IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Alderbridge Way GP Ltd. (Re),*
2023 BCSC 1718

Date: 20231003
Docket: S222758
Registry: Vancouver

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

- and -

In the Matter of a Plan of Compromise and Arrangement of 0989705 B.C. Ltd., Alderbridge Way GP Ltd. and Alderbridge Way Limited Partnership

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment (re Procedural Orders)

Counsel for the Petitioners:	H. Shapray, K.C. S.D. Coblin
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Counsel for GEC (Richmond) GP Inc. and GEC (Richmond) Limited Partnership:	J.P. Sullivan S.Y. Bhura
Place and Date of Hearing:	Vancouver, B.C. August 3-4, 2023
Place and Date of Judgment:	Vancouver, B.C. October 3, 2023

INTRODUCTION

[1] This is a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 [*CCAA*]. The subject matter of this proceeding is a development property undertaken by the petitioners (the "CCAA Debtors"). In April 2022, I granted an Initial Order in these proceedings. To date, efforts toward arranging a sale of the development property have been stalled.

[2] The backdrop to today's application is that significant disputes have arisen between the CCAA Debtors and a secured creditor, on the one hand, and another secured creditor, Romspen Investment Corporation ("Romspen"), on the other. Those disputes have crystallized in various actions filed in this Court against Romspen and an action by Romspen against the CCAA Debtors and guarantors of that debt (collectively, the "Related Actions").

[3] Romspen seeks procedural orders with respect to the Related Actions. In summary, the order sought would: (a) provide that the Related Actions would be tried together in the context of the *CCAA* proceedings; and (b) set various deadlines for the filing of pleadings, listing of documents and examinations for discovery, consistent with case plan orders that have been regularly granted in this Court.

[4] The respondents to this application oppose the relief sought, arguing that the Court has no jurisdiction under the *CCAA* to grant the relief sought; alternatively, they contend that such orders are inappropriate. In the main, the respondents wish to have the Related Actions resolved in the fullness of time and in the usual civil trial process outside of these *CCAA* proceeding without the *CCAA* court imposing any case management deadlines at any time.

[5] For the reasons set out below, I agree with Romspen on all of the issues and grant the orders sought.

BACKGROUND

[6] The development in question, which was to be known as "The Atmosphere", was an ambitious large-scale real estate project that included seven residential and

commercial office towers spanning an entire city block in Richmond, BC (the "Development"). Romspen was the construction lender providing financing for the initial stages of the Development.

[7] The debt owed to Romspen by the CCAA Debtors is guaranteed by 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"). The Guarantors are either shareholders of the general partner or limited partners who are in the CCAA Debtors group. The CCAA Debtors and Guarantors are represented by the same counsel and argue identical positions.

[8] In March 2020, Romspen declined to advance any further funds to the CCAA Debtors under its credit facility. The CCAA Debtors managed to continue with their development efforts for some time after, albeit under significant financial strain. However, some two years later, the CCAA Debtors could no longer avoid undertaking a formal restructuring of their substantial debt.

[9] On April 1, 2022, I granted an Initial Order in favour of the CCAA Debtors under the *CCAA*: *Alderbridge Way GP Ltd. (Re)*, 2022 BCSC 1436. In the Initial Order, I granted enhanced powers to the Monitor to conduct a sales and investment solicitation process ("SISP") to move reasonably quickly to secure a sale of the Development.

[10] As of early 2022, the major creditors secured against the Development were as follows and, presently, have the following order of priority:

a) Romspen owed approximately $176 million under a construction loan facility (the "Romspen Security");

b) A group of lenders (the "2ML Lenders") owed approximately $76 million; and

c) GEC Education City (Richmond) Limited Partnership (via its general partner, GEC (Richmond) GP Ltd.) ("GEC"), owed approximately $94 million arising from a deposit for the purchase of towers in the Development.

[11] No secured creditor, including Romspen, the 2ML Lenders or GEC, objected to the granting of the Initial Order or the granting of enhanced powers to the Monitor to conduct the SISP on jurisdictional grounds or any other basis.

[12] Unfortunately, the hoped-for resolution through the SISP did not materialize. By August 2022, the Monitor had not received any compliant bid to purchase the Development. At that time, a Second Amended and Restated Initial Order was granted to further extend the stay and expand the Monitor's powers to control the Development and continue the SISP: *Alderbridge Way GP Ltd. (Re)*, 2022 BCSC 1694 at paras. 27–28.

[13] Also by August 2022, the Monitor had identified another significant factor relevant to the marketing of the Development in that the building permit had expired. The Monitor took the view, one shared by all stakeholders, that obtaining a new building permit was critical toward preserving the Development's value while sale efforts continued.

[14] By December 2022, the Monitor had still not received any bids under the SISP. Accordingly, the Monitor terminated the SISP until the issue relating to the building permit was resolved. Throughout 2023, the Monitor has continued its efforts to obtain a new building permit.

[15] For the purposes of this application, the Monitor has filed its Ninth Report dated July 31, 2023 (the "Report"). The Monitor understandably takes no position on the application itself but it has expressed its views as to what it expects to be the impact of the Related Actions on this *CCAA* proceeding, particularly as to how this proceeding may be impacted by the timing of the resolution of the Related Actions.

[16] The Monitor believes that an expeditious resolution of the claims between the CCAA Debtors/Guarantors, GEC and Romspen is important in relation to the future marketing and sale the Development. The Monitor states that it is important, if not essential, for the Monitor, who has conduct of the sales process, to have clarity on the relative priorities and amounts of the secured claims when the SISP is re-started or, at least, shortly thereafter.

[17] In particular, the Monitor is of the view that it will need to know which secured creditor(s) are “in the money” or the “fulcrum creditor(s)”, in terms of who is affected by a potential sale. The Monitor points out that a transaction may be other than entirely cash or may involve different structures that will require negotiations with the secured creditors who have a financial stake in the transaction. Finally, the Monitor states that a credit bid from secured creditor(s) is very possible and that, without knowing the relative amounts and priorities of the secured claims, any full or partial credit bid would be impossible.

[18] The Monitor anticipates filing an application for the new building permit by November 1, 2023 and the expectation is that it will be issued within a few months or by March 2024. Shortly thereafter, the Monitor anticipates re-starting the SISP which will hopefully garner bids toward a transaction.

[19] For the above reasons, the Monitor states that it would be preferable if the outstanding claims in the Related Actions were resolved by spring 2024 or shortly after the SISP is re-started.

LITIGATION HISTORY

[20] The well-spring from which all claims in the Related Actions arose was Romspen’s decision, in March 2020, to suspend all further draws and advances under its construction lending facility.

[21] The CCAA Debtors/Guarantors, the 2ML Lenders and GEC alleged that Romspen improperly failed to advance monies to the CCAA Debtors under the

construction lending facility to allow the Development to be completed, thus causing the CCAA Debtors' insolvency and later losses, loss of value or exposure to losses.

[22] The following claims were filed:

Action	**Commencement Date**	**Plaintiff(s) / Defendant(s) by Counterclaim**	**Defendant(s) / Plaintiff(s) by Counterclaim**
S228019 ("GEC Action")	October 6, 2022	GEC	Romspen
S231106 ("Romspen Action")	February 15, 2023	Romspen	CCAA Debtors / Guarantors
S248773 ("2ML Action")	March 24, 2023	2MLs	Romspen
S232583 ("CCAA Debtors/Guarantors Action")	March 28, 2023	CCAA Debtors / Guarantors	Romspen

[23] In July 2023, the 2ML Lenders discontinued the 2ML Action.

[24] In the Romspen Action, Romspen seeks judgment against the CCAA Debtors/Guarantors for the outstanding debt owed to it. The CCAA Debtors/Guarantors Action was filed as a separate action and not as a defence/counterclaim to the Romspen Action because Romspen's notice of civil claim had not yet been formally served. As such, the Romspen Action and the CCAA Debtors/Guarantors Action are two sides of the same coin and essentially join the same issues.

[25] The Related Actions are interrelated and significantly overlap in many, if not most, respects. I accept Romspen's characterization of the interplay between the Related Actions, as follows (with slight editing for definitions):

(a) each of the parties to the Related Actions has an ownership or security interest in the Development lands and a contractual nexus to the other parties to the Related Actions;

(b) each of the Related Actions involves claims by or against Romspen and concerns the validity and/or priority of the Romspen Security;

(c) each of the Related Actions centers on Romspen's rights and obligations under the Credit Agreement;

(d) it is alleged in each of the 2ML Action, the GEC Action, and the CCAA Debtors/Guarantors Action that Romspen breached its obligations under the Credit Agreement in suspending draws and advances under the Credit Agreement;

(e) it is alleged in each of the 2ML Action, the GEC Action, and the CCAA Debtors/Guarantors Action that Romspen elected to fund other projects in preference to the Development during the COVID-19 pandemic notwithstanding its alleged obligations to continue to make draws and advances available to the CCAA Debtors for the purpose of funding the Development;

(f) it is alleged in each of the 2ML Action, the GEC Action, and the CCAA Debtors/Guarantors Action that Romspen's alleged conduct in suspending the CCAA Debtors' access to draws and advances under the Credit Agreement resulted in the CCAA Debtors' liquidity crisis and that each of the 2MLs, GEC, the CCAA Debtors and Guarantors have suffered as a result; and,

(g) it is alleged in each of the 2ML Action, the GEC Action, and the CCAA Debtors/Guarantors Action that Romspen's alleged conduct in suspending the CCAA Debtors' access to draws and advances under the Credit Agreement warrants extraordinary relief.

[26] The relief sought against Romspen in the Related Actions is:

a) In the GEC Action, GEC seeks a declaration of priority over the Romspen Security, or alternatively, damages, including aggravated and punitive damages. The stated legal basis for the claim is grounded in: a failure of consideration, breach of contract (including the duty of good faith), equitable subordination and the tort of unlawful means. GEC's claim and Romspen's counterclaim involve a consideration of various priority or subordination agreements entered into between GEC and Romspen; and

b) In the CCAA Debtors/Guarantors Action, the plaintiffs seek: damages for breach of contract (including the duty of good faith and honest

performance); a declaration that the Romspen Security, including the Guarantees, are unenforceable; a declaration that no interest is payable to Romspen; damages for the tort of unlawful means; aggravated and punitive damages; and, set off.

[27] As at the date of this application, the Related Actions were at a very early procedural stage:

a) In the GEC Action, the pleadings were closed in December 2022. On March 2, 2023, Romspen filed a notice of trial scheduling the trial of the GEC Action for 19 days commencing January 29, 2024, with the agreement of GEC. In doing so, Romspen's counsel asserted the need to resolve the issues as soon as possible to limit the damages and prejudice to Romspen. As of the date of this application, GEC had only recently delivered its list of documents. Romspen has yet to do so;

b) In the Romspen Action, the CCAA Debtors/Guarantors filed their response to civil claim just days earlier—on August 2, 2023. That pleading essentially tracks their notice of civil claim in the CCAA Debtors/Guarantors Action; and

c) In the CCAA Debtor/Guarantor Action, Romspen had yet to file a response to civil claim, although it is expected to track Romspen's response to civil claim filed in the GEC Action.

THE *CCAA* FRAMEWORK

[28] The jurisdictional basis for the relief sought by Romspen is two-fold: ss. 20 and 11 of the *CCAA*.

[29] Section 20 of the *CCAA* is a specific provision for the determination of claims, including secured claims, in *CCAA* proceedings:

> 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:
>
> (a) the amount of an unsecured claim is the amount

> (i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,
>
> (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and
>
> (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.
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> [Emphasis added.]

[30] Accordingly, the *CCAA* specifically mandates that Romspen's secured claim against the CCAA Debtors *must* be determined by the Court in these proceedings and on a summary basis.

[31] In addition, to the extent that the relief is not specifically provided for in s. 20, s. 11 of the *CCAA* endows the *CCAA* court with broad jurisdiction to advance the purposes of the statute by making any order that it considers "appropriate."

[32] In *1057863 B.C. Ltd. (Re)*, 2022 BCSC 759, I discussed s. 11 and the extensive judicial commentary on how the court's powers under that provision are to be exercised:

> [46] The broad scope of this statutory jurisdiction as to what is "appropriate" has been the subject of substantial discussion in various Supreme Court of Canada decisions: *Century Services Inc v. Canada (Attorney General)*, 2010 SCC 60 at paras. 61-62 [*Century Services*]; *9354-*

9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10 at para. 65 [*Callidus*]; and most recently, *Canada v. Canada North Group Inc.*, 2021 SCC 30 at paras. 21 and 31 [*Canada North*].

[47] In *Canada North*, Justice Côté, writing for the majority, synthesized the previous two decisions of the Court and stated:

> [21] The most important feature of the *CCAA* - and the feature that enables it to be adapted so readily to each reorganization - is the broad discretionary power it vests in the supervising court (*Callidus Capital,* at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital,* at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services,* at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). …
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> [Emphasis added.]

[48] Similarly, in *Canada North*, Justice Karakatsanis, in concurring reasons, stated:

> [138] Due to its remedial nature, the *CCAA* is famously skeletal in nature *(Century Services,* at paras. 57-62). It does not "contain a comprehensive code that lays out all that is permitted or barred" (para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re),* 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as "the engine that drives this broad and flexible statutory scheme" (*Stelco Inc. (Re)* (2005), 2005 CanLII 8671 (ON CA), 75 O.R. (3d) 5 (C.A.), at para. 36; see also *9354-9186 Québec inc.,* at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the *CCAA* to adapt and evolve to meet contemporary business and social needs. Although judicial discretion must always be exercised in furtherance of the *CCAA*'s remedial purpose, it takes many forms and has

> proven to be flexible, innovative, and necessary (paras. 58-61; *U.S. Steel Canada Inc*., *Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).
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> [Emphasis added.]
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> [49] Accordingly, this Court has broad statutory jurisdiction to grant the Mediation Order under the *CCAA*, if it is "appropriate". A determination in that respect will depend on the unique factual landscape in the restructuring which can be, as it is here, complex: *Callidus* at para. 76.
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> [50] The *CCAA* has long been considered an example of judicial adaptation, innovation and evolution, particularly when the statute was even more "skeletal" than it is now: *Century Services* at para. 57-58.
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> [51] While that broad statutory jurisdiction or power is "vast", as described by Côté J. in *Canada North*, there are constraints. The Petitioners must be acting in good faith and with due diligence. In addition, any relief granted must be consistent with the statutory objectives of the *CCAA* and in furtherance of its remedial purposes. In considering the relevant factual circumstances, the overarching question is whether both the purpose of the order sought and the means it seeks to employ advance the remedial purpose of the *CCAA* : *Century Services* at paras. 59 and 70; *Callidus* at paras. 49, 50 and 70.
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> [Emphasis added.]

DISCUSSION

[33] As stated above, both GEC and the CCAA Debtors/Guarantors strenuously object to any case management by this Court in these *CCAA* proceedings in relation to the Related Actions, both on jurisdictional and other grounds.

Does the *CCAA* Court Have Jurisdiction?

[34] In my view, a plain reading of s. 20 of the *CCAA* leads to the conclusion that this Court has jurisdiction to adjudicate the issue as to whether Romspen has a valid debt and security against the Development and, if so, in what priority. In that event, the substantive issues raised in the Romspen Action, as defended by the CCAA Debtors or as asserted by the CCAA Debtors in the CCAA Debtors/Guarantors Action, are to be determined in this proceeding in accordance with the dictates of s. 20 of the *CCAA*.

[35] Romspen concedes that s. 20 does not apply to the issues relating to the Guarantors and GEC. In that event, Romspen relies on s. 11 of the *CCAA*.

[36] Romspen and the respondents have made substantive submissions on the application of s. 11 of the *CCAA*, in terms of whether it would provide a basis upon which this Court could assume jurisdiction toward determining the issues in: (1) the GEC Action; and (2) the Romspen Action regarding the Guarantors and the CCAA Debtors/Guarantors Action by the Guarantors.

[37] In that regard, Romspen cites *U.S. Steel Canada Inc. (Re),* 2015 ONSC 5103 [*U.S. Steel SC*]; aff''d *U.S. Steel Canada Inc. (Re),* 2016 ONCA 662 [*U.S. Steel CA*]. Romspen asserts that those decisions stand for the proposition that the court in *CCAA* proceedings has authority under s. 11 of the *CCAA* to order that inter-creditor claims and other claims be determined in the context of *CCAA* proceedings, if it is established that, on balance, such determination is likely to further the remedial purposes of the *CCAA*.

[38] In *U.S. Steel SC*, Justice Wilton-Siegel was addressing a complex scenario in a *CCAA* proceeding where claims against the debtor by a creditor (USS) were subject to various objections by other creditors and stakeholders (USW and the Milbournes). The objections were based on characterization of USS' claim, allegations of breach of fiduciary duty, oppression and equitable subordination. If those objections against USS' claims were successful, it could result is a dismissal or subordination of USS' claims. The issues addressed by the Ontario court were how those claims would be determined and in what proceeding.

[39] In *U.S. Steel SC*, Wilton-Siegel J. held that:

a) the debt-to-equity recharacterization claims of one group of creditors of a debtor company can be the proper subject matter of a *CCAA* claims process implemented pursuant to s. 20 of the *CCAA*: paras. 42–44;

b) neither the claims process underway in that proceeding nor the *CCAA* contemplate that inter-creditor claims will be addressed within a *CCAA* proceeding: paras. 58–61; and

c) the court did not have authority under the *CCAA* to apply the doctrine of equitable subordination, if that doctrine exists in Canadian law: paras. 38–53.

[40] As such, the remaining issue to be determined in *U.S. Steel SC* was: what would be the forum for the adjudication of the USW and the Milbournes' objections to USS' claims and whether the *CCAA* court had jurisdiction to address those issues?

[41] Justice Wilton-Siegel concluded that the *CCAA* court did have jurisdiction under s. 11 to address the other claims *if* it was in furtherance of the *CCAA*'s remedial purposes. He stated:

> [72] I acknowledge that the purpose of the CCAA is to facilitate a compromise or arrangement between an insolvent debtor corporation and its creditors to allow the business to continue as a going concern. Accordingly, in most situations, it would be expected that the resolution of inter-creditor disputes would not further such process and may, in fact, delay and possibly hinder such process. In such circumstances, there is no reasonable basis for a determination of such claims within the CCAA process.
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> [73] The issue for the Court, however, is whether the broad jurisdiction of a court granted under section 11 of the CCAA permits a court to exercise its discretion to determine inter-creditor claims within a CCAA process if it determines that, in its judgment, such action would further the purposes of the CCAA. USS argues, in effect, for an inflexible rule that excludes such a possibility. I am not persuaded, however, that this is correct as a matter of the statutory interpretation of section 11 of the CCAA. I am also not persuaded that the case law relied upon by USS precludes such an approach.
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> [74] On its face, section 11 of the CCAA confers broad authority on a court. As mentioned above, it provides that, subject to the restrictions set out in the CCAA, a court may make "any order that it considers appropriate in the circumstances". It is not suggested that there is any express restriction in the CCAA that prevents a court from ordering that inter-creditor claims, such as the Subordination Claims, shall be heard under the CCAA proceeding outside the process contemplated by the Claims Process Order.
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> …
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> [80] All of these considerations argue in favour of a broad authority under section 11 that does not preclude the determination of inter-creditor claims within CCAA proceedings in appropriate circumstances. I do not suggest that such circumstances are presented in most circumstances before the courts. I do, however, think that the discretion or authority of a court under section 11 of the CCA A extends to the determination of inter-creditor matters within a

> CCAA proceeding if, on balance, such action would appear to further the remedial purpose of the CCAA.
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> …
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> [84] Based on the foregoing, I conclude that the Court has authority under section 11 of the CCAA to order that the Subordination Claims be determined by a process within the CCAA proceedings, other than the process contemplated by the Claims Process Order, if the Court is of the opinion that, on balance, such action is likely to further the remedial purpose of the CCAA.
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> [Emphasis added.]

[42] GEC and the CCAA Debtors/Guarantors take the position that the decision in *U.S. Steel CA* did not endorse Wilton-Siegel J.'s conclusions on jurisdiction. They point to the appeal court's statement:

> [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.

[43] For the reasons stated by Romspen's counsel, I disagree that the Ontario Court of Appeal's decision calls into question the lower court's decision, as relevant here.

[44] The sole issue on appeal in *U.S. Steel CA* was whether the court below erred in finding that a *CCAA* court did not have the jurisdiction to apply the doctrine of equitable subordination so as to subordinate USS' claims to those of USW and the Milbournes. Ultimately, the court in *U.S. Steel CA* agreed with Wilton-Siegel J. that the *CCAA* court had no jurisdiction to apply the doctrine of equitable subordination, but for different reasons, namely that the doctrine would not further the remedial purposes of the *CCAA*: *U.S. Steel CA* at paras. 100–102.

[45] As relevant to the arguments here, Wilton-Siegel J.'s conclusion that the inter-creditor claims could be determined in the *CCAA* proceedings under s. 11, if appropriate, was noted in *U.S. Steel CA* at para. 18. The conclusion in the court below was not the issue under appeal in the *U.S. Steel CA* decision and was not overturned.

[46] All of the parties have also made substantial submissions on the issue of jurisdiction having regard to the "single proceeding model" in insolvency proceedings (including under the *CCAA*) that has been endorsed in the past. While the respondents have addressed the "single proceeding model" as a separate jurisdictional basis for Romspen's application, I agree that the only jurisdictional basis is s. 11 of the *CCAA*, which is informed by this concept.

[47] In *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 at para. 22, the Court endorsed that the purpose of the model was to provide a "collective proceeding" that "supersedes the usual civil process available to creditors to enforce their claims," so as to avoid a "free-for-all" among creditors in enforcing remedies against the debtor and its assets.

[48] GEC and the CCAA Debtors/Guarantors assert that the single proceeding model requires that the proceeding focus on claims against the debtor and the debtor's assets only, and not claims by the debtor or connected in some fashion to either.

[49] The case authorities, however, do not support the narrow scope of the single proceeding model asserted by GEC and the CCAA Debtors/Guarantors.

[50] The model has been applied to prevent fragmentation of proceedings in relation to arbitration proceedings.

[51] In *Mundo Media Ltd. (Re)*, 2022 ONCA 607 [*Mundo*], the court stated:

> [6] The single proceeding model applies to insolvency proceedings. This model favours litigation concerning an insolvent company to be dealt with in a single jurisdiction rather than fragmented across separate proceedings. A creditor "who cannot claim to be a 'stranger to the bankruptcy,' has the burden of demonstrating 'sufficient cause' to have the proceedings fragmented across multiple jurisdictions."

[52] At para. 24 in *Mundo*, the court noted that the motion judge had held that, where a third party was not a stranger to the bankruptcy, the model was not limited

to claims against a debtor, but could also support addressing claims by a debtor in the insolvency proceeding. At para. 52, the appeal court agreed, stating:

> … the single proceeding model is typically used as a 'shield' to protect debtors from having to defend claims in multiple proceedings or jurisdictions, rather than as a 'sword' to enable receivers to pursue claims against a third party. However, I see nothing in the jurisprudence precluding this result. …

[53] The single proceeding model was also discussed in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, again in the context of arbitration proceedings versus insolvency proceedings. At paras. 54-55, the Court stated that the model protects the "clear '[p]ublic interest in the expeditious, efficient and economical clean-up of the aftermath of financial collapse'".

[54] Finally, Romspen refers to *Tron Construction & Mining Limited Partnership & Tron Construction & Mining Inc*., 2022 SKKB 203 [*Tron*] where the court exercised its jurisdiction under s. 183(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] to impose a claims process for determining liens against certain lands, rather than have those claims adjudicated in other civil proceedings in the usual fashion. At para. 51, the court stated, after citing *Century Services* and *Mundo*, that the single proceeding model, which has "long been applied in bankruptcies, receiverships and *CCAA* proceedings, is extremely well-established".

[55] In my view, the conclusions of Wilton-Siegel J. in *U.S. Steel SC* are entirely consistent with the single proceeding model and the benefits that are intended by that model. It is undeniably the case that the *CCAA* court is attuned to providing a means by which claims can be adjudicated, as they relate to the restructuring proceeding, in an efficient manner and in a manner that is fair to all stakeholders.

[56] I agree that it will not always be the case that other claims are appropriately brought into the *CCAA* umbrella for adjudication. However, I adopt the reasoning and result in *U.S. Steel SC* in concluding that, if the circumstances are such that bringing other claims into the *CCAA* proceeding will assist in the restructuring process and further the remedial purposes of the *CCAA*, that may ground the exercise of the court's jurisdiction to grant such an order under s. 11 of the *CCAA*.

[57] I conclude that this Court in these *CCAA* proceedings does have the jurisdiction to grant the order sought by Romspen pursuant to s. 11 of the *CCAA*. It remains to be determined whether it is appropriate to exercise that jurisdiction in these circumstances, as I will discuss below.

Is the Procedural Order Appropriate?

[58] The CCAA Debtors/Guarantors have advanced various arguments against the proposed Order.

[59] As a preliminary point, GEC and the CCAA Debtors/Guarantors contend that the single proceeding model has no application here since the Related Actions are just inter-creditor disputes or disputes towards determining the amount of the debt, matters that are not central to the *CCAA* proceedings at all, which is simply focussed on a sales or liquidating process.

[60] GEC states that no party to its dispute is under *CCAA* protection. GEC further says that it does not seek relief against the CCAA Debtors or their assets (the Development), just as Romspen does not in its counterclaim in the GEC Action.

[61] Further, the CCAA Debtors/Guarantors say that the dispute between Romspen and GEC is entirely separate and distinct from the issues raised in the Romspen Action and the CCAA Debtors/Guarantors Action and that the GEC Action is purely an inter-creditor dispute.

[62] In substance, the respondents say that the single proceeding model is simply focussed on stopping a “free-for-all” by creditors against a debtor’s assets so as to bring all claims within the ambit of the insolvency proceeding. In the context of this *CCAA*, they say that the only focus here is the sales process. They say that, once the issues in the Related Actions are determined, only then should the stakeholders’ rights to enforce any claims against the Development be “collectivised” in the *CCAA* proceeding. In the meantime, they say that the Related Actions do not impact the prospects for any sale or prejudice any other stakeholder or impair the *CCAA*

proceedings in any way. They say that Romspen is attempting to turn this liquidating *CCAA* proceeding into a "litigation forum" under the guise of a *CCAA* proceeding.

[63] With all due respect, I agree with Romspen that this approach is in error to the extent that it narrows the focus of these *CCAA* proceedings to the one singular point of allowing the Development to be sold through the SISP. That said, as I will discuss below, even that prospect is fraught with issues arising from the Related Actions.

[64] I start from the point that liquidating *CCAA*s have been endorsed as achieving the remedial objectives of the *CCAA*, even when no plan of arrangement will ever be presented by the debtor company so as to allow the debtor to continue in business: *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*] at paras. 39-45. In *Callidus*, the Court emphasized that different objectives may come into play depending on the circumstances:

> [46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, <u>when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus</u>. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.
>
> [Emphasis added.]

[65] No stakeholder here—let alone GEC and the Guarantors—objected to the *CCAA* proceedings being commenced and continued toward the objective of selling

the Development. Needless to say, it was the CCAA Debtors that commenced the proceedings in the first place.

[66] The objectives in the *CCAA* proceeding are clear and they have been clear from the outset. The stakeholders are seeking to monetize the Development as soon as possible. That goal will achieve many purposes. Firstly, it will stem the significant and ongoing costs of maintaining the Development in its current state, a cost that is currently being borne by Romspen. Secondly, it will achieve a financial result for the stakeholders depending on how the respective secured claims are determined and ranked. More general social benefits will be achieved by a completion of the Development in the community.

[67] In *U.S. Steel CA*, the court stated:

> [69] The scheme of the *CCAA* focuses on the determination of the validity of claims of creditors against the company and the determination of classes of claims for the purpose of voting on a compromise or arrangement. Except as contemplated by ss. 2(1), 6(8), 22.1 and 36.1, the statute does not address either conflicts between creditors or the order of priorities of creditors. Priorities are, however, part of the background against which the plan of compromise or arrangement is negotiated.
>
> [Emphasis added.]

[68] Similarly, priorities are the background against which a sale of the Development is to be negotiated. However, here, the priority issues have moved from the background to the forefront of this restructuring proceeding in light of the Related Actions.

[69] I would emphasize again the Monitor's comments in the Report at paras. 9 and 15, which I have summarized above, about how the priority issue is expected to negatively impact the Monitor's ability to arrange a sale of the Development if the disputes in the Related Actions are not resolved beforehand. The Monitor does not describe the resolution of the Related Actions as merely "desirable"; rather it is described as "important" and "essential" to achieving the objectives that are before the stakeholders in this insolvency proceeding.

[70] It cannot be seriously questioned that, in these unique circumstances, it is critical and necessary to determine who holds debt and security against the Development and, if security is held, what is its priority.

[71] As was noted in *Tron*, an exception to the single proceeding model is where the claim involves a "stranger" to the insolvency proceeding (similarly, it might be said that bringing claims within *CCAA* proceedings that involve a "stranger" would not further the remedial purposes of the *CCAA*). In *Tron*, the court stated:

> [53] …Where a party is genuinely a stranger to the insolvency proceeding, there is room for that party to make a case that it should not be swept into the proceeding. Similarly, an insolvent party could argue that there is no relationship between its insolvency proceeding and another party, such that any dispute concerning that party should be resolved outside of the insolvency proceeding…

[72] I am not persuaded by the respondent's arguments that attempt to distance themselves and their claims from this *CCAA* proceeding. There is a manifest relationship between the Related Actions, GEC, Romspen, the CCAA Debtors/Guarantors and these *CCAA* proceedings. None of GEC, Romspen or the CCAA Debtors/Guarantors can be characterized as "strangers" to these *CCAA* proceedings.

[73] These *CCAA* proceedings are an insolvency proceeding involving the CCAA Debtors and each of the Related Actions concerns the CCAA Debtors. The Guarantors are in each case either the economic stakeholders of the CCAA Debtors, their controlling minds, or were otherwise involved in their business operations leading up to the commencement of these *CCAA* proceedings.

[74] The Romspen Action is a claim against the CCAA Debtors/Guarantors. It is a claim that is required to be resolved pursuant to s. 20 of the *CCAA*. The CCAA Debtors/Guarantors Action is in substance a cross claim to, and a denial of, the claims asserted in the Romspen Action. The Romspen Action cannot be adjudicated in accordance with s. 20 of the *CCAA* apart from the CCAA Debtors/Guarantors Action.

[75] The GEC Action also concerns the CCAA Debtors. GEC's claims against Romspen in the GEC Action relate to and arise from the affairs of the CCAA Debtors and their insolvency. GEC is a major secured creditor of the CCAA Debtors. The contractual relationship between GEC and Romspen pertains solely to the CCAA Debtors. GEC hopes, through the GEC Action, to elevate its secured claim against the Development in relation to the Romspen Security.

[76] I conclude that there is considerable interconnection between the Related Actions and the conduct of these *CCAA* proceedings, as the Monitor notes in its Report.

[77] In addition, this is not a case where the stakeholders enjoy the luxury of taking their time to have the litigation unfold in the Related Actions to resolve those claims in the fulness of time. As the saying goes, this is real-time litigation and the clock is ticking in terms of the need to achieve a resolution as soon as possible for an asset that is expensive to maintain and where further delay may seriously compromise the outcome.

[78] The CCAA Debtors/Guarantors say that Romspen is guilty of inordinate delay in filing the Romspen Action, which I do not accept. Clearly, Romspen was hoping for a result through the SISP by late 2022—a result that may have fully repaid its debts. That result may also have avoided some or all of the substantive issues that arise in the CCAA Debtors/Guarantors Action. When no bid arose, Romspen acted. I also accept Romspen's submission that the Romspen Action was filed in order to avoid any limitation issues, a step that was expressly allowed under para. 13 of the Initial Order.

[79] Other arguments raised by GEC and the CCAA Debtors/Guarantors can only be described as hyperbole and inflated concerns in terms of the prejudice said by them to arise from the Procedural Order.

[80] GEC and the CCAA Debtors/Guarantors say that Romspen is seeking to "impose an arbitrary, 'fast track' schedule" that is "impossible to meet without

compromising [their] full rights to gather evidence" in defence of Romspen's claims. They say that Romspen is hoping to benefit from an "unreasonably truncated schedule". They say that Romspen is attempting to deny their rights to natural justice and a fair hearing of their claims on the merits. Finally, they say that Romspen is attempting to have its "preferred judge appointed case management and trial judge".

[81] GEC's initial objection to the Procedural Order was that it was entitled to the "full panoply of procedural rights that an action entails". Similarly, the CCAA Debtors/Guarantors stressed the importance of their rights to "discovery and other procedural rights".

[82] However, notwithstanding s. 20 of the *CCAA*, by which there is a statutory presumption that the Romspen Action and certain defences raised in the CCAA Debtors/Guarantors Action be determined on a summary basis, Romspen does not seek an order from this Court that these actions be determined summarily.

[83] Counsel for the CCAA Debtors/Guarantors suggests that document discovery will be fraught with issues and that significant time and "intense investigations" will be required even before the parties could consider proceeding to examinations for discovery. Graham Thom, a representative of the CCAA Debtors, says that he is searching for documents and he is aware that there are more than 10,000 pages of documents relevant to the issues. His counsel says that he expects "vast amounts" of expert evidence, suggestive of lengthy delays. He suggests that his client's action would not be ready for trial in less than 18 months. Finally, he suggests that the granting of the Procedural Order, to bring the Related Actions into the *CCAA* proceedings, could entail "chaos" that will delay the proceeding for years.

[84] The Procedural Order sought allows for the usual civil litigation process with which counsel are very much aware. It includes the filing of the outstanding pleadings, delivery of lists of documents, potential demands for further documents, potential applications to the court to resolve document issues, examinations for discovery and case planning conferences. The Procedural Order does not address the question of the process for determining the claims asserted in the Related

Actions after those pre-trial procedures are completed. Romspen states that this approach is intended to fully preserve the parties' rights to argue that the proper procedure for the determination should be a summary trial, a full trial, or a hybrid hearing. Romspen's counsel also states that this defers the determination of the appropriate mode of dispute resolution procedure to a time when there is a proper basis for assessing what procedure is both just and appropriate in the circumstances, including the ongoing dynamics of this *CCAA* proceedings.

[85] In my view, this approach fully preserves the rights asserted by GEC and the CCAA Debtors/Guarantors and also allows the parties to have time after the pre-trial procedures to formulate next steps: see *U.S. Steel SC* at paras. 87 and 101.

[86] Further, as stated in *U.S. Steel SC* at para. 102, adjudication within the ambit of these *CCAA* proceedings does not do away with the need to assert claims based on recognized legal or equitable principles, or avoid a costs award or preclude any procedural rights, such as appeal rights. On this point, I do not agree with the CCAA Debtors/Guarantors' counsel that their Action involves, "new and still evolving legal theories"; in any event, even assuming that is the case, I see no difficulty in resolving those in the context of the *CCAA* proceeding.

[87] In addition, Romspen is not seeking to formally consolidate the Related Actions. The Procedural Order sought by Romspen is not substantively different that what could have been sought outside of the *CCAA* proceedings.

[88] Under R. 22-5(8) of the *Supreme Court Civil Rules* [*Rules*], a party may seek an order that certain actions be tried at the same time. Romspen refers to the usual test applied by this Court, as set out in *Raymond James Investment Counsel Ltd. v. Clyne*, 2018 BCSC 720 at para. 36, citing *Hui v. Hoa*, 2012 BCSC 1045 at paras. 33-35. I need not set those factors out in detail, other than to highlight that they echo the factors before me in terms of: the degree of commonality and intertwining of issues; savings in pre-trial procedures and costs; potential reductions in trial time; inconvenience to a party; delays affecting the different actions given differing stages of the litigation; possibility of inconsistent findings on the same issue and judicial

economy. In my view, all of these factors are present here and support the granting of the Procedural Order.

[89] As was noted in *Raymond James Investment* at para. 39, the disposition in one action will not necessary dispose of the issues in the other. Therefore, GEC need not be concerned since any specific issues in the GEC Action will not necessary be dictated by the determination of the issues in the CCAA Debtors/Guarantors Action.

[90] CCAA Debtors/Guarantors' counsel asserts that Romspen is avoiding making an application under R. 22-5(8) and also, this Court's Practice Direction-4 regarding Case Planning and Judicial Management of Civil and Family Actions. I do not agree that is the case as those procedures are not necessary engaged under the *CCAA*. In any event, it is difficult to see that his clients would be in any different situation or have any different procedural arguments even if that Rule and Practice Direction had been the impetus to make this application.

[91] There is an interesting dynamic between GEC and the CCAA Debtors/Guarantors in that the former wishes to proceed to trial in January 2024 and the latter complains about being rushed to a summary determination.

[92] I acknowledge that the granting of the Procedural Order will inevitably mean that the current trial dates for the GEC Action will no longer be viable. However, again, it was Romspen who set those trial dates.

[93] At the time of this application, GEC's counsel asserted that his client was ready to proceed to trial and wished to have the claim determined in early 2024. Looking at the overall circumstances, I do not see that scenario as being truly representative of GEC's trial readiness. GEC really only began completing some pre-trial procedures *after* receiving Romspen's request for the Procedural Order, by preparing its list and documents and requesting examination dates. On May 19, 2023, Romspen raised the issue with other counsel. On July 7, 2023, GEC served Romspen with an appointment for examination for discovery for September 8, 2023.

GEC's list of documents was completed on July 28, 2023, on the eve of this application, a step that I consider was rushed by GEC only so as to position itself to argue that it was ready to proceed at the scheduled trial dates.

[94] Although Romspen may have finished its list of documents by the time of delivery of these reasons, I have no basis to believe that examinations for discovery have taken place in the GEC Action. The deadline for any expert reports cannot realistically be met for the trial dates. I see no basis upon which to conclude that the parties are in a position to proceed to trial in the GEC Action.

[95] On the issue of prejudice, GEC also argues that the granting of the Procedural Order would also amount to a dismissal of its equitable subordination claim in the GEC Action. They point to the *U.S. Steel CA* decision as supporting that equitable subordination is not available under the *CCAA*, if it exists in Canadian law.

[96] Romspen's position is that equitable subordination is not part of Canadian law and, even if that is the case, the facts do not support that relief.

[97] Romspen acknowledges the decision in *U.S. Steel CA,* but says that it is far from certain whether that reasoning remains valid and, even if so, whether it will be applied in this jurisdiction. Other Canadian cases have discussed and/or applied equitable subordination. The Supreme Court of Canada has not yet decided whether it even applies in Canada, despite many opportunities to have done so. Romspen also points to more recent comments from the Supreme Court of Canada (such as in *Callidus* at para. 74) that the *BIA* and *CCAA* are to be read and applied in a harmonious fashion. In *U.S. Steel CA* at para. 104, the court stated that s. 183 of the *BIA* gives the bankruptcy court jurisdiction as a court of equity.

[98] As a result, Romspen suggests that it is an "open question" whether this Court will follow *U.S. Steel CA* or come to a contrary conclusion as to the availability of the doctrine of equitable subordination under the *CCAA*.

[99] As is noted, the issue is not before me and, if the Procedural Order is granted, GEC could later argue that, assuming the doctrine applies in Canada, the

equitable subordination claim was determinable under the *CCAA* or, if not, the claim should be determined outside of these proceedings as was done in *U.S. Steel*. In either scenario, GEC remains able to assert such a claim. In addition, Romspen has confirmed that it is not be taking the position that equitable subordination is not available in these *CCAA* proceedings.

[100] In light of the above, I agree that GEC's equitable subordination claim does pose a potential complication to these proceedings and the GEC Action. However, at this stage, I consider that the benefits from the Procedural Order outweigh any such potential issues down the road relating to GEC's equitable subordination claim. At the very least, the claim is before the Court and, one way or the other, it will be determined, again assuming that it is a valid concept under Canadian law.

[101] I confess to being mystified by the intransigence of GEC and the CCAA Debtors/Guarantors to proceeding in the manner proposed by Romspen. This is particularly so since Romspen has made it clear from the outset that it is not proposing that any summary procedure be imposed on the parties, at least for now. Many counsel would be pleased to have a judge for active pre-trial management to ensure that the proceedings move along at an appropriate pace toward what they hope will be a successful outcome of their clients' claim.

[102] Contrary to the suggestion of the CCAA Debtors/Guarantors' counsel, the *CCAA* court is not unfamiliar with the resolution of complex claims. It is obvious that the same judges who preside in *CCAA* proceedings also deal with regular civil litigation matters, some involving complex issues and claims.

[103] My sense is that GEC and the CCAA Debtors/Guarantors fear the unknown of the insolvency proceedings and wish to retreat to the comfort of the well-known and well-worn procedures under the *Rules* that dictate the course of civil litigation. They do not want to worry about any "summary" procedures potentially being imposed on them in the future.

[104] Yet, even in regular civil litigation, there remains the prospect that a summary trial or determination of some or all of the issues may result under R. 9-7. As counsel are no doubt aware, litigants and the courts have increasingly come to the realization that the "old ways" of litigation are not necessary ones that should be considered. All stakeholders in the justice system must now rethink what is truly required to come to a just result given the circumstances that exist in any case, on the basis of proportionality and access to justice: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1-3, 23-33. Rule 1-3 now incorporates this objective by emphasizing proportionality in civil litigation matters.

[105] A knee jerk default position to the "usual" civil litigation process is no longer appropriate or justified.

[106] The *CCAA* court will usually proceed from a "default" position that any claim will be resolved by a summary determination. This is an approach largely driven by the exigencies of insolvency and the usual need to resolve matters as soon as possible given the "real time" nature of the litigation, as the statutory objectives dictate. However, that does not foreclose other means of resolving claims where appropriate, whether under the *CCAA* or the *BIA*. In that event, what *CCAA* courts have done is encourage, if not require, the litigants to bring a practical and creative mindset to the problem to fashion a process that makes sense, as suggested in *Hryniak*.

[107] I do not see Romspen's approach to require GEC and the CCAA Debtors/Guarantors to do anything more. It is not unheard of in *CCAA* proceedings that procedures are implemented to allow litigants more procedural rights and protections than the statute provides for and also preserves the parties' rights to make future submissions as to the appropriate procedure for determining claims.

[108] The parties here are aware of examples of this approach. They are also very familiar with a fairly recent example of that approach in the *CCAA* proceedings in *Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 709 [*Walter Energy*]. In that proceeding, I rejected that a full trial was required to decide the issues. I resolved

what were undoubtedly very complex claims in a manner that was far more expedited than in usual civil litigation by way of a "hybrid trial". I stated:

> [19] There are examples where the courts in *CCAA* proceedings have fashioned a process that was "summary" in the sense of not requiring full pre-trial and trial procedures, but still allowed for certain appropriate pre-hearing steps.
>
> …
>
> [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.
>
> [26] There is no "one size fits all" solution as to how any claim can be determined; ideally, the answer will no doubt be driven by the willingness of the parties to streamline the process and the creativity of the parties, and their counsel, in fashioning an efficient and expeditious means of obtaining the necessary evidence to put before the court. If agreement can't be reached, then it will fall to the court to consider the issue.
>
> [27] Procedural issues that may be considered include:
>
> a) whether pre-trial oral or document discovery is truly necessary and if so, whether limits can be put on such discovery;
>
> b) whether affidavits should be filed as opposed to *viva voce* evidence at a full trial;

c) whether cross-examinations on affidavits or expert reports are necessary and whether that can be done ahead of the hearing or at the hearing itself;

d) whether timelines for delivery of materials, such as affidavits, or any pre-hearing procedures, can be fixed so to expedite the determination of the issues;

e) whether other means of establishing the evidentiary record can be ordered, such as through notices to admit, agreed statement of facts and common documents so as to minimize or eliminate any conflict as to the facts; and

f) whether written arguments can be exchanged in advance of the hearing.

[109] At present, there is no reason why the same approach cannot possibly be employed here. I am not, of course, deciding whether the same procedures set out in para. 27 of *Walter Energy* should or will be employed. The Procedural Order simply moves the matter along, per the usual civil litigation process, in a fairly expedited manner to get the parties to a point where the question of how the claims will be resolved can be considered properly.

[110] I return to GEC and the CCAA Debtors/Guarantors' opposition to this relief. I have already discussed that the fear of the Monitor is that, if a bid should arise through the SISP, there is the very real prospect that the restructuring will be stalled by reason of the outstanding claims in the Related Actions. The very real prospect that emerges from the present scenario is that a bid might arise that requires the "fulcrum creditor" to decide how to respond. The critical difficulty that arises is—who is the "fulcrum creditor"?

[111] As the Monitor states, the results from any future reinvigorated SISP are obviously unknown. However, a credit bid remains a very real prospect, as every stakeholder here knows, including GEC and the CCAA Debtors/Guarantors. They also know that Romspen is the creditor most likely to make that credit bid.

[112] Counsel for the CCAA Debtors/Guarantors states that it will be "many years" before a final determination can be made of Romspen's "net position" given their counterclaims against Romspen. Counsel has bluntly submitted to the Court that, if

Romspen is going to make a credit bid to own the Development, which he agrees is likely, "it can't be done". In other words, the CCAA Debtors/Guarantors will oppose any credit bid.

[113] Similarly, GEC has signaled that they would also oppose any credit bid. GEC says that, if there is a sale, there is:

> … the possibility that GEC may apply to have some portion of the sales proceeds held in court or in trust pending the resolution of the [GEC Action]. That application should be dealt with as and when it arises, on the facts that prevail at that time.

[114] The practical effect of the above positions in respect of any credit bid is that Romspen would either: 1) have to advance new money in order to trust up the purchase price pending the resolution of the Related Actions; or 2) take an inferior bid from a third party and then place the sale proceeds into trust.

[115] I agree with Romspen's counsel that these positions as to any credit bid amply demonstrate that the claims in the Related Actions are inextricably linked to this *CCAA* proceeding. The goal of this proceeding from the outset has been toward a sale of the Development, a result that is undoubtedly one that is consistent with the statutory objectives and remedial purpose of the *CCAA*. As counsel puts it, the whole point is to salvage this project and allow it to be completed for the benefit of all stakeholders and the larger community.

[116] In normal civil litigation, the process is from a backward-looking perspective. In the usual case, a fact scenario has taken place and the objective is to resolve the issues that have arisen from that vantage point. In the Related Actions, that perspective is certainly there given that the issues relate to events that took place years ago when Romspen refused to advance further funds under its credit facility.

[117] However, litigation under the *CCAA* is more immediate and present—hence, the well-worn phrase, "real time litigation". It is against those "real time" present circumstances that the Related Actions have been commenced. In those circumstances, there is an urgent need to resolve the claims in the Related Actions

as soon as reasonably possible and, of course, in a manner that is fair to all of the litigants. Rather than the “chaos” that counsel for the CCAA Debtors/Guarantors predicts would arise from the Procedural Order, there is the distinct possibility that this *CCAA* proceeding will be paralyzed by the outstanding claims in the Related Actions. I see a very possible scenario, as does the Monitor, where the parties are deadlocked in their positions in relation to any sale that might be available, as each seeks to exercise the leverage that they hold.

[118] It remains to be seen what will be the course of the Related Actions. It may be the case that it is impossible to resolve the claims prior to any result arising in the SISP. However, the Procedural Order that Romspen seeks does not foreclose any ability of the *CCAA* court to consider the means by which the claims in the Related Actions will be resolved.

CONCLUSION

[119] I conclude that the circumstances here dictate that the granting of the Procedural Order is appropriate as it will further the remedial purposes of this *CCAA* proceeding. I conclude that the Related Actions ought to be determined within the context of these *CCAA* proceedings, as provided for in the proposed Procedural Order.

[120] While I have discussed many aspects for my conclusion above, I would emphasize:

a) the Romspen Action concerns disputed claims against the CCAA Debtors and, as such, s. 20 of the *CCAA* mandates that this claim be determined by this Court on summary application in these *CCAA* proceedings;

b) the CCAA Debtors/Guarantors Action is, in substance, a crossclaim to the Romspen Action that disputes the quantum of Romspen’s claim and the validity of the Romspen Security asserted in the Romspen Action. It defies common sense to try this Action separately from the

Romspen Action. As it was with USS in the *U.S. Steel SC*, Romspen is, at least presently, the predominate creditor of the CCAA Debtors. If Romspen is to be toppled from that position, a determination in that respect will have a material impact on a consideration of any bids obtained under the SISP: *U.S. Steel SC* at para. 98;

c) the GEC Action similarly directly concerns whether the Romspen Security is indeed in first secured position;

d) the various claims and defences in the Related Actions share a sufficient commonality of facts, claims, and issues which overlap to such a degree that any determination of the issues will inevitably be decided on similar factual, legal, and evidentiary grounds. I expect that the pre-trial discovery process will involve many common elements, which will be addressed at any trial;

e) as Wilton-Siegel J. noted in *U.S. Steel SC* at paras. 99-100, there is a distinct possibility that a determination of the Related Actions in the *CCAA* proceeding could result in a more expeditious process that would avoid protracted and expensive litigation and avoid inconsistent findings on the same issues. As he stated:

> [105] … In these circumstances, considerations of efficient and the avoidance of a multiplicity of actions, with the possibility of conflicting judgments by different courts, argue for determination of all of these claims within the CCAA proceedings so long as the corresponding USW claim is also being determined within the CCAA proceeding. In my view, these latter considerations should be determinative in the present circumstances.

f) fashioning a process and deadlines for pre-trial procedures in this *CCAA* proceeding is no different than the usual situation that this Court addresses in similar situations which call for active judicial case management to shepherd the matters through to a conclusion in a

timely manner and with a view to not only the interests of the litigants, but the concerns of the Court in terms of judicial economy;

g) a determination of the Related Actions in the *CCAA* proceedings provides a flexible and dynamic proceeding that can address the determination of the claims and defences in the Related Actions with a view towards the interests of the stakeholders, which include Romspen, GEC and the CCAA Debtors/Guarantors;

h) while there are presently some differences in status between the GEC Action, the Romspen Action, and the CCAA Debtors/Guarantors Action, I do not consider that granting the Procedural Order will necessarily delay the trial of any of the Related Actions. Further, to the extent that any procedural delay is caused, the resulting prejudice is outweighed by the procedural benefits associated with the Procedural Order;

i) the litigation process established by the Procedural Order substantially reflects the normal litigation process contemplated by the *Rules*, thereby preserving the "full panoply" of procedural rights that a litigant would otherwise have; and

j) no party to the Related Actions will be prejudiced or gain any tactical advantage given the approach set out in the Procedural Order.

[121] I agree with Romspen's counsel that the granting of the Procedural Order and the adjudication of issues in the Related Actions in the context of these *CCAA* proceedings have the likely potential of assisting this Court in addressing issues that may arise with respect to: (a) consideration of any bids for the Development that require lender consent and approval; (b) the appropriateness and timing of any final or interim distributions of proceeds of sale, including under a potential plan of arrangement; and (c) other matters that may require that the stakeholders have certainty as to the priority of creditors and, more critically, the identity of the "fulcrum

creditor(s)", who will no doubt dictate the outcome if they have the only remaining financial stake in the Development.

[122] The proposed completion dates under the Procedural Order before me on the application were set as of August 2, 2023. I am going to presume that the pleadings in the Related Actions are now finalized given the time that has passed.

[123] The deadlines in the Procedural Order will follow from the delivery of lists of documents in accordance with R. 7-1(1). The remaining completion dates regarding document issues, as set out in the proposed Order, will be resolved by the intervals set out in that proposed Order (for example, three weeks from the delivery of the lists of documents to the delivery of any demands under R. 7-1(10) or (11) and so on). As proposed, examinations for discovery will take place within one month of the completion of the document production and resolution of any issues. A case planning conference will be also be scheduled one month after completion of examinations for discovery.

[124] I appreciate that the circumstances may have changed since this hearing in terms of the state of play in the Related Actions. Therefore, the parties have liberty to apply for such directions as may be required, including to resolve or resolve any deadlines for the pre-trial procedures as I have ordered.

[125] As requested by Romspen, I am also staying any further Court applications in the Related Actions save as might be brought forward for determination in this proceeding. The litigants may take any steps under the *Rules* as may be available to them and as may be necessary, again subject to any directions from this Court as may be required. In that respect, this Court seeks the aid and recognition of this Court outside of the *CCAA* proceedings as may be appropriate in carrying out the terms of this Order.

"Fitzpatrick J."