No. S-222758
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF 0989705 B.C. LTD., ALDERBRIDGE WAY GP LTD. AND ALDERBRIDGE WAY LIMITED PARTNERSHIP

PETITIONERS

APPLICATION RESPONSE

FORM 33 (RULE 8-1(10))

Application response of: GEC (Richmond) GP Inc. and Global Education City (Richmond) Limited Partnership, (the "application respondents", and collectively "GEC").

THIS IS A RESPONSE TO the notice of application of Romspen Investment Corporation filed June 28, 2023, set for hearing at the courthouse at 800 Smithe Street, Vancouver, British Columbia on August 3 and 4, 2023 at 10:00 a.m.

PART 1: ORDERS CONSENTED TO

The application respondents consents to the granting of NONE of the orders set out in Part 1 of the notice of application.

PART 2: ORDERS OPPOSED

The application respondents opposes the granting of ALL of the orders set out in Part 1 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents takes no position on the granting of NONE of the orders set out in Part 1 of the notice of application.

PART 4: FACTUAL BASIS

1. These application respondents, GEC (Richmond) GP Inc. and Global Education City (Richmond) Limited Partnership (collectively referred to herein as "**GEC**") commenced an action against Romspen Investment Corporation ("**Romspen**") in Supreme Court of BC Action No. S-228019 (the "**GEC v. Romspen Action**") by means of their notice of civil claim filed October 6, 2022 ("**NoCC**")[1]. The only parties to the GEC v. Romspen Action are the two GEC entities and Romspen, none of which are under Companies' *Creditors Arrangement Act* ("**CCAA**") protection.

2. The entities that are under CCAA protection herein, being 0989705 B.C. Ltd., Alderbridge Way GP Ltd. and Alderbridge Way Limited Partnership (the "**Developers**"), are not parties to the GEC v. Romspen Action. Neither GEC nor Romspen seek any relief against the Developers, or any party under CCAA protection, in the GEC v. Romspen Action.

3. In the GEC v. Romspen Action, GEC seeks the following relief against Romspen, *inter alia,* at Part 2 of the NoCC:

   (a) A declaration that GEC has priority for the amounts owing under its Form B mortgage over any and all amounts owing by the Developers to Romspen for advances made by Romspen prior to the date of the CCAA initial order (as per the NoCC, this is *not* based on any provision of the CCAA; rather, it is based on the *Land Title Act* combined with breach of contract or, in the alternative, the doctrine of equitable subordination);

   (b) In the alternative, damages in the amount of funds GEC advanced to the Developers or any of them;

   (c) Further, or in the alternative, general damages; and

   (d) Aggravated and punitive damages.

[1] The same defined terms are used in this application response as set out in the NoCC, unless otherwise indicated.

4. Very briefly stated, GEC seeks the above relief on the following basis:

   (a) GEC has priority over Rompsen under s. 22 of the *Land Title Act* (GEC filed its mortgage first in time, before Romspen filed), subject to a binding priority agreement to the contrary [see NoCC Part 3, paras. 2 – 9, *inter alia*];

   (b) Romspen cannot rely upon the GEC / Romspen Priority Agreement as constituting such a binding priority agreement due to Romspen's own wrongdoing. Specifically:

      (i) Romspen failed to provide consideration and/or satisfy a condition precedent to the GEC /Romspen Priority Agreement, which was to *actually provide the funding that it had committed to provide* (a minimum of $212,000,000) [NoCC Part 3, paras. 2 – 9, *inter alia*];

      (ii) Further, or in the alternative, Romspen's failure to honour its lending commitment (a minimum of $212,000,000) was a substantial and repudiatory breach of contract in the circumstances [NoCC Part 3, paras. 2 – 14, *inter alia*];

   (c) Further, or in the alternative, this court can and should grant the declaratory relief sought with respect to priority on the under the doctrine of equitable subordination [NoCC Part 3 paras. 15 – 16, *inter alia*]

   (d) Romspen is liable to GEC for damages for its wrongdoing under either breach of contract or under tort law (the tort of unlawful means) [NoCC Part 3, paras. 14 and 17 – 18, *inter alia*].

5. GEC does not rely upon any provision of the CCAA in support of its positions in the NoCC.

6. Very briefly put, GEC makes the following factual allegations in its NoCC:

   (a) *GEC advanced $60 million*: GEC advanced $60 million to the Developers, which amount was secured by a mortgage (the "**GEC Mortgage**"). GEC holds an option to purchase the GEC Air Space Parcels. GEC planned to utilize the GEC Air Space Parcels, upon completion, as student and commercial rental units for the purposes of earning income. [NoCC Part 1, paras. 13 - 15]

   (b) *GEC filed its mortgage security first*: on May 30, 2018, GEC filed the GEC Mortgage with the Land Title Office. As this filing pre-dates the filing of the Romspen Mortgage, GEC has priority subject to a binding priority agreement to the contrary. [NoCC Part 1, paras. 16 – 17 and Part 3, para. 2]

   (c) *Romspen committed to $212,000,000 minimum*: by agreement dated Nov. 6, 2019 (the "Romspen Credit Agreement"), Romspen agreed to provide a set amount of funding to the Developers, for a set period of time, in exchange for interest,

security and priority. The set amount of funding was $212,000,000, which was the "Lender's portion of Construction Loan Commitment Amount", and which is defined in the NoCC as the "Rompsen Lender Commitment". The set period of time was until April 30, 2022. Romspen also agreed to use commercial reasonable efforts to try to syndicate the loan above $212,000,000, up to $422,000,000. If Romspen could not syndicate the balance by March 31, 2020, then Rompsen was not required to make advances in excess of $212,000,000. [NoCC, paras. 19 – 22]

(d) *Stable, set funding is critical*: A set amount of funding, available for a set period of time, is of critical importance to a project like The Atmosphere. [NoCC, Part 3, paras. 1, 4, and 16]

(e) *Romspen required priority in exchange for its Commitment*: as a condition of this funding, Romspen required that GEC: (a) enter into a priority agreement with Romspen; and (b) covenant that it would not exercise its Option to Purchase, and not complete the purchase of the GEC Air Space Parcels, without Romspen's consent. GEC agreed to alter its priority position, as well as its contractual rights with respect to the option to purchase, in order to secure the benefit to GEC of having Romspen provide stable funding for a set period of time by means of the Romspen Lender Commitment. [NoCC paras. 23 and 28]

(f) *GEC granted priority to Romspen on the basis of its Commitment*: GEC did enter into the GEC / Romspen Priority Agreement. As a result of the Romspen Credit Agreement and the GEC / Romspen Priority Agreement: (a) Romspen committed to make available a minimum of $212,000,000 of funding, until April 30, 2022, by means of the Romspen Lender Commitment, and to use commercial reasonable efforts to syndicate the Construction Facility above $212,000,000 and up to $422,000,000 by means of the Romspen Syndication Commitment; (b) the Developers committed to use that funding to develop the Development, and give security for same; and (c) GEC agreed to relinquish its priority position and contractual rights in exchange for the Romspen Lender Commitment, as well as the Romspen Syndication Commitment, so that Romspen would in fact make available these funds, such that Developers could develop the Development, to the benefit of GEC and other stakeholders. The Romspen Credit Agreement and the GEC / Romspen Priority Agreement were components of a larger, global transaction (secure financing from Romspen in exchange for interest and security from the Developers, and priority from GEC) where each agreement was entered into on the faith of the other being executed. [NoCC, paras. 24 – 29]

(g) *Romspen abandoned the project, just four months into the construction funding, and at the start of the pandemic*: after funding four construction draws, Romspen announced that it would no longer fund the project, by means of a letter dated March 31, 2020. The letter is quoted at length at NoCC para. 31. The letter is remarkable, both for what it says, and for what it does not. It alleges no breach of contract or failing on the part of the Developers or GEC. The only party that Romspen says has been "unsuccessful", in any way, is Romspen itself. Romspen advised that: (a) COVID-19 had had dramatic effects on financial markets; (b) Romspen had been "unsuccessful" in syndicating the loan up to $422,000,000;

and therefore (c) Romspen "cannot waive the conditions for continued funding" (though it does not specify which condition it "cannot waive"), and was suspending all further draws, as the capital necessary to complete the project "may not be available". [NoCC, paras. 30 – 31]

(h) *Romspen played favourites with its projects – and The Atmosphere was not one of its favourites*: what Romspen did not disclose in its March 31, 2020 Letter was that Romspen had decided to proceed with some projects, being its most favoured projects, and would relinquish its commitments on the others, in order to preserve its own liquidity while still advancing its most favoured projects – and that the The Atmosphere was not one of these most favoured projects. Contrary to Romspen's assertions in the March 31, 2020 Letter that it "cannot" proceed with further funding, Romspen had funds and investors available in that period but chose to put them into other projects, including Talara Apartments in Toronto, the Landmark in White Rock, and the Lakeland project in Tennessee, among others. In fact, Romspen's revenue went *up* in 2020, and it announced a "record funding year" at the end of 2021, with $1.4 billion in funded mortgage transactions. [NoCC, paras. 32 – 34]

(i) *Romspen's cessation of funding put the project into a crisis from which it has not recovered:* What occurred thereafter is the foreseeable result of a cessation of construction funding mid-stream, at a time when the physical state of the project was a large hole in the ground, with slab on grade not yet achieved, and significant interest payments mounting. Liens were filed; permits with the City lapsed; and the Developers ultimately sought protection under the CCAA. [NoCC, para. 35]

7. The NoCC states at paras. 33 and 39:

> 33. Romspen had funds available to meet the Romspen Lender Commitment. Further, it had investors available who were willing to invest for syndication purposes. Romspen chose to use those funds, and those investors, in other projects instead of the Development, and breached the Romspen Credit Agreement, using the COVID-19 pandemic as a pretext.
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> ...
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> 39. Romspen made a decision to target this Development for a revocation of funding, notwithstanding the Romspen Lender Commitment, and other commitments in the Romspen Credit Agreement, and target other projects for funding and syndication instead, as set out in paragraphs 31 – 33, above.

8. In its response to civil claim ("RtCC"), Romspen denies the allegations at length, and in detail. The factual issues in the GEC v. Romspen Action have been fully joined in the pleadings. By way of one example only, Romspen denies having committed any breach of the Romspen Credit Agreement [see, e.g., RtCC, para. 55]. There are not only signficant factual disputes, but also major issues of credibility.

9. Romspen also seeks relief against GEC in the GEC v. Romspen Action. On November 18, 2022, Romspen filed a Counterclaim in the GEC v. Romspen Action seeking damages against GEC.

10. GEC's claims could be as high as, or possibly even in excess of, $60,000,000 plus aggravated and punitive damages. This is not, in any way, a case that lends itself to a summary procedure.

11. In terms of the status of the GEC v. Romspen Action:

    (a) Pleadings have closed;

    (b) GEC has served an appointment to examine a representative of Romspen on September 8, 2023;

    (c) GEC is finalizing its list of documents and will serve same before this hearing (Romspen is refusing to provide its list, on the basis of this application); and

    (d) Trial is set for four weeks starting January 29, 2024.

12. In terms of the CCAA process, the Developers do not have any employees. The focus of the CCAA proceedings has been to obtain a sale of the Developers' real property through a SISP process. The first SISP process ended in failure. The present hope is that, if the building permit for the project can be renewed with the City of Richmond, then a new SISP process could be launched that will hopefully lead to a sale at some point in 2024.

PART 5: LEGAL BASIS

13. In Part 3 (LEGAL BASIS) of its notice of application, Romspen relies essentially on three propositions in support of its position that the GEC v. Romspen Action should be tried "in the context of the within CCAA proceedings". Specifically:

    (a) S. 11 CCAA;

    (b) S. 20 CCAA;

    (c) The single proceeding model.

14. As applicant, the burden is on Romspen. Romspen errs in their application of all three of those points. We will address each in turn, after addressing a preliminary point.

Preliminary point: no application has been brought in the GEC v. Romspen Action

15. By way of preliminary comment, no application has been brought by Romspen in the GEC v. Romspen Action, in which Romspen has participated substantively. Of note, no stay of proceedings application has been brought in the GEC v. Romspen Action. Unless and until such a stay is granted, on an application in that action, GEC has every right to continue to pursue its claims in the GEC v. Romspen action.

16. More generally, matters such as the style of cause in the GEC v. Romspen Action, and the procedural rights available to the parties in the GEC v. Romspen Action, cannot be affected on this application. Romspen has only invoked this court's powers with respect to this CCAA proceeding. The orders for stays of proceedings that are referenced in the CCAA are specific to the debtor company (see s. 11.02).

Section 11 CCAA is not engaged in the GEC v. Romspen Action

17. In *US Steel,* 2016 ONCA 662 ["*US* Steel"] at para. 80 – 81 the Ontario Court of Appeal read in the words "*in furtherance of the purposes of this act*" into the phrase "make any order it considers appropriate" in s. 11 CCAA. Specifically, the court held that the words "make any order it considers appropriate" in s. 11 must be read as "may ... *in furtherance of the purposes of this act,* make any order it considers appropriate". This

approach is consistent with the case law on s. 11 generally. The key purpose of the CCAA, of course, is to avoid the devastating social and economic effects of bankruptcy while an attempt is made to reorganize the affairs of the debtor.

> See, e.g., *Ted Leroy Trucking (Century Services) Ltd., Re,* 2010 SCC 60 ["*Century Services*"] per Deschamps J. for the majority, at paras. 15 – 18, 59 and 70 – 71

18. The focus of this CCAA proceeding is a sale process being conducted under the CCAA. The fact that GEC is suing Romspen, and Romspen is counterclaiming against GEC, does not impact the prospects for the sale of the property, prejudice other stakeholders, or impair the CCAA proceedings in any way.

19. At para. 16 of its notice of application, Romspen relies upon the decision of the Ontario Superior Court chambers judge, Wilson-Siegel J., in *US Steel* for the proposition that inter-creditor claims can be determined in the context of CCAA proceedings, if such determination is likely to further the remedial purpose of the CCAA. In fact, while the ONCA affirmed in the result, it did not endorse this proposition. To the contrary, the ONCA held as follows in *US Steel*:

> 82 There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement. [emphasis added]

> See also *US Steel* at para. 59;
> *Pacific Coastal Airlines v. Air Canada,* 2001 BCSC 1721 at para. 24;
> *Green Growth Brands Inc., Re.,* 2020 ONSC 3565 at paras. 35 – 36

20. The result in *US Steel* is, of course, consistent with the guidance from the Supreme Court of Canada in *Century Services*, where Deschamps J. held for the majority at para. 1 that "the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally." Deschamps J. continued at para. 15:

> ...the purpose of the CCAA — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

See also: *Montreal (Ville) v. Restructuration Deloitte,* 2021 SCC 53 at para. 44;
Canada v. Canada North Group Inc., 2021 SCC 30 ["*Canada* North"] at paras. 19 – 21;
Blue Range Resource Corp., Re, 2000 ABCA 239 at para. 7

21. After referencing the CCAA's roots in the Great Depression at para. 15, Deschamps continued in *Century Services* at para. 18:

> Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (ibid., at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation. [emphasis added]
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> ...
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> [19] ...Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives [emphasis added]

22. None of these concerns apply in the present CCAA proceeding.

23. At para. 59 of *Century Services*, Deschamps J. cites this passage from Doherty JA[2] as an example of the remedial purpose of the CCAA:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made. [emphasis added]

See also *Quintette Coal Ltd. v. Nippon Steel* (1990), 2 C.B.R. (3d) 303, 1990 CarswellBC 384 (BCCA) at paras. 8 – 11 and 17; and
Cliffs Over Maple Bay Investments v. Fisgard, 2008 BCCA 327 at paras. 27 – 29

24. Similarly, in *Canada North,* Justices Cote, Wagner CJC and Kasirer focused at paras. 19 – 21 on the survival and re-emergence of the debtor company "as a going concern" as a key purpose of the CCAA.

25. Again, none of these concerns apply in the present CCAA proceeding.

26. Deschamps J. continued for the majority at para. 70:

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

See also *Century Services* at para. 71

27. None of the above applies here. The whole CCAA effort with respect to The Atmosphere is aimed at liquidation – i.e., selling the property. While "liquidating CCAA proceedings" can be a legitimate use of the statute (see, e.g., *Canada North* at para. 73), the facts of this proceeding do not engage the above-referenced concerns. There does not appear to be a plan for a successful reorganization and re-emergence of the entities in CCAA (i.e., the Developers). In any event, the Developers have no employees, and thus there are no jobs to save. The Developers are not supplying goods or services crucial to the health of the economy. The Developers have no on-going operations. Nothing that GEC is doing by pursuing its claims in the GEC v. Romspen Action, and nothing that Romspen is doing by pursuing its counterclaim therein, hinders the CCAA liquidation process (and GEC is clear in its notice of civil claim that it is seeking priority only with respect to Romspen's pre-CCAA advances).

28. Romspen proposes to turn this liquidation-oriented CCAA proceeding into a *litigation forum* under the guise of a CCAA proceeding. It should be inferred it seeks to do so because it believes it will obtain a tactical litigation advantage, such as avoiding a trial. With respect, that has nothing to do with the remedial purposes of the CCAA that underlie s. 11. Rather than furthering the objectives of the CCAA, what Romspen

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[2] The quotation is from *Nova Metal v. Comiskey* (1990), 41 O.A.C. 282 (ONCA) at para. 57.

proposes would dramatically complicate and delay this CCAA process. Further, there is already a forum for litigation, which GEC and Romspen have each invoked in the GEC v. Romspen Action by means of GEC's notice of civil claim and Romspen's counterclaim: the Supreme Court acting under its general superior court jurisdiction.

Section 20 CCAA has no application to the GEC v. Romspen Action

29. At Part 3, para. 15 of its notice of application, Romspen relies upon s. 20 of the CCAA.

30. The opening words of s. 20 make clear that this provision is limited to being "[f]or to the purposes of [the CCAA]". Section 20 does not relate to breach of contract claims of one creditor against another.

31. Section 20 is found in Part III of the CCAA, under the heading "Claims". Section 19(1) makes clear that the claims at issue are claims that relate to debts or liabilities of the debtor company – not debts or liabilities of a different party such as Romspen based on contractual arrangements Romspen has with other parties.

32. Section 20 relates to a proof of claim-style process. The s. 20 process entails the proposed creditor presenting a claim to the debtor, The debtor reviews the claim and admits or denies it. If the debtor admits the claim, it is proven. If the debtor denies the claim, either the creditor or debtor may apply to court for a determination.

Roman Catholic Episcopal Corp. of St. John's, 2023 NLSC 5, at para. 65

33. None of this has anything to do with the claims in the GEC v. Romspen Action. Rather, s. 20 addresses *claims against the entities in CCAA*. Neither Romspen nor GEC are CCAA debtors. The CCAA is not a process for the determination of GEC's claims against Romspen, nor for Romspen's counterclaim against GEC.

34. Equally, s. 20 is clear in its wording that it is addressing claims of unsecured and secured creditors against the debtor company. Section 20 provides that "[f]or the purposes of this Act", the amount "represented" by a claim of any secured creditor against a debtor company is to be determined as follows: if the debtor company is not subject to pending proceedings under the WURA or the BIA then "the amount is to be determined by the court on summary application by the company or the creditor."

35. Accordingly, s. 20 has nothing to do with the GEC v. Romspen Action. GEC is not making claims against the CCAA-protected entities (i.e., the Developers) in its notice of civil claim. Equally, Romspen is not making claims against them in its counterclaim. The fact that a different process might have been valid, if these parties were pursuing different relief against different parties, is of no moment.

Single proceeding model of resolving insolvency disputes is not engaged in the GEC v. Romspen Action

36. Romspen asserts at para. 17 of its notice of application that the determination of these claims "in the context of CCAA proceedings" would be consistent with the single proceedings model of resolving insolvency disputes. With respect, the single proceedings model has no application to GEC's claims against Romspen, nor Romspen's counterclaim against GEC.

37. GEC's action against Romspen involves one solvent entity (GEC) suing another (Romspen), with Romspen counterclaiming. No party to this action is under CCAA protection. No relief is sought against the entities under CCAA protection (i.e., the Developers). The only link to the CCAA proceedings is that it is part of the factual matrix and, if there is a sale of The Atmosphere property, then the possibility that GEC may apply to have some portion of the sale proceeds held in court or in trust pending the resolution of the GEC v. Romspen Action. That application should be dealt with as and when it arises, on the facts that prevail at that time.

38. Essentially, Romspen's argument is to the effect that, in any case where a CCAA proceeding forms part of the factual matrix, and the parties are participating in that CCAA process, then the single proceeding model mandates that the CCAA judge take control over the contested litigation. That is, of course, a gross misreading and overinterpretation of the caselaw on the single proceeding model. The correct statement of the single proceeding model is that all claims *against the debtor and the debtor's property* should be addressed in a single proceeding.

39. The "single control" paradigm was established in *Stewart v. LePage* (1916), 69 D.L.R. 689 ["*Stewart*"].

Sam Levy v. Azco; Eagle River, Re, 2001 SCC 92 ["*Sam Levy*"] at para. 80

40. In *Stewart,* the Supreme Court of Canada addressed a situation where the company was in liquidation proceedings under the then-equivalent of the WURA. The WURA liquidation proceedings were in the BC Supreme Court. The plaintiffs sued in PEI for an order that certain property in the hands of the liquidator was in fact held in trust for them. Anglin J. held that, notwithstanding that PEI did appear to be the more convenient forum, the plaintiffs were nonetheless required to first seek the leave of the Supreme Court of BC, as the court charged with the liquidation, for the transfer of the dispute to PEI. In the passage that has been cited as the start of the single proceeding model, Anglin J. held:

> 55 No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases. [emphasis added]

Stewart, paras. 53 – 55; Sam *Levy,* at para. 26

41. In the GEC v. Romspen Action, neither GEC in its NoCC, nor Romspen in its counterclaim, seek any relief against the entities in CCAA protection or their assets and property. The debtors are not parties to the action.

42. In concurring reasons, Idington J. also focused at para. 33 on the need for a single control over the ascertainment of the debtor's assets as the rationale for the single control system He wrote: "The ascertainment of the assets distributable amongst the creditors, so far as unsecured, is part of the duty of the liquidator under the direction of the court. He cannot do that efficiently if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation." [emphasis added]

43. GEC's claim does not affect the ascertainment of the debtors' assets distributable among the creditors.

44. Gonthier J.'s oft-quoted statement for the majority in *Husky Oil Operations v. MNR*, [1995] 3 S.C.R. 453 at para. 7 is instructive:

> 7 At the outset, it is useful to remember that our bankruptcy system serves two distinct goals. The first is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se*. As one commentator has noted (Aleck Dadson, "Comment" (1986) 64 Can. Bar Rev. 755, at p. 755):
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> > [b]ankruptcy serves this goal by replacing a regime of individual action with a regime of collective action. While the pre-bankruptcy regime of individual action allows creditors to pursue their separate and competing claims to the debtor's assets, bankruptcy's regime of collective action sorts out those diverse claims and deals with the debtor's assets in a way which brings benefits to creditors as a group (reduced costs, increased recovery) ... The collectivization of insolvency proceedings can only be achieved by denying to creditors the use of pre-bankruptcy remedies.
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> .... The second goal of the bankruptcy system is the financial rehabilitation of insolvent individuals (Dadson, at p. 755). This goal is furthered through the opportunity for an insolvent individual's discharge from outstanding debts. [emphasis added throughout]

45. In its action against Romspen, GEC does not make any claim against the assets of the entities under CCAA protection.

46. In *Century Services,* Deschamps J. for the majority adopted as an accurate statement, at para. 22, Prof. Wood's description of the nature and purpose of the single proceeding model, as follows:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [emphasis added]

47. Deschamps J. for the majority continued at para 22:

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding

> controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the CCAA and the BIA allow a court to order all actions against a debtor to be stayed while a compromise is sought. [emphasis added]

48. Romspen relies upon paras. 54 – 55 of *Peace River v. Petrowest Corp.,* 2022 SCC 41 ["*Petrowest*"] in support of its position on the single proceedings model. However, *Petrowest* expressly references the above passages from *Century Services,* and there is nothing in *Petrowest* that says that the single proceeding model applies to a case where one solvent entity makes a claim against another solvent entity, such that none of the parties to the action are under CCAA protection.

49. In other words, the Supreme Court of Canada has been clear in holding that the single proceeding model is debtor-focused. It aims to avoid a "free-for-all" or "race to the courthouse", in which creditors each pursue their separate and competing claims against the debtor and to the debtor's assets as quickly as possible in the hopes of beating the creditors to the punch. None of which has anything to do with GEC's claims against Romspen, and Romspen's counterclaim against GEC. Neither GEC nor Romspen are under CCAA protection (or any insolvency protection). None of this provides any justification for Romspen's attempt to divert the GEC v. Romspen Action to a proceeding under the CCAA.

Attempting to resolve the GEC v. Romspen Action within the CCAA proceeding is not practical nor even possible

50. Romspen seeks an order that the GEC Action be tried, along with the "Related Actions", "in the context of the within CCAA proceedings".

51. This begs the question: What does Romspen mean by "in the context of"? With respect, the phrase "in the context of" is sufficiently vague and imprecise that it should not form part of any order of this court.

52. One can only presume that, in reality, Romspen is asking the court to order that the issues in the GEC v. Romspen Action *be litigated in the CCAA proceedings*, S-222758, rather than in the GEC v. Romspen Action itself, S-228019.

53. Romspen points to no authority where anything like this has occurred.

54. Such an approach is entirely impractical. The trial in the GEC v. Romspen Action is set for 19 days, which is a reasonable time estimate. It will be a large, contentious and time-consuming proceeding. The many parties that are involved or will be involved in the CCAA proceedings – ranging from potential bidders, to GBL Architects, to the City of Richmond, and others – do not need to be involved in litigating the GEC v. Romspen Action, and should not have their CCAA process overwhelmed by this litigation process.

55. Further, and in any event, it is not possible to resolve the issues raised and provide the relief claimed in the GEC v. Romspen Action in the CCAA proceeding. CCAA proceedings are designed for reorganizations, as outlined above. They are not designed for contested trials seeking damages, equitable subordination, and the like among two parties that are not debtor companies.

56. GEC seeks an award of general damages, as well as aggravated and punitive damages, against Romspen. This is a principal component of GEC's claims against Romspen. However, there is no provision in the CCAA that provides for an award of damages. Romspen points to no judicial authority where a court operating in CCAA proceedings has ordered damages payable by one company that is not under CCAA protection to another company that is not under CCAA protection. The CCAA was not designed for this.

57. GEC also seeks a declaration that GEC has priority over amounts owing to Romspen for advances Romspen made pre-CCAA. This is principally on the basis that GEC filed its mortgage security prior to Romspen and thus has priority under s. 22 of the *Land Title Act,* subject to a binding priority agreement to the contrary. For the reasons outlined in Part 3, paras. 2 – 14 of GEC's NoCC, Romspen is not able to rely upon the GEC / Romspen Priority Agreement, and GEC has priority. These arguments fundamentally

relate to the law of contracts. However, GEC also pleads in the alternative that this court can and should grant the declaratory relief sought with respect to priority under the doctrine of equitable subordination.

58. In *US Steel,* the ONCA held that equitable subordination does not fall within the language of the CCAA, and "[n]or does it fall within the scheme of the statute, which focuses on the implementation of a plan of arrangement or compromise." The ONCA noted in this respect that there is no equivalent to BIA s. 183(1) in the CCAA, and concluded as follows:

> 104 There is no provision in the CCAA equivalent to s. 183 of the BIA or §105(a) of the U.S. Bankruptcy Code. Section 183 invests the bankruptcy court with "such jurisdiction at law and in equity" as will enable it to exercise its bankruptcy jurisdiction. This is significant, because if equitable subordination is to become a part of Canadian law, it would appear that the BIA gives the bankruptcy court explicit jurisdiction as a court of equity to ground such a remedy and a legislative purpose that is more relevant to the potential reordering of priorities.

US Steel, at paras. 27 and 100 – 104

59. Instead, the ONCA held in *US Steel* at para. 82, the court exercising its powers under the CCAA should focus on "the business at hand: the compromise or arrangement".

60. In other words, the equitable jurisdiction that would be necessary to invoke equitable subordination, if it is available in Canada (and GEC says that it is), does not exist under the CCAA.

61. In the circumstances, it would be inappropriate to pull the GEC v. Romspen Action into the CCAA proceeding. It would, *inter alia,* amount to a dismissal of significant aspects of GEC's claims under the guise of a procedural order. This would not be an appropriate order for this court to grant under the CCAA.

Similarities, differences and case management

62. GEC has commenced an action against Romspen, being the GEC v. Romspen Action. Romspen has counterclaimed. Both parties have all their procedural and substantive

rights such as are available in a superior court of justice. This court has no abilility to compromise GEC's procedural or substantive rights in the GEC v. Romspen Action by means of an application brought in a separate proceeding, being this CCAA proceeding.

63. The application to have the GEC v. Romspen Action decided "in the context of the within CCAA proceedings" must be dismissed, for the reasons above.

64. Our understanding is that *R Jay Management et al., v. Romspen,* SCBC Action No. 248773 (New Westminster) has been or will be discontinued, and thus is no longer at issue.

65. There are some similarities between the pleadings in the GEC v. Romspen Action, and the matter of *Hanson et al. v. Romspen,* SCBC Action No. S-232583 (the "**Hanson v. Romspen Action**"). There are also significant differences.

66. In terms of similarities, both the GEC plaintiffs and the Hanson plaintiffs say that they were damaged when Romspen chose to abandon The Atmosphere, and fund other projects instead, at the start of the pandemic. The issue of the impropriety or propriety of Romspen's decision on March 31, 2020, is common to both actions.

67. By contrast, the issue of equitable subordination is unique to the GEC v. Romspen Action, for example, and the issues around enforceability of guarantees play no role in the GEC v. Romspen Action.

68. Romspen has sued the Developers and their guarantors in debt and for enforcement of the guarantees. Romspen's action against the Developers raises different causes of action from the GEC v. Romspen Action, along with a number of different issues.

69. The three actions are at dramatically different stages. The GEC v. Romspen Action is 6 months pre-trial. Pleadings are closed and GEC will imminently produce its list of documents. An examination for discovery of Romspen's representative has been set. Romspen, by contrast, is dragging its feet and using this motion as an excuse. It is plain that the order sought by Romspen herein, if granted, would necessitate an adjournment of the GEC v. Romspen trial date of January 29, 2024. It is, in effect, an adjournment motion of the trial date in the GEC v. Romspen Action, in the guise of a "carriage

motion" brought in a different proceeding. If Romspen wants an adjournment of the GEC v. Romspen trial date, it needs to apply in the GEC v. Romspen Action. And Romspen needs to comply with its obligations under the Supreme Court Civil Rules.

70. Although the three actions are at different stages, there may be an ability to have them case-managed together. As previously outlined, GEC does not object to this.

Austin Affidavit, Ex. "B"

71. Having the three actions tried together is likely not possible given their dramatically different stages. Also, they raise a number of different issues. Again, no application has been brought by Romspen in the three actions to have them heard together. GEC objects to any order that would impair its procedural and substantive rights in the GEC v. Romspen Action. As set out above, there is no basis for such an order, which would be inappropriate. Also, GEC does not agree with or consent to a delay of its trial.

PART 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Barbara Olson, made July 26, 2023.

The application respondents estimate that the application will take two days.

☑ The application respondents have filed in this proceeding a document that contains the application respondents' address for service.

Date: July 26, 2023

HARPER GREY LLP
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