No. S222758
Vancouver Registry

In the Supreme Court of British Columbia

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 AND ARRANGMENT OF 0989705 B.C. LTD., ALDERBRIDGE WAY LIMITED PARTNERSHIP, AND ALDERBRIDGE WAY GP LTD.

PETITIONERS

APPLICATION RESPONSE

Application response of: 0989705 B.C. Ltd.,
Alderbridge Way Limited Partnership and
Alderbridge Way GP Ltd.
(the "**Application Respondents**")

THIS IS A RESPONSE TO the notice of application of the Applicant, Romspen Investment Corporation ("**Rompsen**").

Part 1: ORDERS CONSENTED TO

The Application Respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: **NIL**.

Part 2: ORDERS OPPOSED

The Application Respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **ALL**.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **NIL**.

Part 4: FACTUAL BASIS

Preliminary Objection

1. This application is not properly before the court. An application pursuant to section 22-5(8) seeking to have two or more separate actions heard together, must be brought simultaneously in each of the respective actions, not just one of them. The within application has only been brought in Action No. S222758, and thus this court lacks the necessary jurisdiction simpliciter to hear the application and grant the orders sought.

2. The Plaintiffs in Supreme Court Action S-232583 ("**Alderbridge Action**"), who are also Defendants in Action S-231106 ("**Romspen Action**"), and who are not parties to this proceeding but are affected by the orders sought on this application, intend to raise this preliminary objection at the outset of the hearing. Those parties are Gatland Development Corporation; REV Holdings Ltd., REV Investments Inc.; South Street Development Managers Ltd; South Street (Alderbridge) Limited Partnership; Samuel David Hanson and Brent Taylor Hanson (collectively, the "**Guarantors**").

3. Should the application proceed after the preliminary objection is heard, the Application Respondents maintain that the application ought to be dismissed on its merits.

4. It is the Application Respondent's position that the orders sought by Romspen would defeat the overriding purpose of the CCAA and are designed to deny the Application Respondents and the Guarantors their rights to natural justice and a fair hearing of the Alderbridge and Romspen Actions on their merits, and to circumvent Practice Direction #4 in an effort to have Romspen's preferred judge appointed case management and trial judge.

The Initial Order and the Stay

5. The Initial Order in this proceeding was pronounced on April 1, 2022, and thereafter amended and restated on April 25, 2022, and again on August 11, 2022 ("**Initial Order**").

6. The initial Order specifically contemplates that there may be actions brought by or against the Petitioner outside of these CCAA Proceedings. Paragraphs 11 and 12 establish a stay period for any such proceedings, and paragraph 13 provide for an

exception to permit separate proceedings to be commenced for the purpose of preserving a limitation period ("**Stay**").

7. The Stay has been extended multiple times and, by order dated May 31, 2023, is to remain in place until at least September 29, 2023.

8. Each of the four actions that Romspen seeks to now have brought into these CCAA proceedings were commenced as separate proceedings outside of the CCAA as contemplated by the Initial Order.

The First Inter-Creditor Dispute

9. The first action Romspen seeks to have brought into these CCAA proceedings is an action commenced by GEC (Richmond) GP Inc. and Global Education City (Richmond) Limited Partnership (collectively, "**GEC**") against Rompsen seeking damages and other relief related to the circumstances in which GEC agreed to postpone its secured debt to Romspen's ("**GEC Postponement Agreement**"). The allegations involve breaches of the express and implied terms of that agreement, and allegations that Romspen engaged in conduct that would invoke the doctrine of equitable subordination and attract damages under the tort of unlawful means as well as aggravated and punitive damages ("**First Inter-Creditor Dispute**").

10. Neither the Debtor companies nor the Guarantors are party to that action or to the GEC Postponement Agreement at issue therein. The Alderbridge parties have no involvement in the matters in issue in that dispute. Those matters are "res inter alios acta"; the principle behind that maxim is that a contract made by others cannot affect the rights of a non-party to the agreement.

Thom Affidavit at para 9
*Affidavit #1 of Jennifer Alambre, made March 31, 2022 ("**Alambre Affidavit**") at Ex. H*

11. In its Notice of Application, Romspen defines the First Inter-Creditor Dispute as the "2ML Action", but it is purely an inter-creditor dispute and thus more aptly defined as such for the purposes of this application.

12. The First Inter-Creditor Dispute was commenced on October 6, 2022. Romspen filed a Response and pleadings were closed by December of 2022. Romspen filed a

Notice of Trial on March 2, 2023, setting a 19 day trial to commenced on January 24, 2024.

13. Romspen did not raise any objection to the First Inter-Creditor Dispute proceeding independently from these CCAA Proceedings until May 19, 2023, when counsel for Romspen wrote to counsel in the various actions asserting that Romspen wanted the matters heard together and wanted to have Justice Fitzpatrick appointed as the case management and trial judge in each action ("**May 19th Letter**"). The within application is the manifestation of that desire. The relevant text is:

> Our client's position is that the claims and counterclaims asserted in each of the Actions (the "Claims") are necessarily related to each other and to the CCAA Proceedings such that their timely and orderly resolution in the context of the CCAA Proceedings is required. Accordingly, we have instructions to bring an application in the CCAA Proceedings for (a) an order providing that the Claims be determined by Justice Fitzpatrick in the context of the CCAA Proceedings (the "Carriage Order"); and (b) an order establishing a litigation process for the determination of the Claims in the context of the CCAA.

*Affidavit #4 of Graham Thom, made July 26, 2023 ["**Thom Affidavit**"] at para. 14 and Exhibit C*

The Rompsen Action

14. The second action Romspen seeks to have brought into these CCAA proceedings is the action that it commenced against the Debtors and the Guarantors on February 15, 2023. The Romspen Action seeks judgment in excess of $191 million. In its notice of application Rompspen has defined the Guarantors as the "CCAA Guarantors". This definition is nothing more than a false attempt to make the Guarantors, who are ***not***, and have never been, parties to these CCAA proceedings, appear that they are parties.

15. Critically, rather than seeking to have this dispute resolved within the CCAA from the outset, Romspen expressly relied upon paragraph 13 of the Initial Order, as amended and restated, to get around the Stay and to commence its action outside of the jurisdiction of the CCAA proceedings.

16. Pursuant to paragraphs 11 and 12 of the Initial Order, the Romspen Action should be stayed but for service. However, in breach of the Initial Order, as amended and

restated, on June 27, 2022, Rompsen demanded that the Debtor and Individual Guarantors each deliver Responses.

Thom Affidavit at paras.15-16

17. At no point prior to its May 19th Letter did Romspen raise any suggestion that its action should proceed within the contexts of the CCAA.

Thom Affidavit at paras.15-16

The Second Inter-Creditor Dispute

18. The third action that Romspen seeks to have brough into these CCAA Proceedings is an action commenced by R Jay Management Ltd., MNB Enterprises Inc. Denis Schwab, Lesley Schwab, and Inland Consulting Ltd. (collectively, the "**R Jay Group**"), against Romspen seeking damages and other relief in relation to the circumstances in which the R Jay Group agreed to postpone its secured debt to Romspen's ("**R Jay Postponement Agreement**"). The allegations involve breaches of the express and implied terms of that agreement and misrepresentation, and allegations that Rompsen engaged in conduct that would invoke the doctrine of equitable subordination and attract damages for interference with economic relations as well as aggravated and punitive damages. ("**Second Inter-Creditor Dispute**").

19. Neither the Debtor companies nor the Guarantors are parties to this action or to the R Jay Postponement Agreement.

Thom Affidavit at para 11
Alambre Affidavit at Ex. G

20. In its notice of application, Romspen defined the Second Inter-Creditor Dispute as the "2ML Action", but like the dispute with GEC, this is purely an inter-creditor dispute and is more aptly defined as such.

21. The Second Inter-Creditor Dispute was commenced on March 28, 2023. At no point prior to the May 19th Letter did Romspen ever object to the Second Inter-Creditor Dispute proceeding independently from these CCAA Proceedings.

The Alderbridge Action

22. The final action that Romspen seeks to have rolled into these CCAA proceedings, and the one that caused Romspen to reconsider its overall litigation strategy, is the Alderbridge Action, which was brought by the Debtor and the Guarantors.

23. The Alderbridge Action was commenced on March 28, 2023. The Plaintiffs in that action seek damages for breach of contract, breach of the implied term of good faith, breach of the duty of honest performance, and damages pursuant to the tort of "unlawful means". They also claim equitable relief in the form of a declaration that the Guarantors are relieved from their obligations under various guarantees in favour of Romspen and punitive damages in respect of Romspen's conduct. The action turns on the interpretation of the various agreements between Romspen, the Debtor companies and the Individual Guarantors, on oral and written representations made by Romspen, and on Romspen's alleged wrongful conduct. None of GEC or the R Jay Group are parties to this action, or to the agreements at issue therein.

24. A copy of the Alderbridge Action was provided to counsel for Romspen on March 29, 2023.

25. At no point prior to its May 19 Letter, did Romspen object to the Alderbridge Action proceeding independently from the CCAA Proceedings.

Thom Affidavit at paras.15-16

Part 5: LEGAL BASIS

26. Romspen seeks three orders from this court:

(a) a "Carriage Order" order pursuant to section 11 of the Act requiring that each of the subject actions be determined within the context of this CCAA Proceeding with Justice Fitzpatrick appointed case management and trial judge in each action;

(b) An order pursuant to Rule 22-8(5) that each of the four actions be heard together; and

(c) an order pursuant to section 20 of the Act that each action be determined on a summary basis without a trial.

The "Carriage Order"

27. The "Carriage Order" is nothing more than an attempt by Romspen to sidestep the requirements of Practice Direction #4.

28. If Romspen truly believed that these matters should be heard together and jointly case managed, the proper procedure would have been to bring an application in regular chambers pursuant to rule 22-8(5) in each proceeding and then, if successful, to seek the early appointment of a trial judge at a case planning conference in accordance with Practice Direction #4, which provides in relevant part:

> A party or counsel wishing to make a request for the early assignment of a trial judge **must do so** in Form 19 and at the case planning conference, and **must provide an explanation** to the case planning judge or master of the specific reasons why the early assignment of a trial judge is warranted.
>
> Where the case planning judge or master is satisfied that the early assignment of a trial judge is warranted, the case planning judge or master may request **that the Chief Justice** direct the early assignment of a trial judge in the action.
>
> Where the Chief Justice directs the early assignment of a trial judge:
>
> a. The assigned judge will preside at the trial unless unavailable or disqualified;
>
> b. The assigned judge may conduct all further case planning conferences
>
> [Emphasis added]

29. A judge of this court cannot unilaterally appoint themselves as trial judge.

In order to get around the requirements of the Practice Direction, Romspen seeks to rely upon section 11 of the Act to simply have these action joined into a proceeding that is already being case managed by a specific judge. That is not the purpose of section11.

30. The court's discretion to make orders pursuant to section 11 can only be exercised in a manner that promotes the purpose of the CCAA.

US Steel Canada In (Re), 2016 ONCA 662 ["***US Steel CA***"] at paras. 80 and 81

31. As stated by our Court of Appeal in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Cord.*, 2008 BCCA 327 at paras. 27-29:

> [27] The fundamental purpose of the ***CCAA*** is expressed in the long title of the statute:
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> > "An Act to facilitate compromises and arrangements between companies and their creditors".
>
> [28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in ***Re United Used Auto & Truck Parts Ltd.***, 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is ***A.G. Can. v. A.G. Que.***(*sub. nom.* ***Reference re Companies' Creditors Arrangement Act***), 1934 CanLII 72 (SCC), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:
>
> > . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
> >
> > The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the *status quo* for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

32. The single proceeding model created by the CCAA is meant to collectivize creditors' remedies so as to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies against the debtor's assets. This was addressed by the Supreme Court of Canada in *Ted Leroy Trucking (Century Services) Ltd., Re*, 2010 SCC 60 at para. 22:

> 22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> 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. [pp. 2-3]

33. None of the four actions have any bearing on the business at hand in these proceedings. None of the four actions involve a situation in which a creditor is seeking to exercise their remedies against the Debtor's assets. The two inter-creditor disputes do not involve the Debtor at all; the Alderbridge Action is one brought by the Debtor and the Guarantors against Romspen; and the Romspen Action does not seek to enforce any creditor remedies against the Debtor. It simply seeks judgment as to the amount of the debt, if any, it is owed. Once that debt is determined, any remedies it seeks to enforce against the Debtor's assets will be collectivized with other creditor claims in these CCAA proceedings. These actions are not a "free-for-all" against the Debtors' assets.

34. Further, and contrary to the assertion at paragraph 16 of the Notice of Application, there is **no** authority under section 11 to order that inter-creditor disputes, or any other substantive disputes, be determined in the context of the CCAA. Specifically, in *US Steel CA*, the court states:

> [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]

35. In the alternative, if this court finds that these actions do have a bearing on the compromise or arrangement at issue, which is denied, this is still not a situation in which the court can properly exercise any discretion.

36. The matters in dispute in the actions each involve their own complex factual matrices that are unique and nuanced in each action. They involve allegations of:

(a) breaches of various different contracts and promises related to the funding obligations of Romspen. Not only are the words of each contract different,

but the relevant factual matrix known to the parties in one case is irrelevant for the purposes of the next. Specifically, the First Inter Creditor Dispute involves allegations in respect of the interpretation of the GEC Postponement Agreement and the Second Inter-Creditor Dispute involves allegations in respect of the interpretation of the R Jay Postponement Agreement, while the Alderbridge and Romspen Actions involve allegation in respect of commitment letters, loan agreements, promises and guarantees entered into between Romspen, the Debtor companies and the Guarantor. Other than Romspen, the parties to each agreement are different and each was negotiated and agreed to at a different time within a different factual matrix;

(b) intentional and deceitful conduct by way of the tort of "unlawful means". What constitutes "unlawful means" will be dependant upon the unique circumstances that occurred in each case, including the representations made to induce each contract and the express and implied terms found therein;

(c) breaches of various common law and equitable duties, such as the equitable doctrine of subordination, which have no application in either the Alderbridge or Romspen Actions; and

(d) allegations of bad faith and breach of the duty of honest performance, which are dependant upon the unique circumstances of each case.

37. Each case will have its own separate set of facts, with the Romspen and Alderbridge Actions being heavily reliant upon *viva voce* testimony including cross examination of certain of officers and directors of Romspen, not to mention evidence relating to the third parties that received funding after Romspen's announcement that it was justified in ceasing to fund the Alderbridge project.

Thom Affidavit at para. 8

38. Document production in the two actions involving the Alderbridge parties alone will likely be in the range of ten thousand pages, and it is expected that court assistance will be required to obtain production of many documents relating to Romspen's intentional

conduct. Once document production is complete, those documents need to be reviewed and understood so that discoveries, and ultimately the trial, can be conducted in an effective and efficient manner.

Thom Affidavit at para. 7

39. At this early stage, it is difficult to estimate the length of trial, but it is anticipated that the Alderbrdge Action will require several weeks. To simply deal with the alleged impact of COVID-19 fears on the capital markets as early as March 31, 2021. This estimate does not take into account the time and complexity that will be involved in obtaining and dealing with vast amounts of expert evidence relating to the issues of damages and the expenses of attempts at mitigation.

40. The pretext for bringing these four disparate actions into this one proceeding clearly would not meet the goals of the CCAA; to the contrary, it would be a recipe for chaos that will delay these proceedings, and each action, for years. Introducing significant delay and uncertainty into a CCAA proceeding defeats the purpose of the Act.

41. As stated by the Supreme Court of Canada in *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at paragraphs 39 and 40:

> [39] The CCAA is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("WURA"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (WURA, s. 6(1)). While both the CCAA and the BIA enable reorganizations of insolvent companies, access to the CCAA is restricted to debtor companies facing total claims in excess of $5 million (CCAA, s. 3(1)).
>
> [40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: **providing for timely, efficient and impartial resolution of a debtor's insolvency;** preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum:

> Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., Annual Review of Insolvency Law 2016 (2017), 9, at pp. 9-10; J. P. Sarra, Rescue! The Companies' Creditors Arrangement Act (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at pp. 9-10; R. J. Wood, Bankruptcy and Insolvency Law (2nd ed. 2015), at pp. 4-5).
>
> [emphasis added]

A proceeding under the CCAA is not intended as a forum for the litigation of complex factual and legal disputes between guarantors and lenders, especially where certain of those claims, specifically the ones made against Romspen, are not even subject to compromised under the Act. Disputes like this, requiring intense investigations, protracted discovery, third party witnesses, findings of credibility and the application of relatively new and still evolving legal theories of implied contractual obligations giving rise to actionable damage claims or defences are antithetical to the purpose for which the CCAA exists. As such, the "Carriage Order" ought to be dismissed.

The Joinder Order

42. If the Carriage Order is not dismissed, there is still no basis to order that these four actions be heard together. Firstly, they are at significantly different stages, with the GEC Action set for a 19 day trial starting January 29, 2024, and the other three still in their infancy. An order requiring them to be heard together would mean the GEC Action would be derailed and delayed for at least a year, if not more, while the other actions are made ready for trial..

43. More importantly however, other than the fact that Rompsen is the alleged wrongdoer in each of these actions, there is insufficient commonality between them to warrant such an order.

44. The applicable test for joinder was set out in *Hui v. Hoa*, 2012 BCSC 1045 at paragraphs 33 to 35:

> [33] The law with respect to when two proceedings should be tried together was helpfully summarized by Master Shaw in *Egan v. ICBC*, 2010 BCSC 1042. Briefly, there are two questions which must be answered. The first involves considering whether the two proceedings involve common

claims, disputes and relationships. As set out in *Merritt v. Imasco Enterprises Inc.*, (1992) 2 C.P.C. (3d) 275, that determination is made on a review of the pleadings.

[34] The second question is whether the two proceedings are so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and expense. This question involves considering a number of factors including whether trial together will:

a) create a saving in pre-trial procedures;

b) reduce the number of trial days;

c) seriously inconvenience a party by being required to attend part of a joined proceeding in which they may have little or no interest;

[35] Other factors to be considered are whether:

a) one of the proceedings is at a more advanced stage than the other;

b) trial together will result in a delay of the trial of one of the proceedings and the prejudice of that delay outweighing the potential benefits of trial together;

c) there is a risk of inconsistent findings on identical issues; and

d) one party might be deprived of their right to a jury trial.

45. The test is not met in this case. The issues in the First and Second Inter-Creditor Disputes relates to the interpretation of two different postponement agreements. Neither the Debtor nor the Individual Guarantors are parties to those Actions ***or those contracts***. The result of those action will turn on the specific factual matrix known to those specific parties when those agreement were negotiated. No finding in those cases will have any bearing on the interpretation or application of the Agreements at issue in the Romspen or the Alderbridge Actions.

46. The contracts at issue in the Romspen and the Alderbridge Actions are entirely different. Neither GEC nor the R Jay Group are parties to these actions ***or the contracts*** at issue therein. The interpretation of the contracts between Alderbrige and Romspen will be interpreted based upon the specific factual matrix know to those specific parties at the time they were negotiated.

47. While the Agreements between Romspen and Alderbridge may be in evidence in the Inter-Creditor Disputes, the court in those actions will not be, and could not be, called upon to make any findings relating to how they must be interpretated *vis-à-vis* Rompsen, the Debtor companies and the Guarantors. In those actions, these agreements will simply exist as part of the factual matrix. As such, there is no risk of inconsistent findings.

48. Ordering that these actions proceed and be heard together will only serve to cause delay and added expense for the parties that will be forced to sit through lengthy discovery, trial testimony, and argument that has no relevance to their dispute. As such, the test for joinder is not met.

The Summary Determination Order

49. If the Carriage Order is issued, Romspen takes the position that, pursuant to section 20 of the Act, each of the four actions, including the Romspen Action and the Alderbridge Action, must be determined on a summary basis without a trial.

50. Section 20 does not give the court jurisdiction to determine any of these actions on a summary basis, however, even if it did, this is not the circumstances in which such an order ought to be made.

51. Section 20 states, in relevant part:

> **Determination of amount of claims**
>
> 20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:
>
> ...
>
> (b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, **but the amount if not admitted by the company is,** in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor. [Emphasis added]

52. Firstly, for section 20(b) to have any application, the Debtor must first refuse to admit the amount of the claim of the secured creditor. This has not yet happened and cannot happen until a claim process order has been issued by this court. Until that time, there is no manner in which a court can assess whether a claim should be allowed in the amount sought or not. As such, the conditions of section 20 have not been met in this case.

53. However, even if the conditions of section 20 had been met, the court will only exercise its discretion to order a summary determination of the amount of a secured creditor's claim where it would be just to do so in the circumstances.

54. Indeed, as stated by Justice Fitzpatrick in *Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 709 ["***Walter*** Energy"] at paragraphs 22 to 25:

> [22] In *Coast Capital Savings Credit Union v. The Symphony Development Corp.*, 2011 BCSC 333 at paras. 23-27, the Court referred to a "principled" approach to the determination of claims, albeit in a receivership context, which respected the summary claims process while also ensuring that the claim was adjudicated in a just manner.
>
> [23] Accordingly, although the CCAA requires that, presumptively, claims be determined on a summary basis, the court has the discretion to order another procedure where it is appropriate. That other procedure may, but will not usually, involve a full trial procedure. One possible approach is to conduct a hybrid hearing, such as occurred here.
>
> [24] Needless to say, the exercise of the court's discretion will be guided by the statutory objectives of the CCAA toward a timely and inexpensive resolution of claims and distribution to creditors, while also ensuring that the determination of claims is made in a manner that is just and fair to all the stakeholders, including the debtor company, the claimant and other creditors: 0487826 B.C. Ltd. (Re), 2012 BCSC 1501 at para. 38. These objectives are consistent with Rule 1-3(1) which states that the object of the Rules is to secure the "just, speedy and inexpensive determination of every proceeding on its merits". These objectives are also consistent with the Supreme Court of Canada's recent exhortation to the legal profession and the courts to embrace more summary forms of adjudication where appropriate, as found in *Hryniak v. Mauldin*, 2014 SCC 7.
>
> [25] In exercising the court's discretion to move beyond a pure summary determination in accordance with s. 20 of the *CCAA*, factors to be considered by the court will vary from case to case depending on the

> circumstances, but may include: the nature and complexity of the claim or issues arising; the amount in issue; the nature of the evidence (including whether credibility is in issue); the importance of the claim to the creditor and the estate; the cost and delay of further procedures; and what prejudice, if any, may arise from a summary hearing.

55. As described above, these actions are factually complex, they involve issues of credibility, they involve individuals and entities that are non-parties to the CCAA Proceeding, they involve debts that are not alleged to be owing by the Debtor company and they seek other relief that does not come within the definition of a "claim" under the Act. In addition, the proper and fair determination of these issues are extremely important to Rompsen, the Debtor companies and the Individual Guarantors.

56. The consistent jurisprudence under the Supreme Court Rules relating to any "summary" proceedings i.e. summary judgments or summary trials, requires not only procedural fairness, but also guarantees the procedural right to a full and fair trial unless there is no *bona fide* issue to be tried.

57. The pleadings in these actions are replete with *bona fide* triable issues, including issues of credibility, liability, and assessment of damages that go directly to the issues of the entitlement and quantum of damages for breach of contract, the tort of unlawful means, the right of set-off, etc. These are patently complex factual and legal issues that from today's perspective require nothing less than a full trial after discoveries, both oral and documentary, have occurred, and there has been an opportunity to obtain the testimony of, and documents from, non-party witnesses including from entities to which Romspen chose to divert funds intended for the Debtors' development.

58. The unlawful interference with economic relations otherwise known as the "unlawful means" tort explained by the Supreme Court of Canada in ***Bram v. A.I. Enterprises***, 2014 SCC 12 is a direct cause of action for damages available to the Guarantors. The gist of the tort is provided in the headnote as follows:

> The tort of unlawful interference with economic relations has also been referred to as "interference with a trade or business by unlawful means", "intentional interference with economic relations", "causing loss by unlawful means" or simply as the "unlawful means" tort. The unlawful means tort is an intentional tort which creates a type of "parasitic" liability in a three party

situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party.

59. Simply put, Romspen's action or the Alderbridge NOCC cannot be managed or determined on a summary basis under s. 20 of the *Act*. To do so is to attempt to fit the proverbial square peg in a round hole.

Scheduling

60. If this court does determine that the four actions should be case managed within this CCAA proceeding, and that an order pursuant to section 20 may be available, the schedule proposed by the Romspen is unworkable and unfair.

61. When the time come for Romspen to bring its application for a summary determination pursuant to section 20 of the Act, it is the Application Respondent's burden to show why a summary disposition is unsuitable

Walter Energy at para 29

62. In order to do that, the court will consider the same factors as would be considered pursuant to Rule 9-7.

Walter Energy at para 14

63. For the parties in the Alderbridge and Romspen Actions to be in a position to discharge that burden, there must be, at a minimum, disclosure of documents, examinations for discovery, examinations of relevant third-party witnesses, and exchange of expert reports on damages and mitigation.

64. There are literally thousands of documents that are potentially relevant to the issues in the Alderbridge Action that could affect the issue of liability of the Guarantors.

Thom Affidavit at paras. 7

65. There is no realistic prospect that the action between Romspen and the Guarantors could be ready for such an application, let alone a full-blown trial, in less than 18 months, if not more. Without the production of a single document, a Response to Alderbridge's notice of civil claim, or a single sworn statement from Romspen in relation to either of these two actions, it is inconceivable that anyone could make a realistic assessment of the potential length of time it could take to be ready.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #4 of Graham Thom, made July 26, 2023;

2. Affidavit #1 of Jennifer Alambre, made March 31, 2022;

3. such further and other materials as counsel may advise.

The Application Respondents estimate that the application will take *2 days [time estimate]*.

☒ The Application Respondents have filed in this proceeding a document that contains the Application Respondents' address for service.

☐ The Application Respondent has not filed in this proceeding a document that contains an address for service. The application respondents ADDRESS FOR SERVICE is:

Date: **2023

Signature of Lawyer for Application Respondents
Lawyer: Howard Shapray, K.C. and Shane Coblin

This APPLICATION RESPONSE is prepared by Howard Shapray, K.C. and Shane Coblin of the law firm of Kornfeld LLP whose place of business is 1100 – 505 Burrard Street, Vancouver, BC, V7X 1M5, Telephone: 604-331-8340, Email: hshapray@kornfeldllp.com and scoblin@kornfeldllp.com.