

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

**SUPERIOR COURT
Commercial Division**

(Sitting as a court designated pursuant to
the *Companies Creditors Arrangement Act*,
R.S.C. 1985, c. C-36)

No.: 500-11-041305-117

**IN THE MATTER OF THE PLAN OF
COMPROMISE OR ARRANGEMENT OF:**

HOMBURG INVEST INC.,

Debtor / Petitioner

-and-

**THE ENTITIES LISTED IN ANNEX I AS
DEBTORS AND MISES-EN-CAUSE**

Debtors

-and-

STATOIL CANADA LTD. et als.,

Mises-en-cause

-and-

**SAMSON BÉLAIR/DELOITTE & TOUCHE
INC.**

Monitor

CONTESTATION OF STATOIL CANADA LTD. (“Statoil”)

**RE: Amended Motion for an Order Confirming the Re-Assignment and
Assignment of Certain Agreements and the Release of HII’s Obligations
under these Agreements (the “Amended Motion”)**

TO THE HONOURABLE LOUIS J. GOUIN, J.S.C. OR TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT OF MONTREAL, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE MISE-EN-CAUSE STATOIL RESPECTFULLY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. By way of this written contestation, Statoil seeks to have the Amended Motion dismissed, principally on the basis that:
 - a. Hll does not have the required legal standing and interest to seek the conclusions of the Amended Motion;
 - b. This CCAA Court does not have the *ratione materiae* jurisdiction to hear the Amended Motion;
 - c. Subsidiarily, the Assignment Disclaimer should be annulled; and
 - d. Subsidiarily, the relief sought in the Amended Motion cannot be granted;

II. PROCEDURAL AND FACTUAL BACKGROUND

2. On September 9, 2011, the Honourable Louis J. Gouin, J.S.C., issued the Initial Order¹;
3. Pursuant to the Initial Order, the Monitor was appointed as monitor of the Debtors and the Hll Stay was ordered until October 7, 2011 which was extended to December 9, 2011 pursuant to an Order of the Court²;
4. On September 13, 2011, Cadillac issued the Notice of Default, Exhibit R-25, to Hll and Statoil giving notice that the sum of \$561,279.56 was outstanding in respect of net rent and additional rent owing under the Head Lease, Exhibit R-1;
5. Cadillac did not apply to this Court to request that the stay of proceedings under the Initial Order be lifted prior to issuing the Notice of Default;
6. Cadillac did not send (and still has not sent as at the date hereof) a notice of intent to terminate the Head Lease to Statoil or otherwise indicate to Statoil that it intended on terminating the Head Lease;
7. On September 27, 2011, Statoil issued a payment in the amount of \$561,279,56 to Cadillac in error ("Statoil's Erroneous Payment"), for those reasons and based

¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Amended Motion, unless the context dictates otherwise.

² The term Court is used herein to mean the CCAA Court.

on the facts more fully set out in paragraphs 23 - 34 of the November 11, 2011 Affidavit of François Parent in support of this Contestation;

8. Statoil's Erroneous Payment was not accompanied with any cover letter nor did it contain any indications whatsoever that Statoil understood and intended to have the Head Lease re-assigned to it;
9. In a letter dated October 5, 2011, Statoil's Alberta counsel promptly advised counsel for Cadillac that the \$567,279.56 was paid by Statoil in error, and demanded the return of the funds, as appears from the letter dated October 5, 2011 from Mr. Simard of Bennett Jones LLP to Cadillac, a copy of which is communicated and filed herewith as **Exhibit D-1**;
10. As at the date hereof, Cadillac has not returned the \$567,279.56 to Statoil, as demanded in the October 5, 2011 letter, Exhibit D-1;
11. Further to Statoil's Erroneous Payment, HII did not surrender up possession of the premises at Canoxy Place;
12. On September 30, 2011, with the approval of the Monitor, HII served:
 - a. The Head Lease Disclaimer, Exhibit R-26, the Assignment Disclaimer, Exhibit R-27, upon Cadillac and Statoil pursuant to Section 32(1) of the CCAA, pursuant to which disclaimers HII notified Cadillac and Statoil that it intended to disclaim the Head Lease and the Assignment as of October 30, 2011;
 - b. The Subtenant Notices, R-28, upon each of the Subtenants, pursuant to which HII notified the Subtenants that it intended to disclaim, as Sublandlord, the Subleases as of October 30, 2011;
13. On October 5, 2011, HII paid to Cadillac the Head Lease rent owing for the post-CCAA portion of September (i.e., as of September 9, 2011) and for all of October, as admitted at paragraph 25 of the Amended Motion;
14. On Thursday, October 13, 2011, or thereafter, the following motions were served on Alberta counsel for Statoil:
 - a. The motion of Cadillac to declare null and void the Head Lease Disclaimer and the Assignment Disclaimer ("Cadillac's Motion to Annul Disclaimers");
 - b. The motions of BOS, Premier, MHM, CTS, Keywest, MHI, SPT, Tucker, Surge, Logan, and CE to declare null and void the Head Lease Disclaimer and its disclaimer of their respective Subleases (collectively "Subtenants' Motion to Annul Disclaimers");

(collectively the "Motions to Annul Disclaimers")

15. In the circumstances, Statoil did not itself, make a duplicative and redundant application to annul the disclaimers given that:
 - a. Statoil could avoid the hardship (set out at paragraphs 59 – 61 hereinbelow) resulting from the Assignment Disclaimer by a finding from the CCAA Court: (i) that the Head Lease Disclaimer was valid and effective or (ii) in favour of Cadillac's position that the Head Lease and the Assignment Agreement should not be disclaimed; and
 - b. Statoil's position was and still is that its obligations under the Head Lease had not been triggered for those reasons more fully set out in paragraphs 64 – 87 hereinbelow;
16. On or about October 24, 2011, Cadillac served an amended motion to declare null and void the Head Lease Disclaimer and the Assignment Disclaimer, whereby Statoil was impleaded in the proceedings and Cadillac sought to reserve and not prejudice its rights against Statoil under the Head Lease and the Assignment notwithstanding the conclusions it was seeking against HII;
17. Subsequently, certain Subtenants served amended motions to declare null and void the Head Lease Disclaimer and its disclaimer of their respective Subleases whereby Statoil was impleaded in the proceedings and the declaration of HII's default was sought to be binding as against Statoil;
18. On October 31, 2011, a complete change of tactics and legal strategy arose insomuch as counsel for HII and the Monitor announced during a conference call at 12:00pm with, *inter alia*, counsel for Statoil, that HII would be presenting an application which now solely targeted Statoil with the consent of the Monitor, Cadillac and the Subtenants;
19. At 2:15pm on October 31, 2011, counsel for HII confirmed to this Court during a case management hearing that it intended to serve and file the above-mentioned application by 4:30pm on November 2, 2011. The Court decided that the application would be presentable on November 7 and 8, 2011, notwithstanding Statoil's objection as to the impossibility for it to advance a full and complete defence in such a short delay;
20. On November 2, 2011, the Motion for an Order confirming the Re-Assignment and Assignment of Certain Agreements and the Release of HII's Obligations under these Agreements (the "Motion") was effectively served on Statoil at 4:30pm;
21. The Motion seeks declaratory conclusions against Statoil so that: (a) the Head Lease is re-assigned to Statoil and Statoil is bound by all of its obligations vis-à-vis Cadillac and (b) Statoil abide by its obligations under the NDAs and is deemed to have concluded the New Sublease Agreements;

22. At paragraph 51 of the Motion, it is alleged that Cadillac and the Subtenants undertake to desist from the Motions to Annul Disclaimers if all of the conclusions sought in the Motion are granted;
23. On November 4, 2011, Statoil requested, by way of letter to this Court, that the Motion which was presentable on November 7 and 8 be adjourned by one week so as to allow the parties to agree on a litigation agenda setting out the necessary and appropriate procedural steps prior to the hearing on the merits of the Motion to take into consideration:
 - a. Statoil's intent to present preliminary exceptions regarding HII's lack of legal interest and standing to present the Motion and this Court's lack of subject-matter jurisdiction to hear and decide on the Motion; and
 - b. Statoil's desire to conduct certain examinations on discovery of the representative of HII, Cadillac and of the Subtenants;

as appears from the letter from the undersigned attorneys to the Honourable Louis J. Gouin, J.S.C., dated November 4, 2011, a copy of which is communicated and filed herewith as **Exhibit D-2**;

24. On November 7, 2011, Statoil requested to have an adjournment of the Motion before this Court on the basis that Statoil was not in a position to advance a full and complete contestation, reiterating the grounds raised in the November 4, 2011 letter, Exhibit D-2;
25. The Court refused Statoil's request for an adjournment and the hearing of the Motion commenced on November 7, 2011, with the examination in chief of the representative of HII, as appears from the Case Management Order #5 dated November 7, 2011, a copy of which is communicated and filed herewith for convenience purposes as **Exhibit D-3**;
26. In the Case Management Order #5, the Court requested that the Parties abide by a very rigid and extremely short litigation agenda whereby the following steps would be completed:
 - a. Cross-Examination by Statoil outside of Court of Mr. James F. Miles, the representative of HII (not on discovery but to be filed into the Court Record in its entirety): Wednesday, November 9, 2011;
 - b. Examination by Statoil outside of Court of a representative of Cadillac (not on discovery but to be filed into the Court Record in its entirety): Thursday, November 10, 2011;
 - c. Filing by Statoil of its Contestation (including its preliminary exceptions), Affidavit(s) of Fact, Affidavit(s) of Law and Expert Report(s) : Friday, November 11, 2011;

- d. Cross-Examination by HII of a representative of Statoil on its detailed affidavit in support of the Contestation: Tuesday, November 15, 2011;
- e. Filing by HII of any rebuttal expert reports by HII, Cadillac and the Subtenants: Wednesday, November 16, 2011;
- f. Peremptory date for hearing on HII's Motion (being understood that no witness will testify other than the Monitor): Friday, November 18, 2011;

the whole, as appears from the Case Management Order #5, Exhibit D-3;

- 27. On November 7, 2011, the undersigned attorneys only agreed to comply with this litigation agenda to properly protect Statoil's rights and under reserve of the clear objection that Statoil could not advance a full and complete defence in the circumstances. The undersigned attorneys namely pleaded that the issues raised in the Motion did not fall within the purview of this Court's jurisdiction but should rather be adjudicated by the civil courts of Alberta (for a number of reasons as more set out at paragraphs 34 – 44 hereinbelow) at an ordinary and reasonable pace in light of the nature, scope and significant financial consequence on Statoil of the conclusions sought in the Motion;

III. STATOIL'S PRELIMINARY EXCEPTIONS

A. Preliminary Dismissal for HII's Lack of Legal Standing

- 28. HII does not have the legal standing and interest to advance this Amended Motion for the reasons more fully set out hereinbelow;
- 29. The Amended Motion principally seeks a series of declarations to resolve a dispute that has not yet been legally triggered between Cadillac and Statoil on the first part and the Subtenants and Statoil on the second part;
- 30. At conclusions [1], [1.1], [1.2], [1.3], [1.4], [2], [3] [4], [5] (in relevant part), [6], [7], [9], [10], [11] of the Amended Motion, HII (and not Cadillac) seeks, without legal interest and standing, to have this Court declare and enforce the obligations of Statoil towards Cadillac under the Head Lease and the Assignment;
- 31. At conclusions [1.2], [1.3], [1.5], [7], [8], [12] of the Amended Motion, HII (and not the Subtenants) seeks, without legal interest and standing, to have this Court declare and enforce the obligations of Statoil towards the Subtenants under the NDAs;
- 32. Neither Cadillac nor the Subtenants have adduced any evidence before this Court in connection with the Amended Motion and the conclusions sought therein;

33. Cadillac and the Subtenants do not consent to the Amended Motion nor do they undertake to desist from the Motions to Annul the Disclaimers if only conclusions [13] *et seq.* are left standing by this Court;

B. Declinatory Exception for Lack of Subject Matter Jurisdiction

34. This Court does not have the jurisdiction to hear the Amended Motion for the reasons more fully set out hereinbelow;

35. The Amended Motion seeks to have this Court issue relief under its generally broad discretionary powers which would effectively allow HII to circumvent express statutory provisions under the CCAA, and namely the provision preventing a sublandlord from disclaiming a sublease. This would result in a direct violation of Section 32(9)(d) of the CCAA which prevents a lessor from disclaiming a lease and deprives the Court of the power to approve such a disclaimer;

36. The Amended Motion also seeks to have this Court decide on the contractual rights and obligations of non-debtor parties as between themselves under the Head Lease, the Assignment, the Subleases, the NDAs and the Consents to Sublease entered into by all Subtenants in respect of Canoxy Place (the "Consents to Sublease"), the latter of which are communicated and filed *en liasse* herewith as **Exhibit D-4**. Such relief is not inextricably connected to HII's restructuring;

37. With respect, it is the civil courts, and not this Court, that would have the subject matter jurisdiction to hear the issues raised by this Amended Motion were they to be advanced by the appropriate parties;

38. Furthermore, the issues raised in the Amended Motion should properly be adjudicated upon by the civil courts of Alberta for the following reasons;

39. The law of Alberta dictates that Alberta is the proper forum in which to adjudicate any disputes arising under the Head Lease, Assignment, Subleases, the NDAs, and the Consents to Sublease as leases and contracts relating to real property in Alberta, and to be performed in Alberta;

40. The law of Alberta provides that Alberta will be the proper forum within which to bring an action if a "real and substantial connection" to Alberta can be shown. The "real and substantial" test is set out in the common law, as well as Rule 11.25 of the Alberta Rules of Court, Alta. Reg. 124/2010, as amended;

41. Rule 11.25 of the Rules of Court provides that a real and substantial connection is presumed to exist in the following circumstances:

- i. the claim relates to land in Alberta;

- ii. the claim relates to a contract or alleged contract made, performed or breached in Alberta;
 - iii. the claim is governed by the law of Alberta; or
 - iv. the defendant is resident in Alberta.
42. Thus, the effect of Rule 11.25 is to create a rebuttable presumption of a real and substantial connection of jurisdiction in Alberta with respect to real property interests, including leasehold interests, and contracts made, performed or breached in Alberta;
43. This presumption can be rebutted with evidence as to the intention of the parties, and such factors as: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the nature and subject matter of the contract, and the place of business of the parties;
44. In this case, the presumption is not rebuttable given that:
- i. the Leased Premises are located in Alberta;
 - ii. the parties to the Head Lease, Assignment, Subleases, the NDAs and the Consents to Sublease carry on business in Alberta;
 - iii. the contracts all appear to have been negotiated and entered into in Alberta;
 - iv. the contracts are governed by Alberta law; and
 - v. all the obligations under the Head Lease, Assignment, Subleases, NDAs and the Consents to Sublease are or were to be performed in Alberta;

with the result that an Alberta court would find all the contracts to have a "real and substantial connection" to Alberta, and thus conclude that Alberta is the proper legal forum for the determination of any disputes between Cadillac, Statoil, and the Sub-tenants relating to the contracts;

IV. ANNULMENT OF DISCLAIMER ASSIGNMENT

45. In light of the recent turn of events on October 31, 2011, and of the filing and service of the Motion on November 2, 2011, and of the Amended Motion on November 11, 2011, Statoil is now entitled to seek the annulment of the Assignment Disclaimer;
46. Prior to October 31, 2011, Statoil believed that, because of Cadillac's application to annul the disclaimer of both the Head Lease and the Assignment Agreement, and because Statoil was named in that application (and obviously materially affected by same) it was unnecessary for Statoil or any other party to file a duplicative application seeking the same relief;

47. In the circumstances, Statoil did not itself, apply to annul the disclaimers given that:
 - a. Statoil could avoid the hardship (set out at paragraphs 59 – 61 below) resulting from the Assignment Disclaimer by a finding from this Court: (i) that the Head Lease Disclaimer was valid and effective or (ii) in favour of Cadillac's position that the Head Lease and the Assignment Agreement should not be disclaimed; and
 - b. Statoil's position was and still is that its obligations under the Head Lease had not been triggered for those reasons more fully set out in the next section hereinbelow;
48. Statoil, as an affected party, would have been able to appear and make argument at the contested hearing on the proposed disclaimers, all of which were opposed. This was the case both on the original filing deadline for motions to annul disclaimers (October 17, 2011) and on the proposed effective date of the disclaimers, October 30, 2011;
49. It was only on October 31, 2011 (informally, in the Court hearing) and then on November 2, 2011 (formally, upon the filing of the Motion) that the parties who had filed and were advancing the Motions to Annul the Disclaimers, announced their intention to (conditionally) withdraw them;
50. Therefore, there would be no prejudice to any of the parties, if the time period under s. 32(2) of the CCAA were extended to allow Statoil the opportunity to apply to the Court to annul the Assignment Disclaimer. That relief would merely allow Statoil to preserve the status quo as it existed both on October 17, 2011 and October 30, 2011, prior to the previously unannounced and surprising change in direction of Cadillac and the Subtenants on October 31, 2011;
 - a. **Hll is precluded from Disclaiming the Assignment and the Head Lease**
51. The Head Lease, the Assignment and the Subleases, were all part of a legally and commercially integrated group of agreements as pleaded by Hll;
52. Hll's legal restriction from disclaiming the Subleases, precludes it from disclaiming the Head Lease and the Assignment;
53. This Court does not have the power to render orders which entail and/or ratify the violation of the CCAA's provisions;
 - b. **Absence of any Evidence Whatsoever of a Prospect of a Viable Compromise or Arrangement**
54. Hll has not discharged its burden of proof to establish that a viable compromise or arrangement exists;

55. In paragraph 30 of its Amended Motion, HII states its position that the proposed disclaimers "would enhance HII's ability to achieve a viable compromise or arrangement in its CCAA proceeding." This statement is then adopted as evidence by Mr. Miles, HII's Affiant;
56. However, that statement does not provide the type of evidence stipulated by s. 32(4) of the CCAA, which requires this Court to consider whether a proposed disclaimer "would enhance the prospects of a viable compromise or arrangement being made by the company." Unlike HII, the Monitor has made a statement to this effect (referred to at paragraph 52 of the Amended Motion) which is then adopted (as hearsay) by Mr. Miles;
57. However, the Monitor's simple statement, which amounts only to a mere verbatim recitation of the issue on which evidence is required by s. 32(4), does not amount to the necessary evidence. What HII must prove, by admissible non-hearsay evidence is that: (a) there currently exists the prospect of a viable compromise and arrangement; and (b) the proposed disclaimers would enhance those prospects. HII has tendered no such evidence. This type of evidence is absolutely essential and central to justify this Court's exercise of its very powerful remedy to approve disclaimers;
58. HII is thus precluded from disclaiming either the Head Lease, the Assignment Lease or the Subleases;

c. Statoil will Suffer Significant Hardship further to Assignment Disclaimer

59. It is impossible for Statoil to now "undo" the entire arrangement put in place by HII. Statoil cannot economically move its office premises back from Jamieson Place to Canoxy Place.
60. The overall project cost of moving Statoil to Jamieson Place, including design, construction, and move was \$29M (Statoil paid most of it). This amount is more than the \$22.6M that Statoil would assume instead of HII;
61. Statoil could not possibly move its office back to the Head Lease Premises (which comprise 117,000 square feet, in which Statoil housed 378 employees and contractors). Statoil currently has 209,000 square feet in Jamieson Place, in which it houses 420 employees and contractors. Statoil expects to have 573 employees and contractors in place by the end of 2012 (more than completely filling the Jamieson Place premises). Therefore, there is simply no way that Statoil could move back to Canoxy Place – there is far too little space there to meet Statoil's requirements;

d. Notices of Disclaimer were issued contrary to the terms of the Initial Order

62. Contrary to paragraph 28 of the Initial Order, neither HII nor the Monitor made any attempt to discuss or reach an agreement with Statoil prior to the issuance of

the Head Lease Disclaimer and the Assignment Disclaimer. On the contrary, neither HII nor the Monitor even contacted Statoil or gave it any advance notice in respect of either the filing of the proceeding seeking the Initial Order under the CCAA or its intent to disclaim;

63. In striking the appropriate balance between the interests of the various stakeholders, the Court should look with disfavour at the unilateral and precipitous actions of HII which ignored clear declarations contained in the Initial Order.

V. HII IS NOT ENTITLED TO THE RELIEF BEING SOUGHT UNDER ALBERTA LAW

64. Subject and without prejudice to Statoil's preliminary exceptions and argument as to the impossibility of disclaiming the Assignment Agreement, Statoil contests the merits of what is being sought by HII in the following manner;

65. The contractual mechanism and requisite notices whereby the Head Lease may be re-assigned to Statoil reveals that Statoil has the option to cure a default by HII and is not obligated to do so as per the Assignment;

66. By the express wording of the Assignment and the NDAs, there are a number of conditions precedent that must be satisfied before Statoil may exercise its option to be re-assigned in the Head Lease under the Assignment and/or Statoil's obligations arise *vis-à-vis* the Subtenants:

- a. Cadillac manifests its clear intent to terminate the Head Lease by way of notice or otherwise to Statoil;
- b. Cadillac delivers a notice of default to HII; and
- c. Cadillac provides a copy of the notice of default to Statoil;

67. If such conditions precedents are satisfied, then:

- a. Under the Assignment, Statoil has the option to cure HII's default, have the Head Lease re-assigned to it and be obligated towards Cadillac thereunder; and
- b. Under the NDAs, Statoil has the obligation to cure HII's default vis-à-vis Cadillac, have the Head Lease re-assigned to it (and be obligated towards Cadillac thereunder), and honour the rights of the Subtenants under the Subleases;

68. While there may be some ambiguity as to what legal consequence is effected as a result of the satisfaction of the condition precedents, the condition precedents themselves are completely unambiguous;

69. Alberta Law holds that unambiguous words used in contracts are to be given their literal meaning, unless to do so would result in absurdity. As such, the clearly-worded conditions precedent in the NDA's must be given their literal meaning and Statoil's rights to cure HII's default cannot be engaged until:
 - a. Cadillac, in fact, intends to terminate the Head Lease;
 - b. Cadillac, in fact, delivers a notice of default to HII (where no stay of proceedings is in effect); and
 - c. Cadillac, in fact, provides a copy of the notice of default to Statoil;
70. Statoil's position was and still is that its right (or obligation?) to remedy HII's default has not been triggered, because **none** of the conditions precedent to its rights being engaged have actually been satisfied:
 - a. No notice of default was properly sent to HII (the stay of proceedings was not lifted); and
 - b. Perhaps more importantly, no notice of intent to terminate the Head Lease has ever been sent to Statoil;
71. HII has clearly admitted that Cadillac has not sent a notice of intent to terminate the Head Lease to HII and/or Statoil, as appears from paragraph 42 of the Amended Motion;
72. As Statoil's right to cure has not yet arisen, Statoil has not yet had to elect whether or not to exercise that right under the Assignment (the September 27, 2011 payment by Statoil was done in error, as appears from paragraphs 23 – 34 of the November 11, 2011 Affidavit of François Parent in support of this Contestation);
73. Under Alberta Law, it is clear that this Court (or any other civil court for that matter) cannot rewrite the Assignment or the NDAs and thereby do away with, *inter alia*, the condition precedent that a notice of intent to terminate be sent to Statoil;
74. The condition precedent (which was expressly agreed to by Cadillac in the Assignment) that Cadillac must intend to terminate the Head Lease before Statoil's right to cure is engaged, is clearly a centrally important commercial term in those agreements. The objective intention and commercial effect of that condition precedent is obvious: Cadillac, a very large, sophisticated and rational economic actor, will only seriously intend to terminate the Head Lease when market rental rates are near or above the Head Lease rental rate. Termination of the Head Lease would end the contractual relationship between Cadillac and Statoil and Cadillac would be forced to re-let the space and sue for damages (subject to mitigation);

75. Therefore, the (expressly drafted and crystal clear) condition precedent plays a very important protective role for Statoil: all rational parties know that Cadillac will only ever intend to terminate the Head Lease when market conditions are such that the potential damages to Statoil (essentially, the gap between market rental rates and the Head Lease rental rate) are minimal;
76. It is only in a situation of minimal potential damages, that Statoil will be put to its election, to decide whether or not to cure a default under the Head Lease;
77. In present circumstances, the Head Lease rent is \$35 per square foot and market rental rates for the Canoxy Place are between \$21 per square foot and \$25 per square foot, as appears from paragraph 4 of the November 11, 2011 Affidavit of Allan Jones, a copy of which is filed and communicated herewith as **Exhibit D-5**;
78. In the current market circumstances, it is obvious that Cadillac does not seriously intend to terminate the Head Lease and that this condition precedent is not satisfied;
79. This unwillingness to send a notice to terminate the Head Lease is also manifest from Cadillac's very conduct:
 - a. Cadillac only sent a (stayed and therefore invalid) notice of default, but no notice of intent to terminate, as appears from Exhibit R-25 of the Amended Motion;
 - b. Cadillac then applied to annul the proposed disclaimer of the Head Lease and the Assignment; and
 - c. Cadillac's recent change of position, offering to withdraw that application to annul the disclaimers, is conditional on this Court ordering that Statoil is liable to cure HII's default;
80. HII, on behalf of Cadillac, attempts to completely deflect this Court's attention from this pivotal condition precedent by not even asking in its conclusion to be dispensed from the obligation to serve a notice of intention to terminate the Head Lease on HII and Statoil;
81. HII's motion is but a clever attempt by Cadillac to achieve a contractual consequence against Statoil that Cadillac expressly and unambiguously agreed would occur only in very favourable economical circumstances to Statoil, and in much different market conditions than presently exist;
82. Cadillac's attempted manoeuvre, presently being advanced by HII and supported by the Monitor, is also being abetted by the Subtenants, albeit for a different reason;

83. The Subtenants are sophisticated parties. They are oil companies, law firms, technology firms and oilfield services companies as appears from paragraph 20 and Exhibit 2 of the November 11, 2011 Affidavit of Francois Parent in support of the present written Contestation;
84. The Subtenants, in the Consents to Sublease executed by each of them (which contracts were not voluntarily produced to this Court but only revealed and filed after the Court was required to expressly request them on November 7, 2011), expressly and unambiguously agreed to unconditionally guarantee HII's obligation to Cadillac under the Head Lease (including the obligation to pay Head Lease rent) as appears from Sections 4(a) and 4(e) of the Consents to Sublease;
85. Therefore, the Subtenants' obligation to remedy HII's default in not paying Head Lease rent is not conditional on Cadillac intending to terminate the Head Lease, like Statoil's;
86. The Subtenants' unconditional obligation to pay Head Lease rent has crystallized, as appears from paragraph 20 and Exhibit 2 of the November 11, 2011 Affidavit of François Parent in support of the present Contestation;
87. There is no doubt that the Subtenants' consent to the Amended Motion is also driven by the terms of the Consents to Sublease which provide for their liability towards Cadillac for the Head Lease rent;

VI. CONCLUSIONS

88. This matter should be properly before the civil courts of Alberta between Cadillac Fairview and Statoil and/or Subtenants and Statoil;
89. The parties hereto have strategized to have these civil law issues unnecessarily and improperly adjudicated upon on an expedited and urgent basis before this Court which is also being asked to overstep the boundaries of its own jurisdiction and authority;
90. This resulting truncated process prevents Statoil from having the meaningful opportunity to advance a full and complete defence;
91. There is simply no urgency. No allegation of any urgency has been made and absolutely no shred of evidence was adduced into the Court Record to establish same;
92. Subsidiarily, it is clear that the Subleases cannot be disclaimed by HII. As a result, Statoil submits that Head Lease and Assignment cannot be disclaimed either, especially where there is no prospect of a viable compromise or arrangement being even adduced into the evidence by HII;

93. Without prejudice to the foregoing arguments, the relief sought on the merits simply cannot be granted in light of the contractual scheme between the parties and the preconditions to re-assignment not having been satisfied;
94. Subsidiarily, should this Court be inclined to grant the relief in whole or in part sought by HII, there are certainly no grounds to make such judgment executory notwithstanding appeal. No justificatory allegations have been made by HII to that effect;

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Contestation;

EXTEND *de bene esse*, Statoil Canada Ltd.'s delay to contest and seek the annulment of the Assignment Disclaimer under Section 32(2) of the CCAA and **DECLARE** *de bene esse* that Statoil Canada may validly seek to contest and annul the Assignment Disclaimer as at the date hereof;

DISMISS the Amended Motion for an Order confirming the Re-Assignment and Assignment of Certain Agreements and the Release of HII's Obligations under these Agreements dated November 11, 2011;

THE WHOLE with costs.

Montreal, this 11th day of November, 2011

(s): *Langlois Kronström Desjardins LLP*

LANGLOIS KRONSTRÖM DESJARDINS ^{L.L.P.}
Attorneys for Mise-en-cause Statoil Canada Ltd.

Superior Court (Commercial Division)
District of Montreal

**IN THE MATTER OF THE PLAN OF
COMPROMISE OR ARRANGEMENT OF:
HOMBURG INVEST INC.,**

Debtor

-and-

**THE ENTITIES LISTED IN ANNEX I AS
DEBTORS AND MISES-EN-CAUSE**

Debtors

-and-

STATOIL CANADA LTD. et als.,

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INC.**

Monitor

CONTESTATION OF STATOIL CANADA LTD. ("Statoil")

**RE: Amended Motion for an Order Confirming the Re-Assignment and
Assignment of Certain Agreements and the Release of HII's
Obligations under these Agreements (the "Amended Motion")**

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