nor will the Principal, whether directly or indirectly, engage in any such sales except through Square Foot.

(C) Square Foot agrees to work in co-operation with marketing, research and other consultants that may be appointed by the Principal from time to time.

2. Term of Agreement

(A) The parties hereto agree that the period of Square Foot's appointment shall commence from September 1st, 2011 and expire on the earlier of the completion of the Sales of the Units in the completed phase of the Project or December 31st, 2013 subject to any extension or amendment by mutual agreement in writing between the parties hereto.

(B) This agreement replaces the Sales Management Agreement dated from August 30th, 2010 which expired on August 31st, 2011.

(C) This agreement pertains to any and all deals written on or after September 1st, 2011. Any deals written on or before August 31st, 2011 will be subject to the terms and conditions of the Sales Management Agreement dated August 30th, 2010.

(D) If building A is launched prior to December 31st, 2013, Square Foot is guaranteed to be appointed as the sole agent with exclusive rights to act as the promotion and sales representative of the Principal for the sale of the Units under similar terms as the agreement herein.

3. Authority and Responsibilities of Square Foot

Square Foot shall have the authority and be obliged to carry out diligently and using its best efforts the following responsibilities:

(a) to be responsible for, recruiting, training (both initially and ongoing) and monitoring an adequate number of sales persons (the "Salespeople") and administrative personnel for the Project who shall work under the supervision of Square Foot's Senior Personnel as approved by the Principal;

(b) to assist with the preparation and presentation of all advertising and promotional material relating to the promotion and sale of the Units (the "Sales"), and to advise on the sales and marketing strategy, advertising and promotion program as well as ongoing monitoring of the sales marketing, advertising and promotion programs should the Principal want such consultation;

(c) to actively market and promote the Sales including being responsible for the executing and funding the advertising and marketing program outlined in Schedule A;

(d) to solicit offers from prospective Purchasers for the purchase of the Units in accordance with price lists and conditions provided by the Principal, but Square Foot shall have no authority to accept any offer or to otherwise make any binding agreements on behalf of the Principal unless authorized in writing by the Principal;

(e) to promptly submit all offers for the Units to the authorized representative of the Principal for acceptance, which acceptance may be withheld by the Principal in its sole discretion;

(f) to brief the Purchasers of the Units (the "Purchasers") on the terms and provisions of the sale and purchase contract (the "Contract"), prepared by the solicitors for the Principal;

(g) to collect/receive on behalf of the Principal, deposit and purchase monies from the Purchasers and to arrange for their remittance to the Principal; or the Principal's solicitor as provided by the Contract;

(h) to monitor Sales and make pricing modification recommendations to the Principal based on price increase strategy and demand exhibited at the Project Sales Centre;

(i) to keep records of and supervise the instalment payments made by Purchasers in respect of sales, and to keep any other records as reasonably directed by the Principal;

(j) to liaise with any financiers providing financing for the Sales and to complete all necessary documents and liase with the Principal's solicitors regarding the conveyance and closing of each sale;

(k) to assist with queries from Purchasers in connection with Sales;

(l) to assist with inquiries from Purchasers and fully co-operate with licensed real estate agents (the "Outside Salespersons") in connection with the Sales;

(m) to provide to the Principal a weekly traffic report;

(n) to provide to the Principal, on a monthly basis, an analysis of Purchasers (including demographic and point of sale information) and traffic to the Sales Centre as well as a financial analysis of Sales to date and remaining inventory;

(o) to provide sales staff for the sales of the Units, such sales staff to be subject to the Principal's reasonable approval. Staff to have sufficient experience, professional appearance and training to properly fulfill their position;

(p) to ensure that on site sales staff understand the Principal's sales completion process and timing so that purchasers can be directed to the appropriate party and basic inquiries answered;

(q) to staff the on site sales centre a minimum of 6 hours per day, six days per week except as otherwise agreed by the Principal;

(r) to meet with the Principal or their Project representative on a regular basis to discuss and approve any of all items that require the Principal's approval as well as to review the ongoing progress of marketing and Sales, general market information and monthly competition reports;

(s) to act on behalf of the Principal to handle all matters reasonably relating to the Sales not specifically referred to in sub-clauses (a) to (r) above, but which will specifically not include deficiency walk-throughs and management, nor detailed accounting.

4. Responsibilities of Principal

The Principal shall be responsible at its own expense for:

(a) supporting Square Foot in its efforts to promote the Sales;

(b) providing Square Foot with true and accurate information and such material as Square Foot may reasonably request in connection with the Sales. Without limiting the generality of the foregoing, such material shall include sales brochures and scale models of the Building;

(c) keeping Square Foot informed of all matters likely to affect the Sales;

(d) promptly informing Square Foot of all changes in availability of the Units, price structures and conditions of Sale;

(e) taking all such action as may be necessary to implement the Sales and to give effect to the terms and conditions of the Contracts of Purchase and Sale;

(f) reimbursing Square Foot or making payment as Square Foot may direct for all costs, expenses and outgoings requested by or previously approved by the Principal (other than advertising costs and expenses) incurred by Square Foot on behalf of the Principal in the conduct of Square Foot's responsibilities hereunder such as realtor events, sales events, etc.;

5. Nature of Engagement

Square Foot is and shall remain at all times during the Term and any extension thereof an independent contractor, and it shall be the sole responsibility of Square Foot to pay any of its sales personnel, employees and sub-agents who directly or indirectly participate in the sale of the Units. Square Foot is responsible to adhere to all Canadian and Alberta Employment and Taxation laws and standards.

6. Commission and Remuneration of Square Foot

(A) The remuneration of Square Foot for successfully selling units in the Building is based purely on performance with no retainers, draws or guarantees given by the Principal. The Principal agrees to pay Square Foot the following sums:

(1) for Units sold by the Salespeople working for Square Foot which are assigned to the Building, a Commission equal to the following shall be paid, plus applicable GST.

Base Commission per deal 2.75%

(2) in addition to the Base Commission Rate outlined in 6(A)(1), a bonus commission equal to three quarters of one percent (0.75%) shall be payable if the pre-sales test is achieved within 100 days of bank confirmation of required presale test or launch date provided to Square Foot in writing, whichever is later. The pre-sale test bonus is calculated separately for each building (C or D). Calculation and payment of these

commissions is retro-active and once achieved will apply to all units in a given building;

(3) for Units sold by Solespeople working for companies other than Square Foot, ("Outside Salesperson") the Principal shall pay a commission directly to the salespersons brokeroge of Three and one half percent (3.5%) on the first $100,000; and One and one half percent (1.5%) on the balance of the contract value prior to GST for every Unit sold, plus applicable GST on the commission amount. Subsequently, Square Foot shall receive a Commission, plus applicable GST equal to Two percent (2.0%) of unit sale price plus GST made payable in the same terms as in clause 6(B)(1) and 6(B)(2).

(B) In respect of every Unit sold for which a Contract exists and for which a Commission is payable to Square Foot under Clause 6(A)(1), 6(A)(2), and 6(A)(3), the Principal shall pay to Square Foot:

(1) fifty percent (50%) of the applicable Commission on the Principal's subsequent cheque run following invoicing from the later of a Purchaser's subject removal or the date of execution of the Contract for the Unit and payment by the Purchaser of the initial deposit to be paid by the Purchaser which deposits will not be less than ten percent (10%) of the purchase price of the Unit in the case of Purchasers not approved under the CMHC mortgage program and five percent (5%) of the purchase price of the Unit for Purchasers that are approved under the CMHC mortgage program. (In the event that the Principal agrees to use a non-standard deposit arrangement, this clause shall be adjusted by Square Foot and Principal, acting reasonably);

(2) the balance of the Commission ("Balance Commission") of fifty percent (50%), upon completion of the sale and purchase of the Unit and receipt by the Principal of the balance of purchase price for the Unit. Square Foot will invoice the Principal once a month for all commissions owing and payment will be payable on the Principal's subsequent cheque run following invoicing;

(C) In the event the sale and purchase of a Unit for which a Commission is payable is not completed, the following shall occur:

(1) where the failure to complete the transaction is by reason only of the default of the Purchaser, the Balance Commission shall be forfeited by Square Foot and Square Foot shall have no further claim against the Principal for the Balance Commission. In addition, in the event that the initial portion of the Commission for the Unit has been paid to Square Foot, then Square Foot shall refund the Commission to the Principal one month following completion date for the sale provided that:

a) all or a portion of any deposit paid in respect of the Unit has not been forfeited to the Principal in an amount in excess of the initial portion of the Commission;

b) in the event that the Purchaser has not forfeited all or a portion of their deposit, that the Principal diligently pursue its legal remedies to both complete the sale retention of the Purchaser's deposit in the case of non completion; and

(2) In the case of default by the Vendor, the Balance Commission shall be payable by the Principal to Square Foot on the earlier of the date of completion contemplated in the Contract and thirty (30) days from the issuance of an occupancy permit for the Unit unless the Vendor's default arises in whole or in part from the Purchaser alleging that the Vendor is in breach of the Contract as a result of an act or misrepresentation made on the part of Square Foot.

(D) All payments to be made by the Principal pursuant to this Clause shall be made without demand, withholding, deduction or set-off, and shall be exclusive of GST and any other applicable taxes.

(E) The Principal shall not be liable for any fees, commissions, compensation or remuneration for or in connection with the sale of Units other than the Commissions earned under Paragraph 6, unless specifically agreed by the Principal.

7. Principal's Covenant

The Principal warrants and undertakes that the Units allocated for sale by Square Foot can be sold to and owned wholly and legally by persons other than Canadian nationals under the prevailing laws in Alberta, Canada.

8. Termination

This Agreement shall terminate:

(1) on the expiry of its term as provided herein;

(2) if either party hereto fails to comply with any of the terms and conditions of this Agreement; or

(3) if either party hereto goes into liquidation either compulsory or voluntary (save for the purpose of reconstruction or amalgamation) or if a receiver is appointed in
respect of the whole or any part of the assets of either party or if either party makes an assignment for the benefit of or composition with its creditors;

(4) upon thirty (30) days notice, in writing, being delivered from one party to the other.

9. Registration

Within ten (10) days of termination of this Agreement Square Foot shall register in writing with the Principal all prospective Purchasers it is actively working with. Should an unconditional offer to purchase be accepted from a registered prospect within 30 days of termination of the Agency Agreement, commission as provided in this Agreement shall be paid to Square Foot. It is agreed that on a case by case basis the Principal shall extend the 30 day time limit where Square Foot can demonstrate ongoing contact and activity with a prospective purchaser and that the party is a serious prospect

10. Confidential Information

All marketing information and such other confidential information acquired by Square Foot or its employees with respect to the Units or the Principal shall be the exclusive property of the Principal and shall remain with the Principal upon the termination or expiration of this Agreement. All leads, registrations, reservations and purchaser files generated within the scope of this agreement are the sole assets of the Principal, and may be used by the Principal at any time, for any purpose, at their discretion.

11. Notices

All notices or other communications required or permitted to be given or made hereunder shall be in writing and delivered personally or sent by facsimile or prepaid registered post addressed to the intended recipient thereof at its address set out herein (or to such other address as each party may from time to time notify the other). Any such notice or communication shall be deemed to have been duly served (if delivered personally) at the time of delivery, (if sent by facsimile) at the time of dispatch when the correct answerback code has been received, or (if made by prepaid registered post) five (5) days after posting and in proving the same it shall be sufficient to show that the envelope containing the same was duly addressed, stamped and posted.

12. Miscellaneous

Time is of the essence of this Agreement. No modification of this Agreement shall be effective unless set forth in writing and signed by both parties. This Agreement contains the entire agreement between the parties and supersedes all prior and written agreements between the parties with respect to the subject matter hereof.

13. Governing Law and Jurisdiction

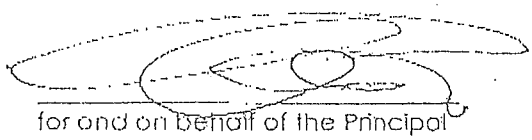
(A) This Agreement shall be governed by and construed in accordance with the laws of Alberta.

(B) In relation to any legal action or proceedings arising out of or in connection with this Agreement ("Proceedings"), each of the parties hereto hereby irrevocably submits to the jurisdiction of the Courts of Alberta and waives any objection to Proceedings in any

such Court on the grounds of venue or on the grounds that the Proceedings have been brought in an inconvenient forum.

IN WITNESS WHEREOF this Agreement has been executed by the parties hereto as at the date written above.

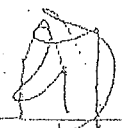
Signed by



for and on behalf of the Principal
Christopher J. Wein

Signature of Witness

SIMON KOVALTCHOU
Name of Witness

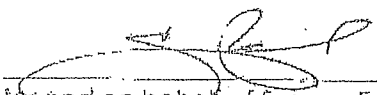


for and on behalf of the Principal
Ryan Doherty

Signature of Witness

SIMON KOVALTCHOU
Name of Witness

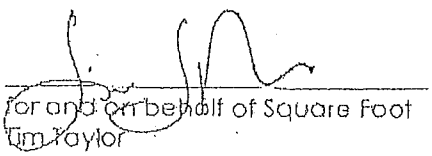
Signed by



for and on behalf of Square Foot
Simon Kowalkow

Signature of Witness

RYAN DOHERTY
Name of Witness



for and on behalf of Square Foot
Tim Taylor

Signature of Witness

RYAN DOHERTY
Name of Witness

TAB 2

The Doctrine of

Res Judicata in Canada

Third Edition

Donald J. Lange, B.A., LL.B., Ph.D. (Cantab.)

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CHAPTER 8

RELATED DOCTRINES

1. THE DOCTRINE OF COLLATERAL ATTACK

Collateral attack cases involve a party, bound by an order, who seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum. The order being attacked usually involves an activity. A party is ordered either to do something or to refrain from doing something. The fundamental policy behind the doctrine of collateral attack is to maintain the rule of law and to preserve the repute of the administration of justice.

The doctrine is often considered in administrative law when, for example, a second proceeding involves the non-compliance with an administrative order that has not been previously challenged through the administrative appeal process but is challenged in the second proceeding. The doctrine is also commonly considered in criminal law when the second proceeding involves the breach of a court order and the accused argues, as a defence, that the order is invalid. A collateral attack in criminal law often involves the breach of a pre-trial order, such as a probation order, which has not been appealed. Many collateral attack decisions in administrative law and criminal law concern the compliance requirement of the rule of law that a court or tribunal order must be obeyed. The challenge to an administrative order or a criminal order in a breach proceeding often considers the doctrine alone, without reference to other estoppel doctrines.

The doctrine is also considered in civil law. In these cases, there is seldom an issue in the second proceeding of a breach of a civil order except in the case of contempt of court proceedings. Most often, collateral attack is applied to the relitigation of an issue in civil law.

A valid and binding judgment, or order of any kind, may be attacked directly in only three ways:[1] (1) by appealing or quashing the judgment, (2) by an application to the court under the rules of civil procedure to vary the judgment, for example, on the basis of new evidence, and (3) by a separate action to set aside the judgment on the basis of fraud. A judgment cannot be attacked

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[1] The three ways are found in *Bank of Montreal v. Coopers Lybrand Inc.* (1996), 137 D.L.R. (4th) 441 (Sask. C.A.) at 447, and are here slightly modified. See also *C. (C.A.) v. H. (J.R.)*, [1992] B.C.J. No. 1070 (C.A.). See *Rodenkirchen v. Peters*, [2006] B.C.J. No. 1547 (S.C.) at par. 6 in regard to the third way, citing this book.

TAB 3

2000 ABCA 285
Alberta Court of Appeal

Blue Range Resource Corp., Re

2000 CarswellAlta 1145, 2000 ABCA 285, [2000] A.J. No. 1232, [2001] 2 W.W.R. 477, 100 A.C.W.S. (3d) 956, 193 D.L.R. (4th) 314, 234 W.A.C. 138, 271 A.R. 138, 87 Alta. L.R. (3d) 352

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended; and in the matter of Blue Range Resources Corporation; Enron Canada Corp., and the Creditor's Committee (Appellants/Appellants) and National Oil-well Canada Ltd. et al. (Respondents/Respondents)

Russell, Sulatycky, Wittmann JJ.A.

Heard: June 15, 2000
Judgment: October 24, 2000
Docket: Calgary Appeal 99-18564, 99-18565, 99-18566, 99-18567, 99-18568, 99-18569, 99-18570, 99-18571, 99-18802

Proceedings: affirmed *Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

Counsel: *A. Robert Anderson* and *Scott J. Burrell*, for Enron Canada Corp. and Creditors' Committee.
S. Collins, for TransAlta Utilities Corporation.
D.W. Dear, for Rigel Oil & Gas Ltd.
D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.
K.E. Staroszik, for Founders Energy Ltd.
J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Table of Authorities

Cases considered by *Wittmann J.A.*:

Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (Eng. C.A.) — applied

Cohen, Re (1956), 19 W.W.R. 14, 3 D.L.R. (2d) 528, 36 C.B.R. 21 (Alta. C.A.) — considered

Hogan v. Kolisnyk, [1983] 3 W.W.R. 481, 25 Alta. L.R. (2d) 17, 43 A.R. 17 (Alta. Q.B.) — considered

Kuziw v. Kucheran Estate, 2000 ABCA 226 (Alta. C.A.) — considered

Lethbridge Motors Co. v. American Motors (Can.) Ltd. (1987), 53 Alta. L.R. (2d) 326, 20 C.P.C. (2d) 11, 79 A.R. 321, 40 D.L.R. (4th) 544 (Alta. C.A.) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73 (B.C. S.C.) — distinguished

Mount James Mines (Que.) Ltd., Re (1980), 28 O.R. (2d) 271, 33 C.B.R. (N.S.) 227, 110 D.L.R. (3d) 80 (Ont. Bktcy.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership (1993), 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn.) — considered

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Specialty Equipment Cos. Inc., Re (1993), 159 B.R. 236 (U.S. Bankr. N.D. Ill.) — considered

W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada (1979), 9 Alta. L.R. (2d) 232, 19 A.R. 196, [1980] I.L.R. 1-1210 (Alta. Dist. Ct.) — considered

312630 British Columbia Ltd. v. Alta Surety Co., 30 C.C.L.I. (2d) 165, 10 B.C.L.R. (3d) 84, [1995] 10 W.W.R. 100, 23 C.L.R. (2d) 273, 61 B.C.A.C. 208, 100 W.A.C. 208 (B.C. C.A.) — applied

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 6 — considered

s. 12(2)(a)(iii) — referred to

Insurance Act, R.S.A. 1980, c. I-5
s. 205 — referred to

s. 211 — referred to

s. 385 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — considered

R. 244(4) [en. Alta. Reg. 234/94] — considered

Federal Rules of Bankruptcy Procedure (U.S.)
Generally — referred to

R. 9006(b)(1) — considered

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of claims bar date.

The judgment of the court was delivered by *Wittmann J.A.*:

Introduction

1 The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to

> allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code, Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
>
> ...
>
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

12 Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In *Pioneer Investment Services Co. v. Brunswick Associates Ltd.*

Partnership, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 1993).

13 The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

14 I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the *CCAA* process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.) where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the *Alberta Rules of Court* in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Alta. C.A.).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act*, R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta. L.R. (2d) 17 (Alta. Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232 (Alta. Dist. Ct.) at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

25 These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the *CCAA* process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington

received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA* proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the *CCAA* proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

35 Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

36 The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 *CCAA*.

37 Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus

effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

38 Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

39 Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

40 In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd.* It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

41 In considering claims filed or amended after a claims bar date in a claims bar order, a *CCAA* supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

42 Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the *CCAA* proceedings. The appeal is dismissed.

Appeal dismissed.

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