2020 01G 2883

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

BETWEEN

SPROTT PRIVATE RESOURCE LENDING (COLLECTOR), LP

APPLICANT

AND:

THE KAMI MINE LIMITED PARTNERSHIP

FIRST RESPONDENT

AND:

KAMI GENERAL PARTNER LIMITED

SECOND RESPONDENT

AND:

ALDERON IRON ORE CORP.

THIRD RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE RECEIVER

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2020 01G 2883
Date of Filing Document:	July , 2021
Name of Party Filing or Person:	Deloitte Restructuring Inc., in its capacity as court-appointed receiver (the **Receiver")** of the First, Second and Third Respondents (the "**Companies**")
Applications to which Document being filed relates:	Interlocutory Application of the Receiver for an Order, *inter alia*, approving the Claims Process
Statement of Purpose in Filing:	Memorandum of Fact & Law in support of the Receiver's Application
Court Sub-File Number, if any:	N/A

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FACTS

1. On June 17, 2020 (the "**Date of Receivership**") the Receiver was appointed by Order of this Court (the "**Receivership Order**") as the receiver of all of the assets, undertakings,

and property (the "**Property**") of Alderon Iron Ore Corp. ("**Alderon**"), The Kami Mine Limited Partnership ("**Kami LP**"), and Kami General Partner Limited ("**Kami GP**") (collectively the "**Companies**") acquired for, or used in relation to the business carried on by the Companies.

2. On November 13, 2020, a Sale Approval and Vesting Order was issued by this Court approving the sale of certain assets of the Companies (the "**Assets**") to Quebec Iron Ore Inc. and 12364042 Canada Inc. (collectively, the "**Purchaser**").

3. On April 1, 2021, the sale of the Assets was concluded and the sale proceeds for the Assets (the "**Sale Proceeds**") were paid to the Receiver.

4. The sale of the Assets resulted in the following consideration:

   (a) The extinguishment of the Companies' indebtedness to Sprott Private Resource Lending (Collector), LP of $19.4 million;

   (b) $15 million in cash; and

   (c) An undertaking in favour of the Receiver to make a finite production payment on a fixed amount of future iron ore concentrate production from the Kami Project.

5. As a result of the quantum of the Sale Proceeds, and based on the information currently available to the Receiver in respect of outstanding amounts owed to creditors, there are sufficient Sale Proceeds to fully address Kami LP's creditor claims such that after payment of the creditor claims the remaining Sale Proceeds will be distributed: i) approximately 25% to HBIS International Holding (Canada) Co., Ltd. that owns approximately 25% of Kami LP; ii) approximately 75% to Alderon that owns approximately 75% of Kami LP; and iii) approximately .001% to Kami GP that owns approximately .001% of Kami LP, such that there will be funds available for Alderon's shareholders through the claims process to be established, as outlined in the Second Report of the Receiver dated July 16, 2021 (the "**Second Report**").

6. The Receiver is seeking Court approval to commence a claims process to assess claims against the Companies and their relative priority. Such claims processes are required to qualify/quantify stakeholder debt and to allow for a fair and equitable distribution of the Sale Proceeds (collectively the "**Claims Process**"). The Receiver is seeking approval of the following:

   (a) A claims procedure to identify all shareholders in respect of Alderon who have a claim as a shareholder in respect of Alderon, including the determination of such share claim, as more particularly outlined in the Second Report; and

   (b) A claims procedure to identify all creditors with claims in respect of Kami LP, Kami GP and Alderon, including the determination of such creditor claims, as more particularly outlined in the Second Report.

7. The Receiver seeks a Claims Process for the following reasons:

   (a) substantially all of the assets of the Companies have been sold and it is necessary to establish a process for a fair and equitable distribution of the Sale Proceeds;

(b) it is anticipated that there are sufficient Sale Proceeds to fully address the Companies' creditor claims such that there will be funds available for the Companies' shareholders;

(c) the Companies are no longer operating and there is no other use for the Sale Proceeds other than to distribute it to the Companies' creditors and shareholders;

(d) the Companies cannot distribute the surplus Sale Proceeds to their shareholders in the ordinary course since all of the directors and officers of the Companies have resigned;

(e) the proposed Claims Process will allow for the most efficient, timely and cost-effective distribution of the Sale Proceeds to the creditors and shareholders of the Companies; and

(f) no prejudice will result from approving the proposed Claims Process.

8. The Receiver seeks an Order:

(a) abridging the time for service, validating service, and dispensing with further service of the within Application;

(b) Approving the activities, fees, and disbursements of the Receiver as described in the Second Report, including, without limitation, the steps taken by the Receiver pursuant to the Receivership Order, and the fees of the Receiver's legal counsel;

(c) Approving the Claims Process, as outlined in the Second Report;

(d) Approving the Receiver's Statement of Receipts and Disbursements for the period from January 23, 2019 to June 30, 2021 attached to the Second Report as Appendix "B"; and

(e) Providing such further or other relief that the Court considers just and warranted in the circumstances.

9. The Receiver relies on the facts as set out in the Second Report. Capitalized terms used herein, where not defined, have the same meaning as ascribed to them in the Second Report.

ISSUES:

1. Should this Court abridge the time for service, validate service, and dispense with further service of the within Application?

2. Should this Court approve the Claims Process?

LAW AND ARGUMENT

Validation of Service

1. The Receiver has provided notice of these proceedings to all parties that received notice of the receivership application. The Receiver has been unable to identify all of the

unsecured creditors of the Companies. However, the proposed Claims Process includes the publishing of advertisements seeking the claims of creditors and shareholders.

Due to the difficulty in identifying and serving all of the unsecured creditors, the Receiver seeks an order abridging the time for service, validating service and dispensing with further service of this Application on any other creditors of the Companies.

2. This Court has the discretion to abridge the time for service, validate service and dispense with further service of the Receiver's Application pursuant to Rule 3.03(1), Rule 6.04(2) and Rule 6.06 of the *Rules of the Supreme Court, 1986.*

Reference: *Rules of the Supreme Court, 1986*, Rule 3.03(1), Rule 6.04(2) and Rule 6.06 [Tab 1]

Approval of Claims Process

3. The British Columbia Supreme Court has noted the importance of claims process orders in insolvency proceedings:

> "Claims process orders are an important step in most restructuring proceedings. In Timminco Limited (Re), 2014 ONSC 3393, Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within CCAA proceedings:
>
> > "It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
> >
> > Adherence to the claims-bar date becomes even more important when distributions are being made..."
>
> **Reference**: *Bul River Mineral Corporation (Re)* 2014 BCSC 1732 at para 31 (BCSC) [Tab 2] and *Timminco Limited* (Re) 2014 ONSC 3393 at paras 41-42 (Ont S.C.) [Tab 3]

4. In the *Bul River* decision, the court emphasized the requirement for the claims process to be fair and reasonable for all stakeholders:

> "The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring.

My comments in Steels Industrial Products Ltd. (Re), 2012 BCSC 1501 are apposite:

> "Similar issues often arise in CCAA proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In Winalta Inc. (Re), 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> Many CCAA proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, Pine Valley Mining Corp. (Re), 2008 BCSC 356. To this extent, the statutory procedure under the BIA and the claims process under the CCAA will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 at paras. 24 and 47.

Reference: *Bul River Mineral Corporation (Re)* 2014 BCSC 1732 at para 32 (BCSC) [Tab 2]

5. Courts generally accept a claims process if it is created in accordance with fundamental insolvency principles. The main principles that the courts apply in reviewing a claims process are those of fairness, reasonableness, and certainty.

6. It is submitted that the Claims Process crafted by the Receiver in the present case is in alignment with those fundamental principles, as illustrated by the following aspects of the Claims Process:

   (a) The Receiver proactively sends notice of the Claims Process to all known claimants;

   (b) The Receiver advertises notice of the Claims Process in the newspaper and posts notice of the Claims Process on its website.

   (c) The Claims Process sets a claims bar date which provides the certainty needed for the distribution of the Sale Proceeds.

   (d) The Claims Process provides full opportunity for claimants to submit their claims with respect to the Companies.

   (e) There is an independent review of claims by the Receiver, which provides a procedural safeguard for an adjudication of the claims in a fair, reasonable and transparent manner.

Reference: *Bul River Mineral Corporation (Re)* 2014 BCSC 1732 at paras 51-56 (BCSC) [Tab 2]

(f) Claimants have full opportunity to appeal any disallowance of their claims to this Honourable Court.

(g) The Claims Process will allow for the most efficient, timely and cost-effective distribution of the Sale Proceeds to the creditors and shareholders of the Companies.

7. The Office of the Superintendent of Bankruptcy ("OSB") does not require the distribution of immaterial amounts if the cost of distribution would exceed the amount to be distributed. The Receiver therefore proposes to follow the OSB's guidelines as to materiality and not make any distribution to claimants that is less than $10.00.

Reference: *Office of the Superintendent of Bankruptcy Canada, Directive No. 18, Section 6.* [Tab 4]

8. The Receiver repeats the foregoing paragraphs and submits that it is appropriate in the circumstances for this Court to approve the proposed Claims Process.

9. The Receiver respectfully requests that this Honorable Court grant the relief requested, for the reasons set out in the Second Report and in this Memorandum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 30th day of July, 2021.

Geoffrey Spencer
McInnes Cooper
Solicitors for the Receiver
Whose address for service is:
5th Floor, Baine Johnston Centre
10 Fort William Place
St. John's, NL A1C 5X4

TO: **Supreme Court of Newfoundland & Labrador**
Trial Division (In Bankruptcy)
P.O. Box 937
313 Duckworth Street
St. John's, NL A1C 5M3

AND TO: **The Service List attached as Schedule "A" to the Application**

List of Authorities:

1. *Rules of the Supreme Court, 1986*, Rule 3.03(1), Rule 6.04(2) and Rule 6.06
2. *Bul River Mineral Corporation (Re)* 2014 BCSC 1732 (BCSC)
3. *Timminco Limited* (Re) 2014 ONSC 3393 (Ont S.C.)
4. *Office of the Superintendent of Bankruptcy Canada, Directive No. 18*

Newfoundland and Labrador Rules
Rules of the Supreme Court, 1986
Rule 3 — Time

S.N. 1986, c. 42, Sched. D, s. 3.03

s 3.03 Extension, etc., of time

Currency

3.03Extension, etc., of time
3.03(1) The Court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these rules, or by any order, to do or abstain from doing any act in a proceeding.

3.03(2) The Court may extend any period referred to in rule 3.03(1) although the application for extension is not made until after the expiration of the period.

3.03(3) The period within which a person is required by these rules or any orderto serve, file or amend any pleading or other document may be extended by consent in writing of the parties.

Currency
Newfoundland and Labrador Current to Gazette Vol. 95:40 (October 2, 2020)

Concordance References
Rules Concordance 5, Time

End of Document

Newfoundland and Labrador Rules
Rules of the Supreme Court, 1986
Part I
Rule 6 — Originating and Other Documents: Service

S.N. 1986, c. 42, Sched. D, s. 6.04

s 6.04 Substituted service

Currency

6.04Substituted service
6.04(1) Where an attempt to personally serve a person at his or her residence is unsuccessful, service may be made, without the need to seek an order of the Court, by

(a) leaving a copy, in a sealed envelope addressed to the person, at the residence with a person who appears to be an adult member of the same household; and

(b) mailing another copy of the document to the person at their residence by ordinary mail on the same day as the attempted personal service or the following day.

6.04(2) Where it is impracticable for any reason to serve an originating document personally or by an alternative to personal service, the Court may make an order for substituted service or an order dispensing with service.

6.04(3) Substituted service of an originating document is made by taking such steps as the Court has ordered to bring the document to the attention of the person to be served.

6.04(4) The court shall specify in an order for substituted service when service in accordance with the order is considered to be effective, for the purpose of computation of time under these rules.

6.04(5) Where an order is made dispensing with service of a document, the document is considered to have been served on the date the order is signed, for the purpose of computation of time under these rules.

6.04(6) Where an originating document contains a claim for the possession of land, the Court may,

(a) if satisfied on an application made without notice to a party, that no person appears to be in possession of the land and that service could not otherwise be made on a defendant, authorize service on that defendant to be made by attaching a copy of the originating document to some conspicuous part of the land; or

(b) make such other order as it thinks just.

6.04(7) An application for an order for substituted service shall be supported by an affidavit stating why it is impractical to serve the document by personal service or an alternative to personal service, and proposing a substitute method of service which, in the opinion of the deponent will, or is likely to, be effective.

6.04(8) An application for an order dispensing with service shall be supported by an affidavit setting out:

(a) evidence which enables the court to draw the inference that the person is likely to be aware that process has been or is about to be issued against him or her and is evading service; or

(b) other evidence which satisfies the court that the interests of the plaintiff in proceeding with the matter without notice

to the person outweigh the potential prejudice to the person of not knowing that proceedings have been taken against him or her.

Currency
Newfoundland and Labrador Current to Gazette Vol. 95:40 (October 2, 2020)

Concordance References
Rules Concordance 18, Substituted service or dispensing with service

End of Document

Newfoundland and Labrador Rules
Rules of the Supreme Court, 1986
Part I
Rule 6 — Originating and Other Documents: Service

S.N. 1986, c. 42, Sched. D, s. 6.06

s 6.06 Validating service

Currency

6.06Validating service
Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the Court is satisfied that

(a) the document came to the notice of the person to be served; or

(b) the document would have come to the notice of the person to be served, except for the person's own attempts to evade service.

Currency
Newfoundland and Labrador Current to Gazette Vol. 95:40 (October 2, 2020)

Concordance References
Rules Concordance 21, Validating service

End of Document

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732

Date: 20140915
Docket: S113459
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9

And

In the Matter of
Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Colin D. Brousson
Counsel for CuVeras, LLC:	William C. Kaplan, Q.C. Peter Bychawski
Counsel for Eldon Clarence Stafford	J. Roger Webber, Q.C.
Counsel for Gordon Preston and Carol Preston	Robert M. Curtis, Q.C.

Counsel for the Monitor, Deloitte Restructuring Inc.	Tevia R.M. Jeffries
Place and Date of Hearing:	Vancouver, B.C. September 3 and 5, 2014
Place and Date of Judgment:	Vancouver, B.C. September 15, 2014

Introduction

[1] These are longstanding proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "*CCAA*"), having been commenced some three and a half years ago in May 2011. Since that time, the petitioners have made slow and steady progress toward the goal of presenting a plan of arrangement to their creditors and certain equity participants.

[2] The principal petitioners, being Bul River Mineral Corporation ("Bul River") and Gallowai Metal Mining Corporation ("Gallowai"), are the owners of certain mining properties and related assets in the Kootenay region of British Columbia. As a result of these proceedings, Bul River and Gallowai now have some indication that the mine is viable. This has been accomplished mainly due to the participation of CuVeras, LLC ("CuVeras") who has, since late 2011, provided interim financing which allowed this further development work to continue to this point in time.

[3] Some years ago, Bul River and Gallowai completed a claims process to identify not only trade creditors but also claims of its common and preferred shareholders. Now that Bul River and Gallowai, with the assistance and sponsorship of CuVeras, are on the cusp of preparing a plan of arrangement for consideration by the stakeholders, those claims have become of central importance.

[4] Some of the claims that were advanced through the claims process were not critically considered by either the petitioners or the court-appointed monitor, Deloitte Restructuring Inc. (the "Monitor"). However, at this late date, the characterization of certain claims and the validity of certain claims have been put in issue and will have a profound impact on the manner in which these restructuring proceedings go forward.

[5] At present, the general intention is that the restructuring will take place along the lines of a Letter of Agreement between the petitioners and CuVeras dated May 23, 2014. By that agreement, a newly formed British Columbia entity ("Newco") will be created and the shares in Newco will be distributed to CuVeras and other related parties and also to non-voting preferred shareholders. Trade creditors will also

participate in Newco. This Letter of Agreement is the product of some history, sometimes contentious, between the petitioners and CuVeras which was discussed in the court's earlier reasons: *Bul River Mineral Corporation (Re)*, 2014 BCSC 645.

[6] One of the claims is that advanced by Gordon and Carol Preston (the "Preston Claim"), which CuVeras contends is an equity claim as opposed to a debt claim. Another claim is that advanced by Eldon Stafford (the "Stafford Claim"), which CuVeras contends is not a valid claim against Bul River or Gallowai. The substance of the issue before the court therefore is two-fold: (a) the proper categorization of the Preston Claim and (b) whether the Stafford Claim is a valid claim against the petitioners.

[7] As will become apparent from the discussion below, the resolution of these issues will significantly impact how any restructuring plan can be crafted and will also impact all stakeholders in terms of how the Newco shares will be distributed between the various stakeholders. There is some urgency in resolving these last issues before the restructuring can proceed. All involved, including the Monitor, state that it is necessary for the petitioners to exit this *CCAA* proceeding as quickly as possible. At this time, a plan of arrangement sponsored by CuVeras is the only option available to the petitioners so as to avoid a liquidation and bankruptcy.

Background

[8] The petitioners are also known as the Stanfield Mining Group (the "Group"). The Group carried on the business of developing a mining property situated near the Bull River just outside of Fernie, British Columbia. It is effectively controlled by the estate of Ross Stanfield ("Stanfield") which holds 100% and 99.9% of the voting common shares in the parent companies, Zeus Mineral Corporation and Fort Steele Mineral Corporation, respectively. As stated above, the two principal companies involved in the development and operation of the mine within the Group are Bul River and Gallowai.

[9] The mine, known as the Gallowai Bul River Mine, is not currently in production. There has been significant underground development to this point such

that the petitioners and CuVeras consider that with a relatively modest further investment the mine could be placed into production.

[10] Bul River and Gallowai were incorporated in the 1980s. Commencing in the mid-1990s, Stanfield began raising funds for the development of the mine. The marketing program focused on "sophisticated investors" which are, through securities regulation statutes, defined as persons with a net worth in excess of $1 million willing to invest a minimum of $100,000 in a given venture. The persons targeted by Stanfield's marketing campaign were farmers in Alberta, particularly around Edmonton, Red Deer and Medicine Hat, as well as farmers from the area around Regina, Saskatchewan.

[11] Until 2010, Stanfield engaged in a sophisticated marketing program to sell redeemable preferred non-voting shares to these investors. Over that period of time, approximately $229 million was invested in consideration of which preferred shares in Bul River and Gallowai were issued.

[12] The marketing program involved repeated representations as to the ore content of the mine. Stanfield continually referred to the mine as an "elephant" mine, meaning that the mineral resources were enormous. Over the years, the program included visits to the mine site and presentations to potential investors by Stanfield. Those presentations referred to the history of the mine and the future prospects of the mine, including development plans and the levels of ore content (copper, gold and platinum). The presentations also involved discussion as to when production would commence and typically production was forecast to commence within a foreseeable period of time, be it one or two years from the date of the meeting.

[13] The same representations were also made in written materials, including a report from Phillip De Souza ("De Souza"), a professional engineer.

[14] Some potential investors executed subscription agreements for shares during those visits to the mine or immediately thereafter. Some returned to the mine for

subsequent tours and subsequent purchases. In some instances, Stanfield recruited current investors to further market the preferred shares to other investors.

[15] These representations by Stanfield were made in the face of contemporaneous reports which questioned the value of the resources announced by the Group. These included papers published by the British Columbia Ministry of Energy and Mines in 2000 in which it was reported that they were unable to confirm the gold grades reported by the Group. In 2006, a professional conduct hearing in Alberta was held arising from charges that De Souza's report was "deficient and misleading". The panel issued reasons which were published in January 2008 in which it concluded that De Souza's conduct constituted unskilled practice and unprofessional conduct.

[16] Eventually, Stanfield's activities caught the attention of various provincial securities regulators. In May 2010, the British Columbia Securities Commission (the "Commission") issued a Notice of Hearing against Stanfield, Bul River and Gallowai seeking to order them to produce an independently prepared technical report fully compliant with NI 43-101 (Standards of Disclosure for Mineral Projects) that would include an estimate of the mineral resources available at the mine.

[17] Ross Stanfield died on August 3, 2010.

[18] By the fall of 2010, in addition to being faced with the Commission proceedings, certain preferred shareholders had taken legal action against the Group in light of the failure to comply with redemption obligations arising in respect of the preferred shares. Stanfield's grandson, George Hewison, is the sole beneficiary of Stanfield's estate. He stepped in to continue the work of the Group as best he could. In late 2010 or early 2011, undertakings were given to the securities regulators in British Columbia and Alberta by which the petitioners agreed not to issue any new securities without their consent.

[19] The evidence would later establish that the representations made by Stanfield regarding the mine resources were false. A technical report was later prepared by

Rosco Postle and Associates Inc. ("RPA") in March 2011 that provided some review of the available mineral resources at the mine. Both the RPA report and a later report prepared by Snowden Mining Industry Consultants in March 2013 would indicate that while there is valuable ore in the mine, the quantity of the resources is markedly less than what was indicated in the representations made to investors.

[20] On May 26, 2011, the Group sought and obtained creditor protection pursuant to the *CCAA* and an Initial Order was granted at that time.

[21] At the time of the *CCAA* filing, the Class A common voting shares in Bul River and Gallowai were held by the Stanfield estate. Other Class B and Class E common non-voting shares were held by investors.

[22] As of the date of filing, the petitioners had no secured creditors. The petition referenced debt obligations of $904,000 to trade suppliers and two unsecured judgments totalling $386,135. Various preferred non-voting shares were held by investors in Classes C, D and F. The petition materials indicated that amounts owing for "redeemable shares" (i.e., the preferred shares) were approximately $137,718,557. The holders of both common and preferred shares comprise some 3,500 individual investors.

[23] The subscription agreements for the preferred shares provided that the shares were redeemable at the end of five years from the date of the subscription together with a "preferred cumulative annual dividend" of 12.75%. There is no evidence of any significant redemption of the preferred shares. Rather, as redemption dates arose, preferred shareholders were approached to execute extension agreements extending their redemption rights from a given date to a date defined by the commencement of production from the mine. Many preferred shareholders signed those extension agreements, some did not. For those who did not, some of them demanded redemption of their shares. For the most part, those investors were told that there was no money to redeem the shares.

[24] Accordingly, the largest liability faced by the petitioners is that arising from the preferred shares. The preferred shareholders appear to have certain claims arising from their holdings. Firstly, they have a claim for payment of the redemption amount plus the accumulated dividend. Secondly, they may have a claim for misrepresentation against the Group, giving rise to potential remedies of rescission of their subscription agreements, damages, or both.

The Claims Process

[25] In August 2011, the Group prepared a list of creditors (the "Creditor List") in support of seeking a claims process order. The list actually included not only trade claims but also shareholder claims. Not surprisingly, the purpose of the claims process was to assist the Group in developing its restructuring plan.

[26] On August 19, 2011, the court approved a Claims Process Order, which authorized the petitioners to conduct a claims process for the determination of any and all claims against them (the "Claims Process"). The Claims Process Order defined "claims" that were to be determined in the Claims Process as follows:

> ... indebtedness, liability or obligation (including an equity obligations arising from the ownership of equity shares) ...
>
> ... all obligations of or ownership interests in the Petitioners or any of them arising from or relating to the holding of a Share.

[27] Under the Claims Process Order, all "Known Creditors" (defined in the Claims Process Order as all creditors shown on the books and records of the petitioners as having a claim in excess of $250), including holders of shares, were to receive a claims package from the petitioners that included an instruction letter, a Notice of Dispute, a Proof of Claim, and a copy of the Claims Process Order (the "Claims Package"). The Claims Process was also advertised in certain publications. The Creditor List indicating such Known Creditors was posted on the Monitor's website, as was noted in the Claims Package, such that both creditors and shareholders were able to view it. The process of determining claims was as follows:

a) all creditors and shareholders were given the opportunity to review the Creditor List;

b) in the event a creditor or shareholder agreed with the "Claim Particulars" listed in the Creditor List (which included the number and class of shares), the creditor or shareholder did not need to file a Proof of Claim with the petitioners. In that event, the Claim Particulars in the Creditor List would be deemed to be the creditor or shareholder's proven claim for voting and distribution purposes under any restructuring plan subsequently filed by the petitioners;

c) in the event a creditor or shareholder objected to the Claim Particulars in the Creditor List, or wished to advance another claim, the creditor or shareholder had to, on or before October 17, 2011 (the "Claims Bar Date"), deliver to the petitioners, with a copy to the Monitor, a notice of such objection in the form of a Notice of Dispute, together with a Proof of Claim and supporting documentation;

d) in the event a Notice of Dispute was not submitted on or before the Claims Bar Date, the creditor or shareholder was deemed to have accepted the amount owing and all other Claim Particulars set out in the Creditor List, and was forever barred from advancing any other claim against the petitioners or participating in any plan subsequently filed by the petitioners;

e) where a Notice of Dispute and/or Proof of Claim was filed by a creditor or shareholder, the petitioners were deemed to have accepted it unless they delivered to the creditor or shareholder a Notice of Disallowance on or before October 31, 2011 (later extended to November 15, 2011); and

f) in the event of the petitioners delivering a Notice of Disallowance, a creditor or shareholder had 21 days to seek a determination from the court of the validity and value of and particulars of the claim by filing and serving

> the petitioners and the Monitor with application materials. A creditor or shareholder who failed to file and serve such materials by the deadline was deemed to have accepted the particulars of its claim set out in the Notice of Disallowance.

[28] The Claims Process Order did not contemplate the appointment of a claims officer or the participation of the Monitor in the process of assessing the validity of the Proofs of Claim and/or Notices of Dispute submitted to the petitioners through the Claims Process. Nor did the Claims Process allow any independent review of claims submitted by other creditors of the petitioners or by CuVeras as the interim financier.

(i) Jurisdiction of the Court

[29] Before turning to claims process orders specifically, it is important to keep in mind the broad remedial objectives of the *CCAA* to facilitate a restructuring rather than a liquidation of assets: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 15-18, 56. As the Supreme Court of Canada has noted, it is now well recognized that a supervising judge of a *CCAA* proceeding has a "broad and flexible authority" or statutory jurisdiction to makes such orders as are necessary to achieve those objectives: *Century Services* at paras. 19, 57-66.

[30] The discretionary authority of the court is confirmed by s. 11 of the *CCAA* which provides that the court may make any order that it considers "appropriate in the circumstances". As Madam Justice Deschamps observed in *Century Services*, whether an order will be appropriate is driven by the policy objectives of the *CCAA*:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for

> successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] Claims process orders are an important step in most restructuring proceedings. In *Timminco Limited (Re)*, 2014 ONSC 3393, Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within *CCAA* proceedings:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
>
> [42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".
>
> [43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[32] The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring. My comments in *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 are apposite:

> [38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all

> stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> [39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356. To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[33] Nevertheless, issues can and do arise that no one is able to foresee at the time of the claims process order. In that event, the court retains its discretion to address the application of the claims process order: *Timminco* at para. 38. In that case, the claims process order specifically allowed the court to order a further claims bar date. No such provision is found in the Claims Process Order but I do not consider that its absence is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances.

[34] This, of course, is a different issue in that by the failure of the petitioners to deliver a Notice of Disallowance in respect of the claims in issue, they were deemed to have been accepted by the petitioners. This is not a case where a creditor is seeking to avoid the consequences of not filing materials by the time of the Claims Bar Date. Nevertheless, in my view, the court still retains the statutory jurisdiction to consider the validity of claims that might otherwise, by the Claims Process Order, be deemed to have been accepted.

[35] The Prestons and Mr. Stafford do not suggest that the court lacks the jurisdiction to reconsider the issues that arise in relation to their claims. The Prestons do, however, contend that it is not appropriate that any reconsideration take place at this time.

(ii) Review of the Claims

[36] The stated purpose of the *CCAA* is to facilitate compromises and arrangements between companies and their creditors (see also s. 6 of the *CCAA*). In

accordance with that fundamental objective or purpose, it is axiomatic that it is necessary to determine what are the true claims of the creditors as might be compromised or arranged.

[37] A "creditor" is not defined in the *CCAA*, unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") where it is defined as meaning "a person having a claim provable as a claim" under that *Act* (s. 2). Both the *CCAA* and the *BIA* define "claim" by reference to liabilities "provable" under the *BIA*. Specifically, s. 2(1) of the *CCAA* defines "claim" as meaning:

> any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.

Section 2 of the *BIA* defines a "claim provable in bankruptcy" as "any claim or liability provable in proceedings under this Act by a creditor".

[38] Section 121(1) of the *BIA* addresses which claims are "provable claims":

> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[39] In substance, this same statutory definition is applied in the *CCAA* and represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24. In addition, as noted by CuVeras, this definition is essentially used in the Claims Process Order by its definition of "Claim".

[40] Various authorities establish that a "provable debt" must be due either at law, or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process: *Excelsior Electric Dairy Machinery Ltd. (Re)*, [1923] 2 C.B.R. 599 (Ont. S.C.), 3 D.L.R. 1176; *Farm Credit Corporation v. Dunwoody Limited,* [1988] 68 C.B.R. (N.S.) 255 (Alta. C.A.), 51 D.L.R. (4th) 501, leave to appeal to S.C.C. refused, 73 C.B.R. (N.S.) xxvii (note), 100 60 D.L.R. (4th) vii (note);

Central Capital Corp. (Re), [1995] 29 C.B.R. (3d) 33 (Ont. Gen. Div.), O.J. No. 19 ("*Central Capital*"), aff'd [1996] 27 O.R. (3d) 494 (C.A.), 38 C.B.R. (3d) 1 ("*Central Capital* (ONCA)"); *Negus v. Oakley's General Contracting* (1996), 40 C.B.R. (3d) 270 (N.S.S.C.), 152 N.S.R. (2d) 172.

[41] In a *CCAA* proceeding, a claims process order is the means by which the "claims" of the creditors are determined. By reason of that process, the debtor is able to determine the nature and extent of its debts and liabilities so as to enable it to formulate a plan of arrangement. There are no rules as to when a claims process may be implemented although it is usually early in the process in anticipation of a plan and distributions to creditors. In that respect, a debtor company will be seeking some certainty regarding the determination of claims for that purpose.

[42] In *Timminco*, the Court, prior to citing relevant authorities at para. 52, outlined many of the factors that might be considered by the court in relation to deciding whether to allow claims to be advanced after the claims bar date:

> [51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay[?] (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[43] As I have stated above, the broad jurisdiction of the court under s. 11 of the *CCAA* allows the court to make such orders as are "appropriate". While the above factors have been considered in the past, there is no finite list that detracts from a consideration of all relevant circumstances. Nevertheless, the general considerations of delay and prejudice typically arise, just as they do in this case.

[44] I return to the factual circumstances relating to the Claims Process and the Claims Process Order. The petitioners were themselves responsible for reviewing the Proofs of Claim and/or Notices of Dispute submitted in the Claims Process. The

principal individual involved in the review was Mr. Hewison who did so with the assistance of counsel. It is apparent that the only factors considered in his review included whether a claim related to a trade debt or whether it related to an equity interest in the petitioners.

[45] The Prestons argue that the Claims Process was well known to everyone and that its purpose was to establish the amount and nature of all claims. This is clearly self-evident, but back in late 2011, it was the case that the course of the restructuring proceedings was anything but certain. In fact, the ability of the petitioners to continue the proceedings was tenuous and they were scrambling to find interim financing which they eventually secured with CuVeras in November 2011. By that time, the Claims Process was essentially completed. Even so, understandably, the parties were concerned to proceed as quickly as possible to obtain further technical reports on the proven or inferred mine resources in order to determine whether a viable mine even existed. They did receive those later reports, which included a further RPA report and the Snowden report. In these circumstances, Mr. Hewison did not undertake any substantive review of the claims.

[46] The Prestons further say that, since they faithfully complied with the Claims Process Order, it would be patently unfair to now revisit the characterization of their claim. While they raise the matter of the three year plus delay, no elements of prejudice have been alleged. In my view, the delay, while relevant, will have little effect on the ability of the parties to address the substance of the matter. Nor have any rights been extinguished or compromised by reason of any delay. Accordingly, the objective of certainty has less force in this case where the plan of arrangement has yet to be formulated and the claimants have yet to consider that plan and vote on it. I note that similar considerations were at play in *Timminco* where it was apparent that no plan would ever be put to the creditors.

[47] Finally, the Prestons argue that the Claims Process Order constituted the sole form of adjudication of the validity and nature of the claims submitted. It is true, of course, that the petitioners had an opportunity to consider these claims.

[48] As discussed below, the petitioners did not forward any Notice of Disallowance in respect of the Proofs of Claim later filed by the Prestons and Mr. Stafford. Mr. Hewison considered that the Stafford Claim should be categorized as an "investment" in the mine. Further, with respect to the Preston Claim, he was not aware of the significance of the distinction between an equity claim and a debt claim. In retrospect, and now knowing what type of plan of arrangement is possible, Mr. Hewison recognizes that this was in error. It appears that a combination of factors - including Mr. Hewison's lack of familiarity with the past transactions, inadequate record keeping, lack of resources and distraction in terms of larger issues more relevant to the survival of the mine - all contributed to a less rigorous review and analysis of these claims.

[49] It is the case, however, that the petitioners were acting in good faith, albeit without a full appreciation of the issues arising in respect of these claims and the also the consequences of their inaction.

[50] More importantly, aside from the petitioners, other stakeholders have a significant interest in whether a claim is valid or not and that any claim be properly characterized. Based on the anticipated form of the restructuring plan, the inclusion of the Stafford Claim and characterization of the Preston Claim will impact the recovery of these stakeholders. These other creditors or stakeholders of the petitioners did not have any opportunity up to this point in time to review the claims. I would again note that the Claims Process Order did not contemplate any review of the claims by these other stakeholders, such as was the case in *Steels Products* (see paras. 13-15).

[51] Nor has the Monitor participated in any review of these claims. I do not say this as any criticism of the Monitor as the Claims Process Order did not expressly provide for any such independent review. Nor does the Claims Process Order contemplate that any other independent review of the claims be completed which might have highlighted the issues. The Monitor did report on the Claims Process from time to time (particularly, its report from June 2012 and January 2013),

however, no such issues were identified. As such, the Monitor did not conduct a critical review of the claims, similar to what a trustee in bankruptcy might have done under s. 135 of the *BIA*.

[52] In these circumstances, and in retrospect, the Claims Process lacked procedural safeguards that might have avoided this problem: *Steels Products* at paras. 38-39.

[53] In these circumstances, I disagree with the Prestons that the Claims Process Order constitutes an adjudication of these issues by which CuVeras or any other stakeholder is estopped in bringing these issues forward. It is clear that to this point, no such adjudication has occurred.

[54] As I have indicated above, a Claims Process Order is intended to be a fair, reasonable and transparent method of determining and resolving claims against the estate. In certain circumstances, these objectives fail to be achieved through no fault of the participants. That does not preclude the court from considering the issues on their merits so as to achieve the fundamental objective under the *CCAA* to facilitate a restructuring based on valid claims. This would also include a consideration of the proper characterization of the Preston's claim: *Steels Products* at para. 42.

[55] Simply put, if the Claims Process results in a claim being advanced which is not truly a debt of the petitioners or results in a claim being improperly characterized, the fairness and transparency of these proceedings are inevitably compromised such that the objectives of the *CCAA* will not be fulfilled.

[56] My comments in *Steels Products* apply equally here:

> [46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

[57] Even at this late stage in the proceedings, and considering the ongoing supervisory role of the court, I consider that it is appropriate to address the issues relating to both the Preston Claim and the Stafford Claim on their merits. This is particularly so given the significant repercussions to other stakeholders and the lack of any prejudice to the Prestons and Mr. Stafford.

Discussion

(a) The Preston Claim

[58] The Preston Claim is advanced as a debt claim in these proceedings, a position that is disputed by CuVeras who contends that in fact, it is an equity claim as defined in the *CCAA*.

(i) The Proof of Claim

[59] The Creditor List referenced the Prestons as holding various Class E (2,102) and Class F (2,400) preferred shares.

[60] In October 2011, the Prestons, through their counsel, submitted a Proof of Claim and Notice of Dispute.

[61] The genesis of the claim was as described in a Statement of Claim filed in the Alberta Court of Queen's Bench against Gallowai on May 27, 2010. The claim was as follows: in October 2004, the Prestons subscribed for 2,400 Class F preferred shares in Gallowai in consideration of the payment to Gallowai of $120,000; Gallowai is alleged to have covenanted to redeem the preferred shares at the expiry of five years after the allotment date; the Prestons demanded redemption of the shares and the payment of dividends which was to be by way of issuance of Class E shares; Gallowai refused to respond to their demands; and the Prestons claimed the right to redeem the Class F preferred shares for $120,000 plus either dividends in the form of Class E common shares or, alternatively, cash payment of dividends at 12.75% per annum.

[62] On November 19, 2010, default judgment was granted in favour of the Prestons for the claimed amount of $120,000 plus the cash dividend interest rate for

a total judgment of $214,527.10 including court ordered costs. The Prestons attempted to register their judgment in British Columbia in June 2011 after the court ordered a stay arising under the Initial Order, but nothing turns on that step.

[63] The Proof of Claim indicates that the Prestons were advancing both a trade claim for the judgment amount and also a claim for non-voting shares arising from the allegation that they continue to hold the 2,102 Class E shares noted on the Creditor List.

(ii) Historical Approach to Equity Claims

[64] Before I turn to the current statutory regime arising from amendments to the *CCAA* and *BIA* in 2009, I will review the authorities which applied before these amendments were enacted.

[65] Historically, equity and debt claims have been treated differently in an insolvency proceeding given the fundamental difference in the nature of such claims. That different treatment resulted in the subordination of equity to debt claims. The basis for this judicially developed principle was that equity investors are understood to be higher risk participants. Creditors, on the other hand, have been held by the courts to have chosen a lower level of risk exposure that should generally result in priority over equity investors in an insolvency context.

[66] In *Sino-Forest Corporation*, 2012 ONCA 816, affirming 2012 ONSC 4377, the Court of Appeal commented with approval on the analysis of Morawetz J. in the court below:

> [30] Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described [at paras. 23-25]:
>
> > Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
> >
> > The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited

> upside potential when purchasing shares. Creditors have no corresponding upside potential.
>
> As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement [citations omitted].

[67] See also *Central Capital* at paras. 41-42; *Central Capital* (ONCA) at 510-11, 519.

[68] In light of that key distinction, courts in the past have embarked upon a consideration as to the true characterization of certain claims in an insolvency context. There is considerable authority that in making that determination, the court will consider the true substantive nature or character of the claim, rather than the form of the claim.

[69] The leading case is the Supreme Court of Canada's decision in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 ("*CDIC*"). In that case, the issue was whether money advanced to the debtor bank was in the nature of a loan or a capital investment for the purpose of determining whether the creditors advancing the funds ranked *pari passu* with other unsecured creditors in a winding-up proceeding. Mr. Justice Iacobucci stated that the approach was to determine the "substance" or "true nature" of the transaction (563, 588). His oft quoted statements are found at 590-91, the relevant principles of which can be summarized as follows:

a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;

b) the characterization of a transaction under review requires the determination of the intention of the parties;

c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and

d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

[70] One type of financial instrument that typically has elements of both equity and debt are preferred shares, where arguably rights of redemption and rights to payment of dividends evidence debt characteristics.

[71] The issue of the characterization of preferred shareholder claims in an insolvency context was addressed in *Central Capital* (ONCA). In that case, the court had to characterize a claim arising from the right of retraction in respect of certain preferred shares. Although differing in the result, the majority opinions and the dissenting opinion at the appellate court level were consistent in an approach toward determining the *substance* of the claim in terms of whether it was a "provable debt". In dissent, Finlayson J.A. stated:

> ... I do not think that describing the documents as preferred shares is conclusive as to what instrument the parties thought they were creating. In the second place, it is not what the parties call the documents that is determinative of their identity, but rather it is what the facts require the court to call them. The character of the instrument is revealed by the language creating it and the circumstances of its creation.
>
> (at 509).
>
> ...
>
> Thus, in looking at the substance of the transaction that led to the issuance of the preference shares, it appears to me that the retraction clauses were promises by Central Capital to pay fixed amounts on definite dates to the appellants. They evidenced a debt to the appellants.
>
> (at 512).

Justice Laskin specifically addressed the "substance of the relationship" at 535-36. In addition, Weiler J.A. focused on the "true nature" of the transaction or relationship:

> In order to decide whether the obligation of Central Capital to redeem the preferred shares of the appellants is a claim provable in bankruptcy, it is necessary to characterize the true nature of the transaction. The court must look to the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability by the company: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3

> S.C.R. 558, 97 D.L.R. (4th) 385. In this case, the decision is not an easy one. Where, as here, the agreements between the parties are reflected in the articles of the corporation, it is necessary to examine them carefully to characterize the true relationship. It is not disputed that if the true nature of the relationship is that of a shareholder-equity relationship after the retraction date and at the time of the reorganization, then the appellants do not have a claim provable in bankruptcy. Consequently, they will not have a claim under the CCAA.
>
> (at 519).

[72] In *Blue Range Resource Corp. (Re)*, 2000 ABQB 4, Madam Justice Romaine found that a shareholder's claim for alleged share loss, transaction costs and cash share purchase damages was in substance an equity claim or a claim by the shareholder for a return of its investment. See also *EarthFirst Canada Inc. (Re)*, 2009 ABQB 316.

[73] In *Return on Innovation v. Gandi Innovations* , 2011 ONSC 5018, leave to appeal refused, 2012 ONCA 10, the Court was characterizing indemnity claims advanced by certain individual directors and officers against the debtor, the Gandi Group. That indemnity claim arose by reason of a claim by TA Associates Inc. against them for damages for claims relating in part to TA's US$50 million equity investment in the Gandi Group. Mr. Justice Newbould at the Ontario Superior Court concluded that TA's claim was an equity claim and that therefore, the indemnity claim was also, in substance, an equity claim.

[74] I have also been referred to *Dexior Financial Inc. (Re)*, 2011 BCSC 348. Mr. Justice Masuhara there found the claim to be an equity claim even though the shareholder had given notice of an intention to seek retraction of the shares prior to the filing. Citing *CDIC* and *Central Capital* (ONCA), the Court found that the notice did not change the original intention or substance of the claim.

(iii) The New Statutory Approach

[75] In September 2009, Parliament enacted substantial amendments to the *BIA* and *CCAA* in relation to the treatment of claims arising from equity in an insolvency proceeding.

[76] One of the principle amendments was the prohibition that the court may not sanction a plan of arrangement unless all debt claims are to be paid in full before payment of any "equity claims". Section 6(8) of the *CCAA* provides:

> (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[77] The definitions of "equity claim" and "equity interest" are found in the *CCAA*, s. 2(1):

> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (*a*) a dividend or similar payment,
>
> (*b*) a return of capital,
>
> (*c*) a redemption or retraction obligation,
>
> (*d*) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (*e*) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);
>
> "equity interest" means
>
> (*a*) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt[.]

[78] Section 22.1 further restricts the right of creditors having equity claims from voting on a plan of arrangement:

> 22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

[79] Substantially these same amendments were made to the *BIA* in respect of proposal proceedings under that *Act* in ss. 2, 54(2)(d) and 60(1.7).

[80] The effect of the amendments was considered by Pepall J. (as she then was) in *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229. In that case, the court had

no difficulty in finding that the claims of preferred shareholders for declared but unpaid dividends and requests for redemption were equity claims within the above definition. In addition, the approach of the courts in the past in looking at the substance or true nature of the claim was applied in finding that related claims for compensatory damages or amounts due on rescission were caught by the definition of "equity claim": paras. 32-34. As such, all the claims were not provable debts under the *CCAA*.

[81] The court in *Nelson Financial Group* noted that the introduction of section 6(8) in the *CCAA* provided greater certainty in the treatment to be accorded equity claims and lessened the "judicial flexibility" that previously prevailed in characterizing such claims.

[82] Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, it also represented a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest Corporation* (ONCA) at paras. 24, 34-60. Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might have previously escaped such characterization will now be caught by the *CCAA*.

[83] The claim of the Prestons is set out in their Statement of Claim. The claim is for the return of their capital investment under the redemption rights of the preferred shares. Their claim also included a claim to unpaid dividends, whether by cash payment or the issuance of other shares, being Class E common shares. It is clear that their claims, as evidenced by the Statement of Claim, fall within the definition of "equity claim" in subparas. (a)-(c).

[84] The Prestons do not dispute that their claim, as described and but for one qualification, would fall within the definition. They contend, however, that by reason of their obtaining default judgment against Gallowai, they have transformed their equity claim into a debt claim that is a provable claim in the *CCAA* proceeding.

(iv) The Effect of the Judgment

[85] The 2009 amendments have not affected the ability of the court to continue to analyze the *substance* of the claims, albeit in the context of the expanded definition of "equity claim". This is evident from the approach of the court in *Nelson Financial Group* at paras. 28 and 34.

[86] In *Sino-Forest Corporation*, the court found that certain Shareholder Claims for damages claimed in a class action lawsuit clearly fell within the definition of "equity claims": ONSC at para. 84. Further, certain Related Indemnity Claims were also advanced against the estate by the auditors who were named in the class action lawsuit. These auditors also faced claims for damages relating to their role in what were said to be misrepresentations in the financial statements that led to the loss of equity by the class members. Again, consistent with the historical approach of the courts, Morawetz J. focused on the "substance" of the claim: para. 85. He stated:

> [79] The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.
>
> [80] The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.
>
> ...
>
> [82] It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

The Court of Appeal upheld this approach: *Sino-Forest Corporation* (ONCA) at paras. 37, 58.

[87] I would note in this regard that the Claims Process Order expressly provided:

> THIS COURT ORDERS that the categorization of Claims into Trade Claims, non-voting Shares, and Voting Shares does not in any way set classes or categories for the purposes of priority or voting on a restructuring plan issued by the Creditors and shall not prejudice any party or the Petitioners from applying at a later date to set such classes or priorities in connection with voting on a plan;

[88] The Prestons argue that their obtaining of a judgment against Gallowai has resulted in a replacement or transformation of their equity claim with a debt claim.

[89] The Prestons place considerable reliance on the decision in *I. Waxman & Sons Ltd. (Re)*, [2008] 89 O.R. (3d) 427 (S.C.), 40 C.B.R. (5th) 307, which was decided prior to the 2009 amendments to the *CCAA*. In that case, Morris sued I. Waxman & Sons Limited ("IWS") for lost profits, profit diversions and improper distributions for bonuses paid. He obtained judgment against IWS and asserted that claim in the later bankruptcy proceedings.

[90] The court began by noting that Morris' claim was not for his share of his current equity in IWS, but was, in substance, a claim related to dividends and diverted profits by way of bonuses. Justice Pepall found that the judgment was a debt claim:

> [24] There is support in the case law for the proposition that equity may become debt. For example, declared dividends are treated as constituting a debt that is provable in bankruptcy. As Laskin J.A. stated in *Central Capital Corp. (Re)*, "It seems to me that these appellants must be either shareholders or creditors. Except for declared dividends, they cannot be both." And later, "Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared, it is a debt on which each shareholder can sue the corporation." Similarly, in that same decision, Weiler J.A. stated, "As I understand it, counsel does not question that when a dividend has been lawfully declared by a corporation, it is a debt of the corporation and each shareholder is entitled to sue the corporation for his [portion]: see *Fraser and Stewart*, supra, at p. 220 for a list of authorities." In *East Chilliwack Fruit Growers Co-operative (Re)*, the B.C. Court of Appeal held that an agricultural co-operative member who had exercised a right of redemption and remained only to be paid was an unsecured creditor with a provable debt. Declared bonuses may also sometimes constitute debt: *Stuart v. Hamilton Jockey Club* [footnotes omitted].
>
> [25] Secondly, the claims advanced by Morris are judgment debts. As stated by Weiler J.A. in *Central Capital*, ". . . in order to be a provable claim within the meaning of s.121 of the BIA, the claim must be one recoverable by legal process: *Farm Credit Corp. v. Holowach (Trustee of)*." Clearly a

> judgment constitutes a claim recoverable by legal process. By virtue of the judgment, the money award becomes debt and it is properly the subject of a proof of claim in bankruptcy. In this regard, the facts in this case are unlike those in *Re Blue Range Resource Corp. (Re),* or *National Bank of Canada v. Merit Energy Ltd.* Those cases involved causes of action that had been asserted in court proceedings, but in neither case had judgment been rendered [footnotes omitted].

[91] In my view, *Waxman* is of little assistance to the Prestons.

[92] Firstly, the facts are distinguishable by reason of the fact that the Preston Claim is for recovery of their capital or equity, rather than simply a return on capital as was the case in *Waxman*. I would note that the Preston default judgment obtained in 2010 does include the dividend interest on the preferred shares. What is somewhat anomalous is that this was claimed in the alternative to the issuance of the Class E common shares. Even so, the Prestons in their Statement of Claim did advance a claim for 2,102 Class E common shares and continue to do so by their Proof of Claim, all consistent with what the petitioners had ascribed to them in the Creditor List. It is not clear to me how they can advance both claims.

[93] Secondly, in para. 24 of *Waxman*, the Court focused on the prevailing authority at the time prior to the amendments by which declared dividends were considered debt as opposed to equity. At present, the 2009 amendments make clear that this type of claim now clearly falls within the definition of "equity claim" in subpara. (a): *CCAA*, s.2(1).

[94] With respect to the comments of the Court in *Waxman*, para. 25, I agree with CuVeras that the Court was simply observing that a judgment debt will normally satisfy the requirements of the claim being recoverable by legal process, one of the requirements of a "provable claim", as noted above. These comments do nothing more than note the obvious - that in ordinary circumstances, a judgment is a claim recoverable by legal process. I do not interpret these comments as obviating an analysis of the true nature of a claim, whether represented by a judgment or not.

[95] Accordingly, I do not view *Waxman* as standing for the proposition advanced by the Prestons, namely that a judgment transforms an equity claim into a debt claim

such that no further analysis or characterization by the court is necessary. This would have applied even before the enactment of the 2009 amendments, but certainly is more evident now given the expansive definition now contained in the *CCAA*.

[96] Indeed, the later comments of Justice Pepall in *Nelson Financial Group* suggest that she only decided in *Waxman* that by reason of a judgment, an equity claim *may* become debt:

> [32] The substance of the arrangement between the preferred shareholders and Nelson was a relationship based on equity and not debt. Having said that, as I observed in *I. Waxman & Sons.* there is support in the case law for the proposition that equity may become debt. For instance, in that case, I held that a judgment obtained at the suit of a shareholder constituted debt. An analysis of the nature of the claims is therefore required. If the claims fall within the parameters of section 2 of the *CCAA*, clearly they are to be treated as equity claims and not as debt claims [footnotes omitted].

[97] The Court in *Dexior Financial* at para. 16 commented on *Waxman* but those comments were clearly *obiter* as no judgment had been obtained in that case. See also *EarthFirst Canada* at para. 4.

[98] At its core, the issue before the court is a narrow one - namely, whether a shareholder, having an equity claim but who obtains a judgment before the filing, has become a debt claimant rather than an equity claimant for the purposes of the insolvency proceeding? In my view, they do not, for the reasons below.

[99] In light of the dearth of authority on the issue, I consider that the court must start from first principles.

[100] I return to the comments in *Century Services* regarding the remedial purposes of the *CCAA* and the broad and flexible authority of this court to facilitate a restructuring that is fair, reasonable and equitable in accordance with either the express will of Parliament, as specifically dictated in the *CCAA*, or as might be reasonably interpreted as falling within those broad purposes.

[101] At its core, the policy objectives of the *CCAA* are a fair and efficient resolution of competing claims in a situation (insolvency) where all obligations or expectations cannot be fulfilled. What is "fair" is a flexible or uncertain concept and needless to say, what is fair will likely be differently interpreted depending on which stakeholder you ask. Nevertheless, Parliament has clearly signalled that the policy objectives continue to be that equity will take a back seat in terms of any recovery where there are outstanding debt claims. This was so before September 2009 and is even more decidedly so now, given the express and expansive statutory treatment of equity claims that now applies.

[102] In my view, the characterization of claims by the court continues to have an important role in fulfilling that purpose. I have already outlined the considerable authority from Canadian courts in respect of such claims, both pre- and post-amendments. Particularly, the court continues to have a role in applying these new equity claims provisions by considering the true nature or substance of those claims. In many cases, the matter is now considerably clearer given the definition of "equity claims". What is most important, however, is that form will still not trump substance in the consideration of this issue.

[103] As was noted by counsel for CuVeras, the obtaining of a judgment does not necessarily mean that it will be recognized as a debt for the purpose of an insolvency proceeding. There are many provisions of the *BIA* and *CCAA* which allow for the challenge of certain pre-filing transactions or events that may be the basis for supposed rights in the proceeding. For example, the payment of a dividend and redemption of shares may be attacked (*BIA*, s. 101). Another example is that either the granting of a judgment against the debtor or payment of monies such as redemption amounts that resulted in a preference being obtained may be challenged (*BIA*, s. 95). Both of these provisions apply in a *CCAA* proceeding: *CCAA*, s 36.1.

[104] These types of provisions reflect the policy choices of Parliament in terms of allowing for the recovery of assets transferred away from the debtor even before the filing so that those assets are brought back into the estate for the benefit of the

entire stakeholder group to be distributed in accordance with the legislation. Similarly, some established rights may be challenged in certain circumstances (such as by way of the preference provisions).

[105] In the same manner, the new equity provisions in the *CCAA* reinforce that it remains an important policy objective that equity claims be subordinated to debt claims. In *Sino-Forest Corporation*, the Court of Appeal focused on the purpose of the 2009 amendments and stated:

> [56] In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

[106] This same recognition of the sound policy objectives of insolvency legislation was noted by Laskin J.A. in *Central Capital* (ONCA). He commented at 546 that "[p]ermitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection."

[107] I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.

[108] Some arguments were advanced by CuVeras and the Prestons as to the timing of the judgment. Indeed, the Preston judgment was obtained well in advance of the filing, by some six months. The Prestons cite *Blue Range* at para. 38 in respect of the importance of timing. However, the timing issue there was the filing of the insolvency proceeding, not the granting of a judgment. I agree that the filing of the proceeding is a significant crystallizing event, however, what is important in this case is the ability of the court to analyze the true nature of the claim. Further, whether a judgment is obtained on the eve of the filing or even years before, I consider that it is a distinction without a difference in terms of the court's role in

ensuring that a proper characterizing of the claim has taken place in accordance with the *CCAA*.

[109] The fact remains that there are thousands of other preferred shareholders holding shares in Bul River and Gallowai whose claims are in essence the same - namely, for a return of their capital and the promised return on that capital (and perhaps other damage claims). The evidence indicates that many of them had also made demand for a return of their preferred share investments and their return on capital well before the filing date. Those claims are clearly equity claims. From the perspective of the policy objective of treating similar claims in a similar fashion (i.e., fairness), it makes little sense to me that a similarly situated preferred shareholder without a judgment should be treated differently than one who does.

[110] Nor does it accord with the policy objectives particularly identified in s. 6(8) of the *CCAA* that by the simple mechanism of obtaining a judgment an equity claimant should be elevated to a debt claimant which would inevitably diminish the recovery of other "true" debt claimants.

[111] The Prestons argue that this will open the floodgates to an endless analysis of claims reduced to judgments resulting in increased cost and inefficiencies in these types of proceedings. I see no merit in this submission given that this decision relates to only equity claims and by no stretch of the imagination has the previous litigation on the point overwhelmed the court system across Canada. In any event, if that is the will of Parliament, then there is little ability in this court to take a different approach.

[112] The courts have not been hesitant in preventing claimants from recharacterizing their claims such that an equity claim is indirectly advanced where no direct claim could be made: *Sino-Forest Corporation*, ONSC at para. 84 (although the Court of Appeal preferred to express the same sentiment in terms of the purpose of the *CCAA*). In *Return on Innovation*, Newbould J. stated, consistent with the "substance over form" approach that the court's decision will not be driven by the form of the legal action:

> [59] The Claimants assert that the claim for US $50 million by TA Associates cannot be an equity claim because it is based on breaches of contract, torts and equity. I do not see that as being the deciding factor. TA Associates seeks the return of its US $50 million equity investment because of various wrongdoings alleged against the Claimants and the fact that the claim is based on these causes of action does not make it any less a claim in equity. The legal tools that are used [are] not the important thing. It is the fact that they are being used to recover an equity investment that is important.

[113] Similarly, in addition to the "legal tools" not being determinative, neither are the legal *forms* of recovery determinative, such as the obtaining of a judgment.

[114] In summary, the *CCAA* policy objectives in relation to equity claims are clear. In my view, those objectives are best achieved by the continued approach of the court, both pre- and post-*CCAA* amendments, to consider the substance or true nature of the claim. This accords with the ongoing supervisory jurisdiction of the court to exercise its statutory discretion to achieve the purposes of the *CCAA*. In particular, the court's fundamental role is to facilitate a restructuring that is fair and reasonable to all stakeholders in accordance with the now very clearly stated objective of allowing recovery to debt claimants before any recovery of equity claims. Section 6(8) reflects that the court has no ability to proceed otherwise.

[115] Within those broad objectives, in my view, it is of no importance that prior to the court filing, a claimant with an equity claim has obtained a judgment. That judgment still, in substance, reflects a recovery of that equity claim and therefore, the claim comes within the broad and expansive definition in the *CCAA*. Accordingly, for the purposes of the *CCAA*, that claim or judgment must still, of necessity, bear that characterization in terms of any recovery sought within this proceeding. I conclude that any contrary interpretation, such as advanced by the Prestons, would result in the clear policy objectives under the *CCAA* being defeated.

[116] Nor I do not accept that, as argued by the Prestons, applying this characterization amounts to a collateral attack or an "undoing" of the judgment from the Alberta court. As noted by CuVeras, the obtaining of a judgment by a creditor does not mean that insolvency laws do not apply to it. Judgments are affected by insolvency proceedings all the time. Recoveries of judgments are stayed by such

proceedings and as stated above, they can be attacked as fraudulent preferences. All that results from my conclusions is that notwithstanding the granting of the judgment, within these *CCAA* proceedings, the judgment is to be characterized in accordance with the true nature of the underlying claim, which is an equity claim.

[117] For the above reasons, I conclude that the Preston Claim is an equity claim within the meaning of the *CCAA*.

(b) The Stafford Claim

[118] The Stafford Claim is advanced as a debt claim in these proceedings. That position is disputed by CuVeras who contends that, in fact, it is a claim owed by Stanfield personally and not by either Bul River or Gallowai such that it cannot be advanced in this *CCAA* proceeding.

(i) The Proof of Claim

[119] The Creditor List referenced Mr. Stafford as holding Class B common shares (3,340), Class D preferred shares (4,200) and Class E preferred shares (17,548). He therefore received a Claims Package from the petitioners.

[120] Mr. Stafford took no issue with the shareholdings alleged to be held by him in accordance with the Creditor List. However, on October 14, 2011, a Notice of Dispute and Proof of Claim were submitted on behalf of Mr. Stafford. This was done by Carol Morrison, who was exercising a power of attorney for Mr. Stafford by reason of his mental and physical incapacity that occurred at least as early as November 2010.

[121] The Notice of Dispute refers to "claim not listed" as the "reason for dispute". The Proof of Claim submitted by Mr. Stafford notes the "type of claim" as "other – loan and accrued interest 50% Bul River Mineral Corp. and 50% Gallowai Metal Mining Corp." The Stafford Claim submitted is for outstanding principal and interest under a loan in the total amount of $2,587,174.

[122] The supporting documentation submitted for Mr. Stafford includes a copy of a loan agreement between Stanfield in his personal capacity, as borrower, and Mr. Stafford, as lender, dated June 12, 1990, 21 years before the CCAA filing (the "Stafford Loan Agreement"). The Stafford Loan Agreement references a loan in the principal amount of $150,000, accruing interest in the amount of 20% per annum "on the Principal", calculated yearly and not in advance.

[123] Pursuant to the terms of the Stafford Loan Agreement, Stanfield borrowed these funds for the purpose of "investing the funds in the costs of the ongoing research and development of a Process" with "Process" being defined as a "new improved method or process for extracting precious metals from ore". Paragraphs 6 and 8 of the Stafford Loan Agreement provided for a bonus payable to Mr. Stafford equal to the amount of the Principal, if the "Process" proved successful (as declared by an independent metallurgical consultant). As CuVeras submits, on its face, this was not a loan directly related to the mine or the petitioners.

(ii) Dealings in Respect of the Stafford Loan Agreement

[124] For obvious reasons, the death of Ross Stanfield and the incapacity of Mr. Stafford result in a situation where no individual is in a position to shed light on the intentions of the parties in relation to this loan. Mr. Hewison is similarly unable to provide any evidence about the loan, save for referring to such documents as have been found in relation to this loan. Those documents do provide some indication as to the how Stanfield, Bul River and Gallowai addressed this loan up to the time of the *CCAA* filing.

[125] There are two resolutions of the directors of Bul River, dated October 1994 and February 1996 respectively, that are essentially the same. Both refer to the "need of major amounts of additional financing" and authorize Stanfield to negotiate, on behalf of Bul River, potential sources of debt or equity financing, to settle the terms of the financing, and to sign, seal and deliver any agreements necessary to secure funding required by the company. I agree that these resolutions on their face clearly do not authorize Stanfield to act as an agent for Bul River. They merely

authorize him to act directly in the name of the company with the company as principal in respect to those transactions. These resolutions also do not reference any loan by Mr. Stafford to Stanfield made years before in June 1990.

[126] Bul River also appears to have prepared a schedule of loan payments as of December 31, 2006. That schedule shows payment of interest to Mr. Stafford by Stanfield personally from June 1995 to September 1998 totalling approximately $183,000. In 1999 and 2000, Gallowai appears to have made interest payments of $40,000 and from that time forward, some person (unidentified) made interest payments of $25,000 for 2001 and 2002. From 2004 to 2006, it appears that Bul River made interest payments of $22,500 and principal payments of $26,000 to Mr. Stafford. Mr. Stafford's own calculations show further payments of interest from 2007 to 2009 totalling $58,000.

[127] Accordingly, in respect of his $150,000 loan, as of 2009, Mr. Stafford had received $328,100 in interest payments and $26,000 in principal payments for a total recovery of $354,100.

[128] Leaving aside the interest and principal payments referred to above, the involvement of Bul River and Gallowai in respect of the Stafford Loan Agreement arose, from a corporate perspective, in 2003. At that time, various resolutions were passed by the directors of Bul River. Mr. Stafford places great reliance on these resolutions and as will become apparent from the discussion below, the issue largely turns on the legal effect of these resolutions. As such, I will describe the resolutions in some detail.

[129] The first resolution is dated May 13, 2003. It provides:

> WHEREAS:
>
> A. Loans, loan repayments and principal and interest payments which were property for the benefit of, or were the responsibility of, the Company have for some years been done, as a matter of convenience, in the name of the Company's President, [Stanfield] - and as a result debit and credit entries have improperly been posted to Stanfield's Shareholder Loan Account.
>
> B. Stanfield has requested that the situation described above be corrected...

> C. The Companies' accountant has examined the financial records and has verified that the said situation has occurred with respect to the Company as well as Gallowai...
>
> D. Management has proposed, based on professional advice, that for convenience and simplicity the various Loan Accounts involving Stanfield, the Company and the Other Companies be consolidated in the books of the Company.
>
> ...
>
> NOW THEREFORE, IT IS RESOLVED:
>
> 1. THAT the Loan Accounts and payments referred to above be recognized as solely the responsibility of the Company and it be confirmed that Stanfield was, in being named in the transactions, acting solely on behalf of the Company and that he had no personal, legal or beneficial interest in, or any liabilities as a result of, any of the transactions.
>
> 2. THAT the Agreement dated this May 13, 2003 between the Company, Stanfield and the Other Companies be approved and that Stanfield or any other officer or director of the Company be authorized to sign and deliver it on behalf of the Company.
>
> 3. THAT the Company assume the obligations of the Other Companies to Stanfield pursuant to the shareholder account in their records, to be offset by inter-company accounts whereby each of the Other Companies will be indebted to the Company for the amount of shareholders accounts assumed by the Company.

[130] The second resolution of Bul River is dated October 20, 2003 and relates to the May 2003 resolution. The resolution references that Stanfield is having difficulty providing full documentary verification and back-up for his expenditures for which he was requesting reimbursement. In addition, the preamble to the resolution states in part:

> D. Acceptance of liability to Stanfield at this date poses some special problems due to the fact that some of the disbursements that he has requested to be reimbursed for precede the last date that the financial statements of the company were audited – and such statements did not include the expenditures.

Concern was expressed whether or not the acceptance of these responsibilities would be acceptable to Bul River's auditors. The resolution authorizes the engagement of the auditors for the purpose of conducting a special audit of the expenditures made by Stanfield. There is no evidence as to the result of that special audit or if it even took place.

[131] The third resolution of Bul River is dated November 30, 2003 and is of particular significance. It reads as follows:

> WHEREAS:
>
> A. Ross Stanfield ...has submitted various claims for recognition of corporate liabilities to third parties ... as shareholder's loans for transactions undertaken as agent on behalf of the Company, Gallowai ... to finance the exploration of the British Columbia properties owned by the Companies ("Properties").
>
> B. Stanfield and the Companies signed an Agreement dated May 13, 2003 recognizing the fact that Stanfield has acted as agent on behalf of the Companies since 1972 and had personally undertaken a variety of transactions as agent for the Companies to finance the exploration of the Properties.
>
> C. Stanfield has submitted the following claims pursuant to the Agreement for the Director's consideration and approval.
>
> 1. Exploration Loans
>
> These loans were negotiated between 1983 and 2002 personally by Stanfield, as the agent of the Company, and all funds were advanced to the Companies as shareholders loans from him. Payments were made on the loans with his own personal funds or shareholdings. The Directors were provided with a summary of individual loans and accrued interest for review. Files have been prepared for corporate record keeping purposes that include the documentation and amortization schedules supporting each loan.
>
> Balances as at December 31, 2002
>
> | | |
> |---|---|
> | Loan principal | $1,886,413 |
> | Accrued interest | $6,281,004 |
>
> ...
>
> **NOW THEREFORE**, the undersigned acting as a group excluding ... [Stanfield], RESOLVE:
>
> 1. THAT the loans, accrued interest and share subscriptions detailed in paragraph C.1 above, negotiated by Stanfield as agent on behalf of the Companies, be accepted as liabilities of the Companies.
>
> ...
>
> 3. THAT the resolution passed by the full Board dated May 13, 2003 that the Company accept all of the above described liabilities on behalf of the other Companies – to be offset by inter-company accounts whereby each of the other Companies will be indebted to the Company for the amounts assumed by the Company – be further approved and ratified.

[132] It should be noted that the agreement between Stanfield and Bul River (and perhaps others) dated May 13, 2003 has not been located. Nor have any similar resolutions from the directors of Gallowai been found.

[133] In addition, no one has been able to locate a copy of the summary of the loans as of December 2002 referred to in paragraph C.1 of the November 2003 resolution. Mr. Hewison refers in his evidence to a spreadsheet in the name of Bul River referencing "Mine Development Loans" for the year ended December 2003 which indicates a loan from Mr. Stafford of $150,000 with accrued interest of $899,236.39. The total interest figure for all loans is slightly different (lower) than the interest amount referenced in the November 2003 resolution which was as of December 31, 2002. In any event, CuVeras does not dispute that Mr. Stafford would likely have been on the list referred to in the November 2003 resolution.

[134] No audited financial statements have been produced pre-2003, as might have been amended arising from the special audit authorized in October 2003.

[135] Also in evidence are various letters from Bul River to Mr. Stafford concerning these loans.

[136] On April 23, 2007, a letter was sent to Mr. Stafford's accountant enclosing various amended 2006 T5 (Statement of Investment Income) forms or slips that were apparently issued to Mr. Stafford by Gallowai and Bul River, each as to 50% of interest paid or payable pursuant to the Stafford Loan Agreement. The letter indicates that as of 2006, the amount of such interest was just over $1.5 million (which included the $150,000 bonus amount supposedly due pursuant to the Stafford Loan Agreement).

[137] On March 6, 2008, Mr. Stafford received correspondence from Bul River's controller concerning the 2006 T5s slips from Bul River and Gallowai. Later letters from the controller dated April 2, 2008, February 12, 2009 and January 19, 2010 refer to T5 slips being issued by Bul River and Gallowai for 2007, 2008 and 2009 relating to accrued interest on the Stafford Loan Agreement. Finally, T5 slips for 2010 appear to have been issued by Bul River and Gallowai for that taxation year.

[138] There is no evidence that Mr. Stafford knew anything about the 2003 resolutions by Bul River. It does appear to be the case that he began receiving

interest payments from Gallowai in 1999 and these would continue together with the payment of some principal by either Gallowai or Bul River to 2009. Bul River would also later send Mr. Stafford, commencing in 2007 and continuing to 2010, certain details or statements relating to the loan and the T5 slips.

(iii) Legal Basis for the Stafford Claim

[139] For the reasons set out below, CuVeras submits that the Stafford Claim is not a debt claim against Bul River and Gallowai and ought to be expunged from the Creditor List. CuVeras argues that Mr. Stafford cannot satisfy the onus placed upon him to prove his claim against those petitioners.

[140] At the outset, it is clear that Mr. Stafford advanced his loan to Stanfield personally, and not to either Bul River or Gallowai. The 2003 resolutions confirm that such was the case and, indeed, the amounts were noted in the books of Bul River and Gallowai as shareholder loans owing to Stanfield personally in that respect.

[141] CuVeras made substantial arguments on the later involvement of Bul River and Gallowai in terms of whether those petitioners became the principal obligants under the Stafford Loan Agreement. These arguments related to whether or not there had been a valid assignment of the Stafford Loan Agreement from Stanfield to Bul River and Gallowai. While Mr. Stafford agreed with these submissions, it is helpful to set out these issues and arguments in order to put in focus the later arguments of Mr. Stafford (which are contested by CuVeras).

[142] I agree that there is no basis upon which Mr. Stafford can contend that Stanfield assigned the Stafford Loan Agreement to Bul River and Gallowai. There is no evidence that Gallowai agreed to anything, since the resolutions were only that of Bul River's directors.

[143] Even assuming that the November 2003 resolution was intended to effect a valid assignment of the obligations under the Stafford Loan Agreement from Stanfield to Bul River and Gallowai, it is of no legal effect in that it purports to assign the burden of Stanfield's obligations to Bul River and Gallowai. It is trite law that

neither the common law nor equity has ever permitted a debtor to unilaterally assign the burdens or obligations (as opposed to the benefits) of a contract to a third party without the consent of the creditor. Rather, in that case a novation is required: *Mills v. Triple Five Corp.* 1992 CanLII 6204 (Alta. Q. B.) at paras. 13-14, [1992] 136 A.R. 67.

[144] Novation involves the substitution of a new contract or obligation for an old one which is thereby extinguished: *Royal Bank of Canada v. Netupsky*, 1999 BCCA 561. In *Netupsky* at paras. 11-13, the court set out the essential elements that must be established to satisfy the test to establish novation:

> 1. the new debtor must assume complete liability for the debt;
>
> 2. the creditor must accept the new debtor as a principal debtor, and not merely as an agent or guarantor; and
>
> 3. the creditor must accept the new contract in full satisfaction and substitution for the old contract.

[145] Mr. Stafford bears the burden of proving novation which the Court in *Netupsky* described as a "heavy onus". Further, while the courts may look at the surrounding circumstances, including the conduct of the parties, they will not infer that a novation has occurred in the face of ambiguous evidence as to the parties' intention to effect a new agreement with the substituted party.

[146] As is noted by CuVeras, it is somewhat ironic to suppose that Mr. Stafford might have advanced this issue since he is the creditor and as noted in *Netupsky*, it is usually the "unwilling creditor" who is objecting to any suggestion of a novation. In any event, in this case there is no evidence to suggest that:

a) Mr. Stafford had any knowledge of the 2003 resolutions or was in any other way even advised by Stanfield, Bul River or Gallowai that it was intended that Bul River and Gallowai would assume the obligations under the Stafford Loan Agreement in place of Stanfield; and

b) Stanfield, Bul River, Gallowai and Mr. Stafford reached a consensus with respect to the terms upon which any purported new or substituted agreement would operate.

[147] Accordingly, it is clear, as agreed by CuVeras and Mr. Stafford, that novation did not occur such that Bul River and Gallowai assumed the obligations of Stanfield under the Stafford Loan Agreement with the consensus of Mr. Stafford. In addition, no privity of contract arose simply by reason of later payments to Mr. Stafford or issuance of T5 slips by Bul River and Gallowai. That Mr. Stafford was not directly involved in any such new contractual arrangements and that he only later "assumed" that Bul River and Gallowai were involved is made evident by his own loan summary attached to his Proof of Claim:

> Commencing in 2006, T5 slips were issued by Bul River Mineral Corporation and Gallowai Metal Mining Corporation (50% each). Assumption is therefore that ½ of Grand Total is receivable from each.
>
> [Emphasis added].

[148] Nor is there any suggestion that Bul River or Gallowai provided a guarantee of the Stafford Loan Agreement to Mr. Stafford. Finally, Mr. Stafford does not argue that Bul River and Gallowai are somehow estopped from denying that they are debtors of Mr. Stafford, particularly by reason of the interest and principal payments made by them and the T5 slips prepared by them which were then forwarded to Mr. Stafford.

[149] Having confirmed the agreement of CuVeras and Mr. Stafford on the above issues, I turn to Mr. Stafford's position, which is solely rooted in agency:

> The corporate minutes of Bul River Mineral Corporation confirm that the actions of Ross Hale Stanfield were as agent for the company and associated companies and confirmed by resolution to accept liability of agreements signed by Stanfield as legitimate debts of a company and acted on it accordingly[.]

[150] Essentially, Mr. Stafford's argument is that Stanfield was retroactively appointed as the agent of Bul River and Gallowai by reason of the November 2003 resolution such that he had the express or implied authority to bind Bul River and

Gallowai at the time of the loan. He relies in particular on s. 193(2) and (4) of the *Business Corporations Act*, S.B.C. 2002, c. 57:

> 193 (2) A contract that, if made between individuals, would, by law, be required to be in writing and signed by the parties to be charged, may be made for a company in writing signed by a person acting under the express or implied authority of the company and may, in the same manner, be varied or discharged.
>
> ...
>
> (4) A contract made according to this section is effectual in law and binds the company and all other parties to it.

[151] It seems to be common ground that Stanfield was not acting as the agent of Bul River and Gallowai in 1990 when the loan was made. The Stafford Loan Agreement does not reference Stanfield acting as an agent and the Proof of Claim does not allege an agency relationship at the time of the Stafford Loan Agreement. Nor was Stanfield acting as the agent of Bul River and Gallowai during the ensuing 13 years when the loan was being administered. The allegation is that changes only occurred in 2003 when Stanfield decided he wanted to be reimbursed by Bul River and Gallowai for certain loans he had earlier made.

[152] I was referred to only one authority on the agency issue by CuVeras, being *Spidell v. LaHave Equipment Ltd.*, 2014 NSSC 255.

[153] In *Spidell*, LaHave Equipment Ltd. was a dealer for Case Canada Limited. The plaintiff Spidell purchased a Case Canada excavator from LeHave which was financed by Case Credit Limited. Spidell alleged that employees of LaHave made representations to him about the performance of the equipment. Spidell believed LaHave was a representative or agent or dealer for Case Canada. Spidell did not make the required payments to Case Credit and the equipment was repossessed. Spidell sued LaHave claiming damages for alleged misrepresentations. LaHave defended the action but subsequently went into bankruptcy. Only then did Spidell amend his pleading to add Case Credit and Case Canada as defendants, claiming LaHave was their agent. The issue on the summary trial was whether LaHave was in fact the agent of the Case companies.

[154] Mr. Justice Coughlan reviewed the law of agency, as follows:

> [21] In *Halsbury's Laws of Canada First Edition,* "Agency" paragraph HAY-2 the three essential ingredients of an agency relationship are:
>
> "1. The consent of both the principal and the agent.
>
> 2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position.
>
> 3. The principal's control of the agent's actions."
>
> And at Agency paragraph HAY -11 the manner in which an agency relationship may be created are set out:
>
> "1. the express or implied consent of principal and agent,
>
> 2. by implication of law from the conduct or situation of the parties or from the necessities of the case,
>
> 3. by subsequent ratification by the principal of the agent's act done on the principal's behalf, whether the person doing the act was an agent exceeding his authority or was a person having no authority to act for the principal at all,
>
> 4. by estoppel, or
>
> 5. by operation of the principles of law."
>
> [Emphasis added].

[155] Mr. Stafford relies in particular on the creation of agency by ratification as referred to above. Justice Coughlan said this about agency by ratification:

> [25] The conditions for an agency by ratification to be established were set out in *Halsbury's Laws of Canada, supra*, at Agency HAY-22 as follows:
>
> "**Three Conditions**. Actions by a principal after the agent has purported to act on the principal's behalf may amount to creation of agency by ratification. For this to occur, three conditions must be satisfied. First, the agent whose act is sought to be ratified must have purported to act for the principal; second, at the time the act was done the agent must have had a competent principal; and third, at the time of the ratification the principal must be legally capable of doing the act himself.["]

[156] The key consideration from the above quote is the first requirement. In this case, there is no evidence that Stanfield "purported to act" for Bul River and Gallowai as principals in 1990 when he entered into the Stafford Loan Agreement. In fact, the evidence is to the contrary in that he acted in his personal capacity and not as agent.

[157] I agree with CuVeras that agency by ratification assumes that there exists a relationship (even though perhaps mistaken) between the principal and agent at the time of the transaction which must later be ratified. One example is as noted in the *Halsbury's* quote above, namely where the agent exceeded his or his authority but later the unauthorized transaction is ratified or adopted by the principal. That is not what occurred in this case. Ratification of an agent's actions in that case cannot occur when no agency relationship existed in the first place. The second example of ratification described in *Halsbury's* (where the person had no authority to act but their actions were later ratified) still requires that the actions be done by the agent "on the principal's behalf" in purported furtherance of an agency relationship.

[158] Accordingly, the concept of ratification by Bul River and Gallowai of Stanfield's actions concerning the Stafford Loan Agreement as their agent has no application in this case.

[159] What occurred in this case is that many years later, in 2003, Stanfield, Bul River and Gallowai agreed that the companies would take over responsibility for payment of the Stafford Loan Agreement in place of Stanfield. But those arrangements were only between Bul River, Gallowai and Stanfield and not Mr. Stafford.

[160] Accordingly, we start from the proposition that there was no agency relationship between Stanfield and Bul River and Gallowai in 1990. The only parties to the Stafford Loan Agreement are Stanfield and Mr. Stafford.

[161] The only evidence suggesting any link between Mr. Stafford and Bul River and Gallowai arise from the fact that, commencing in April 2007, Mr. Stafford began to receive T5 slips from them. Payments were also made by Bul River and Gallowai commencing in 1999. Mr. Stafford argues that by reason of such actions, Bul River and Gallowai treated the Stafford Loan Agreement as their debt since they could not have issued T5 slips for someone else's debt. The 2003 resolutions are, of course, an internal document of Bul River but do indicate that Bul River at least intended to accept the Stafford Loan Agreement as its obligation. The basis upon which Bul

River was able to accept this obligation on behalf of Gallowai is unclear and not substantiated.

[162] Mr. Stafford argues that these events confirm that Bul River and Gallowai had assumed the obligations of Stanfield. But this argument brings us back to the legal bases for any liability on the part of Bul River and Gallowai that CuVeras raised and I discussed above (assignment, novation, guarantee and estoppel) and which arguments Mr. Stafford agreed did not apply.

[163] I agree with the submissions of CuVeras that these later actions of Bul River and Gallowai evidence an intention on the part of Bul River (and perhaps Gallowai) to take over or assume payment of the obligations of Stanfield under the Stafford Loan Agreement. In that sense, and without a novation, in substance these arrangements amount to Bul River and Gallowai agreeing to indemnify Stanfield in respect of his obligations to pay the Stafford Loan Agreement amounts and nothing more.

[164] I conclude that Mr. Stafford has not met the onus of proving that the amounts under the Stafford Loan Agreement are obligations or "provable debts" of Bul River and Gallowai.

[165] Both CuVeras and Mr. Stafford made submissions concerning the issue as to whether the Stafford Loan Agreement provided for compound interest or not. In light of my conclusions above, it is not necessary to address that issue.

Conclusion

[166] In accordance with the above reasons, the Court declares that:

a) the Preston Claim is an equity claim for the purposes of this *CCAA* proceeding; and

b) the Stafford Claim is not a debt claim as against Bul River and Gallowai. It follows that the Creditor List should be amended accordingly and that

Mr. Stafford is not entitled to vote on or receive any distribution under any plan of arrangement as may subsequently be filed by those petitioners.

[167] If any party is seeking costs, then written submissions should be delivered to the court and the party against whom costs are sought within 30 days of delivery of these reasons. Any response shall be delivered within 15 days and any reply to that response shall be delivered with seven days of that date.

"Fitzpatrick J."

CITATION: Timminco Limited (Re), 2014 ONSC 3393
COURT FILE NO.: CV-12-9539-00CL
DATE: 2014-07-07

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jane Dietrich* and *Kate Stigler*, for the Board of Directors, except John Walsh

Kenneth D. Kraft, for Chubb Insurance Company of Canada

James C. Orr, for St. Clair Pennyfeather, Plaintiff in the Class Action

Maria Konyukhova, for Timminco Entities

Robert Staley, for John Walsh

Linc Rogers, for the Monitor

HEARD: July 22, 2013

SUPPLEMENTARY WRITTEN SUBMISSIONS RECEIVED MARCH 2014

ENDORSEMENT

Introduction

[1] On May 14, 2009, Kim Orr Barristers PC, counsel to the representative plaintiff Mr. St. Clair Pennyfeather ("Plaintiff's Counsel"), initiated the proposed class action (the "Class Action"), which names as defendants Timminco Limited ("Timminco"), a third party, Photon Consulting LLC, and certain of the directors and officers of Timminco, (the "Directors").

[2] The Class Action focusses on alleged public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.

[3] Mr. Pennyfeather alleges that the representations were first made in March 2008, after which the shares of Timminco gained rapidly in value to more than $18 per share by June 5, 2008. Subsequently, Mr. Pennyfeather alleges that as Timminco began to acknowledge

problems with the alleged proprietary process, the share price fell to the point where the equity was described as "penny stock" prior to its delisting in January 2012.

[4] In the initial order, granted January 3, 2012 in the *Companies' Creditors Arrangement Act.*, R.S.C. 1985, c. C-36, as amended (the "CCAA") proceedings, Timminco sought and obtained stays of all proceedings including the Class Action as against Timminco and the Directors (the "Initial Order").

[5] Timminco also obtained a Claims Procedure Order on June 15, 2012 (the "CPO"). Among other things, the CPO established a claims-bar date of July 23, 2012 for claims against the Directors. Mr. Pennyfeather did not file a proof of claim by this date.

[6] No CCAA plan has been put forward by Timminco and there is no intention to advance a CCAA plan.

[7] Mr. Pennyfeather moves to lift the stay to allow the Class Action to be dealt with on the merits against all named defendants and, if necessary, for an order amending the CPO to exclude the Class Action from the CPO or to allow the filing of a proof of claim relating to those claims.

[8] The Class Action seeks to access insurance moneys and potentially the assets of Directors.

[9] The respondents on this motion, (the Directors named in the Class Action), contend that the failure to file a claim under the CPO bars any claim against officers and directors or insurance proceeds.

[10] Neither Timminco nor the Monitor take any position on this motion.

[11] For the reasons that follow, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action.

The Stay and CPO

[12] The Initial Order contains the relevant stay provision (as extended in subsequent orders):

> 24. This Court Orders that during the Stay Period… no Proceeding may be commenced or continued against any former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacities as directors or officers for the payment or performance of such obligations, **until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this court or is refused by the creditors of the Timminco Entities or this Court.**

[emphasis added]

[13] In May and June 2012, The Court approved sales transactions comprising substantially all of the Timminco Entities' assets. In their June 7, 2012 Motion, the Timminco Entities sought

an extension of the Stay Period to "give the Timminco Entities sufficient time to, among other things, close the transactions relating to the Successful Bid and carry out the Claims Procedure". The Timminco Entities sought court approval of a proposed claims procedure to "identify claims which may be entitled to distributions of potential proceeds of the ... transactions..." The Timminco entities took the position that the Claims Procedure was "a fair and reasonable method of determining the potential distribution rights of creditors of the Timminco Entities".

[14] The mechanics of the CPO are as follows. Paragraph 2(h) of the CPO defines the Claims Bar Date as 5:00 p.m. on July 23, 2012. "D&O Claims" are defined in para. 2(f)(iii):

> Any existing or future right or claim of any person against one or more of the directors and/or officers of the Timminco Entity which arose or arises as a result of such directors or officers position, supervision, management or involvement as a director or officer of a Timminco Entity, whether such right, or the circumstances giving rise to it arose before or after the Initial Order up to and including this Claims Procedure whether enforceable in any civil, administrative, or criminal proceeding (each a "D&O Claim") (and collectively the "D&O Claims"), including any right:
>
> a. relating to any of the categories of obligations described in paragraph 9 of the Initial Order, whether accrued or falling due before or after the Initial Order, in respect of which a director or officer may be liable in his or her capacity as such;
>
> b. in respect of which a director or officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Timminco Entities or any one of them or for vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Timminco Entities or amounts which were required by law to be withheld by the Timminco Entities;
>
> c. in respect of which a director or officer may be liable in his or her capacity as such as a result of any act, omission or breach of duty; or
>
> d. that is or is related to a penalty, fine or claim for damages or costs.
>
> Provided however that in any case "Claim" shall not include an Excluded Claim.

[15] The CPO appears to bar a person who fails to file a D&O Claim by the Claims Bar Date from asserting or enforcing the claim:

> 19. This Court orders that any Person who does not file a proof of a D&O Claim in accordance with this order by the claims-bar date **or such other later date as may be ordered by the Court**, shall be forever barred from asserting or enforcing such D&O Claim against the directors and officers and the directors and officers shall not have any liability whatsoever in respect of such D&O Claim and such D&O Claim shall be extinguished without any further act or notification. [emphasis added]

Mr. Pennyfeather's Position

[16] Mr. Pennyfeather advances a number of arguments. Most significantly, he argues that it is not fair and reasonable to allow the defendants to bar and extinguish the Class Actions claims through the use of an interim and procedural court order. He submits that the respondents attempt to use the CCAA in a tactical and technical fashion to achieve a result unrelated to any legitimate aspect of either a restructuring or orderly liquidation. The operation of the fair and reasonable standard under the CCAA calls for the exercise of the Court's discretion to lift the stay and, if necessary, amend the CPO to either exclude the Class Action claims or permit submissions of a class proof of claim.

[17] In support of this argument, Mr. Pennyfeather adds that there is no evidence that any of the Directors who are defendants in the class action contributed anything to the CCAA process, and that the targeted insurance proceeds are not available to other creditors. Thus, he submits, a bar against pursuing these funds benefits only the insurance companies who are not stakeholders in the restructuring or liquidation.

[18] Mr. Pennyfeather advances a number of additional arguments. Because I am persuaded by this first submission, it is not necessary to discuss the additional arguments in great detail. However, I will give a brief summary of these additional arguments below.

[19] First, Mr. Pennyfeather submits, since the stay was ordered, he has attempted to have the stay lifted as it relates to the Class Action.

[20] Second, Mr. Pennyfeather submits that the CPO did not permit the filing of representative claims, unlike, for example, claims processed in *Labourers' Pension Fund of Canada and Eastern Canada v. Sino-Forest Corporation,* 2013 ONSC 1078, 100 C.B.R. (5th) 30. Representative claims are generally not permitted under the CCAA and the solicitors for the representative plaintiff do not act for class members prior to certification (see: *Muscletech Research and Development Inc. (Re)* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.)). Therefore, Mr. Pennyfeather submits that the omission in the order obtained by the Timminco entities, of the type of provision contained in the *Sino-Forest* Claims Order, precluded the action that they now assert should have been taken.

[21] Third, Mr. Pennyfeather responds to the significant argument made by the responding parties that the CPO bars the claim. He submits that the Class Action, which alleges, *inter alia*, misrepresentations and breaches of the *Securities Act*, R.S.O. 1990, c. S.5, is unaffected by the CPO. There are several reasons for this. First, the CPO excludes claims that cannot be compromised as a result of the provisions of s. 5.1(2) of the CCAA. Alternatively, even if Mr. Pennyfeather and other class members are not creditors pursuant to section 5.1(2), he submits that Parliament has clearly intended to exclude claims for misrepresentation by directors regardless of who brought them. In addition, insofar as the Class Action seeks to recover insurance proceeds, the CPO did not, according to Mr. Pennyfeather, affect that claim.

[22] In summary, Mr. Pennyfeather's most significant argument is that the CCAA process should not be used in a tactical manner to achieve a result collateral to the proper purposes of the legislation. The rights of putative class members should be determined on the merits of the Class

Action, which are considerable given the evidence. Further, the lifting of the stay is fair and reasonable in all of the circumstances.

Directors' Position

[23] Counsel to directors and officers named in the proposed class action, other than Mr. Walsh (the "Defendant Directors") submit there are three issues to be considered on the motion: (a) should the CPO be amended to grant Mr. Pennyfeather the authority to file a claim on behalf of the class members in the D&O Claims Procedure? (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, should the claims-bar date be extended to allow him the opportunity to file a late claim against the Defendant Directors? and (c) if Mr. Pennyfeather is permitted to file a late claim against the Defendant Directors, should the D&O stay be lifted to allow the proposed class action to proceed against the Defendant Directors?

[24] The Defendant Directors take the position that: (a) Mr. Pennyfeather does not have the requisite authority and/or right to file a claim on behalf of the class action members and the CPO and should not be amended to permit such; (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, the claims-bar date should not be extended to allow Mr. Pennyfeather to file a late claim; and (c) if Mr. Pennyfeather is permitted to file a late claim, the D&O stay should not be lifted to allow the proposed class action to proceed against the Defendant Directors.

[25] The Defendant Directors counter Mr. Pennyfeather's arguments with a number of points. They take the position that while they were holding office, they assisted with every aspect of the CCAA process, including (i) the sales process through which the Timminco Entities sold substantially all of their assets and obtained recoveries for the benefit of their creditors; and (ii) the establishment of the claims procedure, resigning only after the claims-bar date passed.

[26] The Defendant Directors also submit that Mr. Pennyfeather has been aware of, and participated in, the CCAA proceedings since the weeks following the granting of the Initial Order. They submit that at no time prior to this motion did Mr. Pennyfeather take any position on the claims procedures established to seek the authority to file a claim on behalf of the class members. They submit that, at this point, Mr. Pennyfeather is asking the court to exercise its discretion to (i) amend the CPO to grant him the authority to file a claim on behalf of the class members; (ii) extend the claims-bar date to allow him to file such claim; and (iii) lift the stay of proceedings. They submit that Mr. Pennyfeather asks this discretion be exercised to allow him to pursue a claim against the Defendant Directors which remains uncertified, is in part statute barred, and lacks merit.

[27] Counsel to the Defendant Directors submits that the D&O Claims Procedure was initiated for the purpose of determining, with finality, the claims against the directors and officers. They submit that the D&O Claims Procedure has at no time been contingent on, tied to, or dependent on the filing of a Plan of Arrangement by the Timminco Entities.

[28] Simply put, the Defendant Directors submit that the CPO sets a claims-bar date of July 23, 2012 for claims against Directors and Mr. Pennyfeather did not file any Proof of Claim against the Defendant Directors by the claims-bar date. Accordingly, they submit that the claims

against the Defendant Directors contemplated by the Class Action are currently barred and extinguished by the CPO.

[29] The arguments put forward by Mr. Walsh are similar.

[30] Counsel to Mr. Walsh attempts to draw similarities between this case and *Sino-Forest.* Counsel submits this is a case where Mr. Pennyfeather intentionally refused to file a Proof of Claim in support of a securities misrepresentation claim against Timminco and its directors and officers.

[31] They further submit that Mr. Pennyfeather is asking for the Court to exercise its discretion in his favour to lift the stay of proceedings, in order to allow him to pursue a proceeding which has been largely, if not entirely neutered by the Court of Appeal (leave to appeal to the Supreme Court of Canada dismissed). They point out that just like in *Sino-Forest*, to lift the stay would be an exercise in futility where the Court commented that "there is no right to opt out of any CCAA process...by virtue of deciding, on their own volition, not to participate in the CCAA process", the objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[32] Counsel to Mr. Walsh also takes the position that Mr. Pennyfeather's only argument is a strained effort to avoid the plain language of the CPO in an effort to say that his claim is an "excluded claim" and therefore a Proof of Claim was never required. Even if Mr. Pennyfeather was right, counsel to Mr. Walsh submits that Mr. Pennyfeather still would have been required to file a Proof of Claim, failing which his claim would have been barred. Under the CPO, proofs of such claims were still called for, even if they were not to be adjudicated.

[33] They note that Mr. Pennyfeather was aware of the CCAA proceeding and the Initial Order. As early as January 17, 2012, counsel to Mr. Pennyfeather contacted counsel for Timminco, asking for consent to lift the Stay.

[34] Counsel contends that the "excluded claim" language that Mr. Pennyfeather relies on is not found in the definition of D&O Claim. Under the terms of the CPO, the language is a carve-out from the larger definition of "claim", not the subset definition of D&O Claim. As a result, counsel submits that proofs of claim are still required for D&O Claims, regardless of whether they are excluded claims. In that way, the universe of D&O Claims would be known, even if excluded claims would ultimately not be part of a plan.

[35] Mr. Walsh also takes the position that Mr. Pennyfeather made an intentional decision not to file a claim. Mr. Walsh emphasizes that Mr. Pennyfeather had full notice of the motion for the CPO and chose not to oppose or appear on the motion. Further, at no time did Mr. Pennyfeather request the Monitor apply to court for directions with respect to the terms of the CPO.

[36] Mr. Walsh submits he is prejudiced by the continuation of the Class Action and he wants to get on with his life but is unable to do so while the claim is extant.

Law and Analysis

[37] For the purposes of this motion, I must decide whether the CPO bars Mr. Pennyfeather from proceeding with the Class Action and whether I should lift the stay of proceedings as it applies to the Class Action. For the reasons that follow, I conclude that the CPO should not serve as a bar to proceeding with the Class Action and that the stay should be lifted.

[38] As I explain below, the application of the claims bar order and lifting the stay are discretionary. This discretion should be exercised in light of the purposes of both claims-bar orders and stays under the CCAA. A claim bar order and a stay under the CCAA are intended to assist the debtor in the restructuring process, which may encompass asset realizations. At this point, Timminco's assets have been sold, distributions made to secured creditors, no CCAA plan has been put forward by Timminco, and there is no intention to advance a CCAA plan. It seems to me that neither the stay, nor the claims bar order continue to serve their functional purposes in these CCAA proceedings by barring the Class Action. In these circumstances, I fail to see why the stay and the claim bar order should be utilized to obstruct the plaintiff from proceeding with its Class Action.

The Purpose of Stay Orders and Claims-Bar Orders

[39] For the purposes of this motion, it is necessary to consider the objective of the CCAA stay order. The stay of proceedings restrains judicial and extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on negotiating of a compromise or arrangement: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. S.C.).

[40] Sections 2, 12 and 19 of the CCAA provide the definition of a "Claim" for the purposes of the CCAA and also provide guidance as to how claims are to be determined. Section 12 of the CCAA states

> 12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

The use of the word "may" in s. 12 indicates that fixing deadlines, which includes granting a claims bar order, is discretionary. Additionally, as noted above the CPO provided at para. 19 that a D&O Claim could be filed on "such other later date as may be ordered by the Court".

[41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and

a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".

[43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[44] Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the CCAA that compromises certain claims against directors and officers. In this context, the provisions of s. 5.1 of the CCAA must be respected.

[45] In the case of Timminco, there have been distributions to secured creditors which are not the subject of challenge. The Class Action claim is subordinate in ranking to the claims of the secured creditors and has no impact on the distributions made to secured creditors. Further, there is no CCAA plan. There will be no compromise of claims against directors and officers. I accept that at the outset of the CCAA proceedings there may very well have been an intention on the part of the debtor to formulate a CCAA plan and further, that plan may have contemplated the compromise of certain claims against directors and officers. However, these plans did not come to fruition. What we are left with is to determine the consequence of failing to file a timely claim in these circumstances.

[46] In the circumstances of this case, i.e., in the absence of a plan, the purpose of the claims bar procedure is questionable. Specifically, in this case, should the claims bar procedure be used to determine the Class Action?

[47] In my view, it is not the function of the court on this motion to determine the merits of Mr. Pennyfeather's claim. Rather, it is to determine whether or not the claims-bar order operates as a bar to Mr. Pennyfeather being able to put forth a claim. It does not act as such a bar.

[48] It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding, where there will be no CCAA plan, should not be used in such a way as to defeat the claim of Mr. Pennyfeather. The determination of the claim should be made on the merits in the proper forum. In these circumstances, where there is no CCAA plan, the CCAA proceeding is, in my view, not the proper forum.

[49] Similar considerations apply to the Stay Order. With no prospect of a compromise or arrangement, and with the sales process completed, there is no need to maintain the status quo to allow the debtor to focus and concentrate its efforts on negotiating a compromise or arrangement. In this regard, the fact that neither Timminco nor the Monitor take a position on this motion or argue prejudice is instructive.

Applicability of Established Tests

[50] The lifting of a stay is discretionary. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of (a) the balance of convenience; (b) the relative prejudice to the parties; and (c) where relevant, the merits of the proposed action: *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156, at para. 27.

[51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[52] These are factors that have been considered by the courts on numerous occasions (see, for example, *Sino-Forest*; *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), *Blue Range Resource Corp. (Re)*, 2000 ABCA 285, 193 D.L.R. (4th) 314, leave to appeal to S.C.C. refused, [2000] SCCA No. 648; *Canadian Red Cross Society (Re)* (2000), 48 C.B.R. (5th) 41 (Ont. S.C.); and *Ivorylane Corp.* v. *Country Style Realty Ltd.*, [2004] O.J. No. 2662 (S.C.)).

[53] However, it should be noted that all of these cases involved a CCAA Plan that was considered by creditors.

[54] In the present circumstances, it seems to me there is an additional factor to take into account: there is no CCAA Plan.

[55] I have noted above that certain delay can be attributed to the CCAA proceedings and the impact of *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, at the Court of Appeal. That is not a full answer for the delay but a partial explanation.

[56] The prejudice experienced by a director not having a final resolution to the proposed Class Action has to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constitutes a degree of prejudice to the defendants, it can be alleviated by requiring the parties to agree upon a timetable to have this matter addressed on a timely basis with case management.

[57] I have not addressed in great detail whether the CPO requires excluded claims to be filed. In my view, it is not necessary to embark on an analysis of this issue, nor have I embarked on a review of the merits. Rather, the principles of equity and fairness dictate that the class action plaintiff can move forward with the claim. The claim may face many hurdles. Some of these have been outlined in the factum submitted by counsel to Mr. Walsh. However, that does not necessarily mean that the class action plaintiff should be disentitled from proceeding.

[58] In the result, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action. The CPO is modified so as to allow Mr. Pennyfeather to file his claim.

Morawetz, R.S.J.

Date: July 7, 2014

Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 18

UNCLAIMED DIVIDENDS AND UNDISTRIBUTED FUNDS

Issued: August 14, 2009

(Supersedes Directive No. 8 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

DIVIDENDES NON RÉCLAMÉS ET FONDS NON DISTRIBUÉS

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 8 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. The purpose of this Directive is twofold:

(a) to minimize the amount of unclaimed dividends and undistributed funds in order to maximize dividends to creditors; and

(b) to reduce the number of unnecessary requests to the OSB for the return to creditors of money remitted as unclaimed dividends and undistributed funds.

Unclaimed Dividends

4. Trustees, when proceeding to the discharge phase of their administration in those estates where a dividend will be payable, should:

(a) in a case of an ordinary administration, apply for a discharge hearing date that will allow a longer period of time for the cashing of cheques, hence reducing the number of returned cheques as a result of a stop-payment or closed account. It is suggested that this period should be 45 to 60 days after the mailing of the cheques to allow for most, if not all, of the outstanding cheques to be cashed. This becomes particularly important for those creditors from outside Canada. In the case of a summary administration, the

3. La présente instruction a une double finalité :

a) réduire le montant des dividendes non réclamés et des fonds non distribués de manière à maximiser les dividendes versés aux créanciers; et

b) réduire les demandes inutiles de remboursement des créanciers auprès du BSF pour les sommes qui ont été remises à titre de dividendes non réclamés ou de fonds non distribués.

Dividendes non réclamés

4. Les syndics procédant à leur libération dans les administrations où un dividende sera payable aux créanciers devraient :

a) demander une date d'audience en vue de leur libération, dans le cas d'une administration ordinaire, qui assurera un délai suffisant pour l'encaissement des chèques, minimisant ainsi le nombre de chèques retournés en raison de la fermeture du compte bancaire. Il est suggéré que la période soit de 45 à 60 jours après l'envoi des chèques afin de permettre que la majorité, sinon la totalité, des chèques retardataires soient encaissés. Ceci devient encore plus important lorsqu'il y a des créanciers de l'extérieur du

sending of the certificate of compliance should be delayed by the same amount of time.

Canada. Dans le cas d'une administration sommaire, l'envoi du certificat de conformité et de libération présumée devrait être retardé du même nombre de jours.

(b) make a reasonable effort to trace the current address for the local financial institutions or nationally known businesses (or those that have local branches) whose notice of trustee discharge or cheque has been returned by the postal services in order to forward the cheque to the proper address;

b) faire un effort raisonnable afin de retracer l'adresse courante des institutions financières locales ou d'entreprises connues nationalement (ou celles ayant un établissement local) dont l'avis de demande de libération du syndic a été retourné, afin de pouvoir faire suivre le chèque à la bonne adresse;

(c) include any reference account number found on the proof of claim or support document to facilitate the tracing by the receiving firm; and

c) inclure sur le chèque toute référence ou tout numéro de compte figurant sur la preuve de réclamation ou le document à l'appui pour permettre au bénéficiaire du chèque d'en connaître l'objet; et

(d) upon expiration of the above period and before proceeding to their discharge, trustees must, in conformity with subsection 154(1) of the Act, forward to the Superintendent all outstanding dividends remaining in their account.

d) à l'expiration du délai dont il est question à l'alinéa 4*a*) ci-dessus et avant de procéder à sa libération, le syndic est tenu, au terme du paragraphe 154(1) de la Loi, de faire parvenir au surintendant tous les chèques non encaissés encore dans son compte bancaire.

Undistributed Funds

5. Trustees are encouraged to distribute all available funds to the creditors instead of

Fonds non distribués

5. On incite les syndics à distribuer tous les fonds disponibles aux créanciers plutôt que de

remitting them as undistributed funds to the Superintendent.

6. Trustees are, however, not expected to distribute immaterial amounts available for distribution to a large number of creditors if the cost of the distribution would appreciably exceed the amount to be distributed. As a guideline, to determine what constitutes materiality, the following will apply to both preferred and ordinary creditors:

(a) if there is only one (1) creditor, the funds are to be paid to the creditor where the gross amount available in the estate exceeds $5;

(b) if there are two (2) to five (5) creditors inclusive, the funds are to be paid to the creditors where the gross amount available in the estate exceeds $50; and

(c) if there are more than five (5) creditors, the funds are to be paid to the creditors where the average dividend to ordinary creditors in the estate (total amount of dividends to ordinary creditors divided by the number of ordinary creditors) will exceed $10.

7. If additional interest is received after the preparation of the Statement of Receipts and Disbursements, the amount should be distributed to the creditors by way of an

les remettre au surintendant des faillites à titre de fonds non distribués.

6. Les syndics ne sont cependant pas tenus de distribuer un montant très peu élevé devant être versé à un grand nombre de créanciers lorsque le coût de distribution dépasserait de beaucoup le montant à être distribué. Afin de déterminer ce que constitue un montant peu élevé, la norme suivante s'applique tant pour les créanciers privilégiés qu'ordinaires :

a) lorsqu'il y a un (1) seul créancier, les fonds doivent être versés au créancier lorsque le montant brut disponible au dossier dépasse 5 $;

b) lorsqu'il y a entre deux (2) et cinq (5) créanciers inclusivement, les fonds doivent être versés aux créanciers lorsque le montant brut disponible au dossier dépasse 50 $;

c) lorsqu'il y a plus de cinq (5) créanciers, les fonds doivent être versés aux créanciers lorsque le dividende moyen aux créanciers ordinaires (montant total des dividendes possibles aux créanciers ordinaires divisé par le nombre de créanciers ordinaires) est supérieur à 10 $.

7. Lorsque des intérêts additionnels sont reçus suite à la préparation de l'état des recettes et des débours, le montant devrait être distribué aux créanciers au moyen d'un bordereau de

amended or additional dividend sheet if the amount available exceeds the guidelines provided in paragraph 6 above.

Coming into Force

8. This Directive comes into force on September 18, 2009.

Enquiries

9. For any questions pertaining to this Directive, please contact your local OSB office.

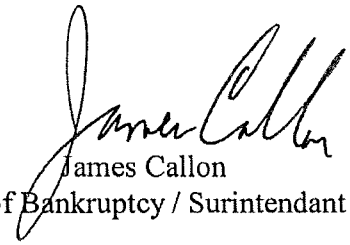
dividendes additionnel ou modifié lorsque le montant disponible excède la norme prévue au paragraphe 6 ci-dessus.

Entrée en vigueur

8. La présente instruction entre en vigueur le 18 septembre 2009.

Demandes de renseignements

9. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.



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