Clerk's Stamp:

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JUDICIAL CENTRE	CALGARY
PLAINTIFF	**ARNAKI LTD.**
DEFENDANT	**SOLVAQUA INC.**
DOCUMENT	**BOOK OF AUTHORITIES TO BRIEF OF EXPORT DEVELOPMENT CANADA**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Field LLP** 400, 444 – 7 Avenue S.W. Calgary, AB T2P 0X8 Lawyer: Douglas Nishimura / Erika Carrasco Phone Number: (403) 260-8548 Fax Number: (403) 264-7084 File No. 50500-8

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5. *Veris Gold Corp. (Re),* 2015 BCSC 1204 (CanLII)

Court of Queen's Bench of Alberta

Citation: Energy Construction and Directional Drilling (Re), 2022 ABQB 268

Date: 20220413
Docket: 24 2609052
Registry: Edmonton

2022 ABQB 268 (CanLII)

In the Matter of the Bankruptcy

of

Energy Construction and Directional Drilling Ltd.

Reasons for Decision
of
Honourable Mr. Justice Douglas R. Mah

A. Background

[1] The question is: Whose contract is this? Stated another way: Was this contract validly assigned? At stake is $330,569.10.

[2] Energy Construction and Directional Drilling Ltd, an Alberta company (henceforth 'EA'), entered into a contract with LTS Build Services Ltd ('Ledcor') on June 13, 2018 to perform certain work. An associated company, federally incorporated but registered in Ontario, called Energy Construction and Directional Drilling (Ontario) Ltd ('EO') claims that the Ontario work under the contract was assigned by EA to EO through a written assignment dated November 22, 2018.

[3] The balance payable by Ledcor in respect of the Ontario work is claimed by both EA and EO. It has been paid into trust pending this determination as to entitlement. EA became bankrupt on January 24, 2020 and BDO Canada Limited was appointed Trustee in Bankruptcy. Canada

Revenue Agency (CRA) is a property claimant (under deemed trust provisions) of EA to the extent of $279,154.45 and has priority to the funds in trust if belonging to EA.

B. Procedure

[4] How this matter ends up before the commercial court requires some explanation. Counsel in this matter, to their credit, devised and agreed to a process that allows for efficient summary disposition.

[5] EO had filed an Originating Application against EA on January 16, 2020 seeking payment of the funds from trust. The bankruptcy of EA then ensued, statutorily staying EO's action. The parties agreed to treat EO's Originating Application as a property claim in the bankruptcy that was deemed to be disallowed by the Trustee, leading to an ostensible appeal. I say 'ostensible' because there is no actual disallowance decision by the Trustee to be appealed. In effect, I am dealing with the matter at first instance.

[6] This procedure, which counsel for the parties put in place by way of consent Order, permitted additional evidence. In addition to the affidavit of Mr. Kostis filed in support of the Originating Application, EO filed further affidavits in the bankruptcy action sworn by members of its project team, namely Mr. Grammatikopolos, Mr. Manios, Mr. Havaris, Ms. Bacani and Mr. Langdon.

[7] Mr. Kostis was the executive assistant to Intus' CEO, Mr. Agouridis. Intus is the parent company of EO. The other EO deponents had different roles on EO's behalf in the construction project that gives rise to the disputed funds.

[8] Darryl Tardif is the sole principal, director and shareholder of EA. His wife, Holly Tardif, provided back-office services to EA. Both of them filed affidavits in support of the Trustee's position that the contract, and therefore the funds, belong to EA and vest in the Trustee.

[9] All deponents were either questioned on their affidavits or made available for questioning. Responses to undertakings were provided, although EO says there has been some imperfect compliance on the part of the Tardifs.

[10] Counsel for EO, the Trustee, and Darryl Tardif all filed briefs with extensive evidentiary excerpts attached. CRA also filed a brief. Counsel at the hearing agreed that I should provide a final and binding adjudication based on the record. From the record and applying the approach from ***Hryniak v Mauldin***, 2014 SCC 7 and ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49, I conclude that all parties have put their best foot forward, that I am able to make all necessary findings of fact, apply the law to the facts and decide this matter in a proportionate, expeditious and fair way.

[11] I heard this application on February 28, 2022 and reserved so that I could review the complete transcripts from the questioning on affidavits. These transcripts were uploaded for my review as part of the record on March 4, 2022.

C. EA and EO

[12] EA was in the business of directional drilling, excavation and the installation of shallow utilities. The contract with Ledcor was for a one-year term with successive one-year renewals. Under para 26(g), neither the rights given to EA nor the obligations to perform the services could be subcontracted, assigned or otherwise delegated by EA without Ledcor's prior written consent.

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[13] Part of the work under the contract involved directional drilling and installation of fibre-optic cable for Rogers Communications in the London, ON-Woodstock, ON area, which was expected to provide work and revenue for a 3 to 5 year period. But there was a problem. CRA had filed a writ against EA at Personal Property Registry for which some $100,000 remained owing. Over time, that indebtedness continued to grow such that the CRA debt (both deemed trust and unsecured) at the time of bankruptcy was $415,241.02.

[14] Thus, in June/July 2018, Mr. Tardif began discussions with the Intus Group of Companies regarding assistance with respect to executing the Ontario part of the contract. The Tardifs and EO differ as to the nature of the assistance. The work for Ledcor in London/Woodstock started in September 2018. EO was incorporated at the instance of Intus or its principals on October 10, 2018 to provide the assistance.

[15] The Tardifs say, in essence, that EO was created so that the Ledcor payments under the contract could be diverted from EA and insulated from its creditors. Counsel for CRA characterized the scheme as follows (at para 24 of CRA brief):

> Thus, Energy Ontario was created, as Holly Tardif put it, to "create distance" from Energy Alberta – a financial pariah. Had the plan worked, Energy Alberta would likely have been abandoned as a spent, debt-riddled shell and new business would carry on under Energy Ontario.

[16] On the other hand, EO says the Ontario work under the Ledcor contract was fully assigned by EA to EO in good faith. According to EO, it was created for the purpose of performing EA's Ledcor work in Ontario. EO says that Intus would provide financial and administrative assistance to EO, while EA would provide some equipment and manpower to perform the work.

[17] EO provided office and accounting infrastructure separate from EA. It issued invoices to Ledcor, authorized by Mr. Tardif, and received payments. EO also performed other accounting functions in connection with the Ontario work. Both EA (through Mr. Tardif) and EO claim to have provided the on-site services for the project.

[18] EO requested that EA execute two documents in its favour. The first was a document entitled "Irrevocable Assignment of Contract and Work" dated effective November 22, 2018 which included statements that:

- good and valuable consideration has been received and is acknowledged by the parties;
- EA assigns, conveys, and transfers all of its interests to EO in the contracts and work orders between EA and Ledcor in Ontario from September 1, 2018 onward;
- EO accepts the assignment and agrees to assume all rights and obligations arising under such contracts, including any work obligation; and
- the assignment supersedes all prior agreements and constitutes the entire agreement between the parties.

[19] The assignment has a disputed provenance. First of all, Holly Tardif deposed and then testified under oath that she forged her husband's signature on the document. Darryl Tardif had left on a hunting trip and was not available to sign the document within the timeframe required. She says she forged the signature after succumbing to Mr. Kostis' insistence that the document

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be signed. She further says that Mr. Kostis told her the document had a limited purpose, that is, so that EO could present it to the bank as evidence of a revenue stream and obtain financing for the project. In a November 22, 2018 email, Mr. Kostis wrote to Ms. Tardif:

> It is the Ledcor Contract assignment to Energy Ontario so we can show it to the bank as well as a draft letter to Ledcor you have to put it in your own letterhead and sent afterwards for the billings.

[20] The signature on the assignment looks a lot like Mr. Tardif's signature on other documents, but I am no expert. Mr. Tardif says that he did not sign the assignment and learned about it for the first time in an email sent by Mr. Kostis to Ms. Schmidt of Ledcor on August 12, 2019, on which Mr. Tardif was copied.

[21] It is not disputed that Ledcor did not formally consent to the assignment under para 26(g) of the contract, nor even acknowledge its existence until receipt of Mr. Kostis' August 12, 2019 email.

[22] The Tardifs say that since EO's financing application was refused, the document had no further purpose or effect. It was only once the business relationship between Mr. Tardif and Intus deteriorated that Mr. Tardif says that the assignment document was dredged up and "thrown in my face." EO says the assignment actually defines the relationship between EA and EO.

[23] Ledcor was working from the other document that EO required EA to sign. The second document is the Direction to Pay. It is also dated November 22, 2018. As between themselves, Darryl Tardif and Holly Tardif disagree about who actually signed it. Darryl believes he signed it. In questioning, Holly admitted to forging Darryl's signature a second time on the Direction to Pay. That is because Darryl was out of town and Mr. Kostis required both documents urgently.

[24] The Direction to Pay is in letter form addressed to Ledcor and it was sent along with every invoice. It states:

> Please note that for purely administrative and accounting purposes and in order to ease registrations, certifications and a multitude of obstacles faced by an Extra-Provincial corporation operating in the Province of Ontario, Energy Construction and Directional Drilling (Ontario) Ltd was incorporated in order to handle all of the Ontario contracts and works on a streamlined basis.
>
> Operations, Accounting and Administration will be directly handled by our now completed local infrastructure separately from our Alberta entity through which we originally initiated operations.

[25] This letter, which is on EA letterhead, then directs Ledcor to amend its records for invoices and payment transactions to reflect EO's information and provides EO's direct deposit and EFT information.

[26] During the Ontario project:

- EO provided accounting, administrative and logistical support for the Ontario work;
- The labour was sourced by EA, the payroll initially prepared by Holly Tardif and then approved by Mr. Manios at EO;
- EO would also remit source deductions to Holly for payment to CRA on behalf of EA, and the T4 slips were issued by EA;

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- EO through Mr. Langdon provided some on-site management;
- Mr. Tardif also claims to have been hands-on in working the project; Mr. Kostis said in questioning that Mr. Tardif insisted on being the information conduit between Ledcor and EA/EO;
- Invoices, statutory declarations as to progress payments and the Notice of Substantial Completion and Request for Acceptance, were all signed by Darryl Tardif and naming Ledcor as "contractor" and EO as "subcontractor".

[27] Ledcor made all payments on the Ontario work to EO. The last payment was made on July11, 2019. EA was not paid for any of the work. No further payments were made because of issues related to compliance with Ledcor's payment procedures. On July 31, 2019, Ledcor indicated that it was refusing to pay the balance of EO's submitted invoices because Ledcor's contract was with a different entity, namely EA. It also seems that at about the same time difficulties had arisen between Darryl Tardif and EA on the one hand and Intus and EO on the other. I am generally aware that the two camps have other related issues arising from their business venture in respect of the London/Woodstock project that have ended up in separate litigation.

[28] EO attempted to extract the final payments from Ledcor by invoking the assignment. Ledcor advised on August 12, 2019 that it was not aware of an assignment. With EA and EO both laying claim to the funds still owed, Ledcor paid them into trust pending the outcome of this application.

[29] Ledcor did not participate in the application before me.

D. Positions

[30] EO argues that:

- The purported assignment is valid, proper consideration in the form of project expenses was paid, EO assumed both the benefits and burdens of the Ledcor contract and performed the work;
- Ledcor, by its conduct, either consented to the assignment or waived the non-assignability clause;
- the Tardifs are not credible and should not be believed. Furthermore, assertions now made by the Tardifs about the origin of the assignment document run afoul the Rule in ***Browne v Dunn***.

[31] Mr. Tardif contends that:

- The purported assignment was not intended to establish legal rights; rather, it was created only to allow EO to apply for bank financing, and for no other purpose;
- The Ledcor contract was non-assignable without Ledcor's prior written consent, which was not provided, and nor did Ledcor waive the non-assignability clause;
- The Direction to Pay is not an assignment, but merely functioned as a discharge of Ledcor's liability under the contract.

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[32] The Trustee agrees with the position advanced by Mr. Tardif. It also argues that there was no novation so as to create a new contract between Ledcor and EO.

[33] CRA argues that EA and EO devised a scheme with the incorporation of EO to protect EA's receivables from its creditors. It says the evidence shows the assignment document was created solely for the purpose of duping a bank into extending credit to EO and was never intended to be shown to Ledcor. Further, CRA also points out, what reason would there be for EO to send a Direction to Pay to Ledcor when EO already owned the receivables by way of assignment?

[34] As applicant, EO has the burden of persuading the court that the assignment is valid and that EO is therefore entitled to the funds in trust. For the reasons set out below, I conclude that EO has not discharged this burden.

E. Browne v Dunn

[35] Counsel for EO expressed concern that no cross-examination occurred of any EO representatives who were presented for questioning on affidavit on core factual allegations raised by either the Trustee or Mr. Tardif concerning the origin of the assignment document. This omission to cross-examine, EO's counsel contends, runs contrary to the Rule in ***Brown v Dunn***. The two main areas of concern were:

- the factual assertion that Mr. Tardif did not sign the assignment document, but rather that Ms. Tardif forged his signature; and
- the further assertion of fact that the only purpose of the assignment document was to induce EO's bank to provide credit to EO, and for no other purpose.

[36] The affidavits from the EO personnel were all filed before the affidavits of the Tardifs. The questioning of the Tardifs occurred before the questioning of any of the EO people. EO's counsel fairly pointed out that no rebuttal affidavits were filed on behalf of EO. I was also advised that Mr. Kostis has since died.

[37] The Rule in ***Browne v Dunn***, (1893) 6 R 67 (UK HL), addresses the problem where a witness is contradicted by other testimony, but where opposing counsel has not put the alternate version of events to that witness in cross-examination. This rule was expressly adopted in Canada in ***Peters v Perras***, 1909 CanLII 178 (SCC), 42 SCR 244. If a cross-examiner intends to impeach the credibility of a witness by means of external evidence, he or she must give that witness notice of that intention. Accordingly, if counsel is considering impeaching the credibility of a witness by calling independent evidence, the witness must be confronted with this evidence in cross-examination. Counsel for EO suggests there is unfairness here because these alternate versions of the facts were not put to EO witnesses.

[38] I tend to think of ***Browne v Dunn*** as primarily a doctrine applicable at trial. However, counsel agreed that this application before me would be a final application and thus there is no opportunity to shore up evidence. The position of the Tardifs on these topics was made out in their affidavits and at their questionings. There is no issue of "ambush" or impugning a witness' credibility by subsequently calling contrary evidence because the position of the Tardifs was made known before the EO witnesses were questioned. Counsel for EO complains that counsel for the Trustee made a deliberate and strategic choice not to cross-examine EO deponents on these certain critical factual points.

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[39] In answer to this complaint, I refer to the Court of Appeal's comments in ***R v Neilson***, 2019 ABCA 403 at para 37:

> Choosing not to cross-examine a witness, but instead asking the trier of fact to disbelieve a witness based on other evidence adduced in the trial, is a valid exercise and does not invoke the rule from ***Browne v Dunn***. It is illogical for a trier of fact to be expected to accept evidence which they disbelieve just because it has not been subject to cross-examination: ***R v Mete*** (1971), [1973] 3 WWR 709 at 712, 1971 CanLII 1422 (BCCA).

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[40] In any event, as I understand Mr. Tardif's position, he is not relying on the forgery as a reason to invalidate the assignment. He is saying there was never an intention to actually assign the Ledcor contract, only to create a document purporting to be an assignment that could be presented as to EO's bank. Therefore, Mr. Tardif's counsel suggests, it doesn't matter whether the signature is genuine or a forgery.

[41] Mr. Kostis, as I will recount later in this decision, was cross-examined on the exact point about the purpose of the assignment document. He was not cross-examined on whether he suggested to Ms. Tardif that she forge the signature, or his knowledge of the forgery.

[42] Does the omission by counsel to confront Mr. Kostis on these latter points require some kind of intervention on my part, such as exclusion of Ms. Tardif's related evidence? The important question to me is whether EO was given the opportunity to respond to Mr. Tardif's contrary position regarding the purpose of the assignment document. This opportunity was afforded through Mr. Kostis' cross-examination on that point. Whether the signature was forged, Mr. Kostis' knowledge of the forgery or whose idea it was for Ms. Tardif to perpetrate the forgery, are matters of detail and, as Mr. Tardif's counsel suggests, of little consequence. I do not intend to make a finding regarding the forgery. Even if the rule in ***Browne v Dunn*** applies here, which I doubt in light of ***R v Neilson*** quoted above, EO incurs little prejudice here as Mr. Tardif is not relying on the forgery as a means to invalidate the assignment document.

F. Credibility

[43] Counsel for EO submitted that the evidence of the Tardifs should be rejected on the key points that (a) Ms. Tardif forged her husband's signature on the assignment document, and (b) it was not intended as a real assignment, only for EO's bank purposes, because:

- the Tardifs can't get their story straight;
- Mr. Tardif is motivated to extract himself from personal CRA liability;
- Mr. Tardif, Ms. Tardif, EA and related persons and entities have been sued for fraud by Intus.

[44] The Tardifs agree with one another that Mr. Tardif did not sign the assignment document (Ms. Tardif claims to have forged the signature) but disagree about whether he signed the Direction to Pay. Counsel for EO says this makes no sense since they were both signed the same day and transmitted by email at the same time. Ms. Tardif says Mr. Tardif is simply mistaken about signing the Direction to Pay. She says she signed both because Mr. Tardif was out of town on his hunting trip at the time and Mr. Kostis wanted the documents urgently.

[45] For the reasons given above, I do not need to resolve the question of forgery, or who signed what. That the Tardifs are at odds with one another regarding who signed the Direction to

Pay suggests to me that they did not collude. Besides that, as between EA and EO, neither is suggesting that the Direction to Pay had no legal effect or that Ledcor should not have paid thereunder for the payments made. (It was Ledcor who thought the wrong entity was being paid in July 2019, fortuitously at the same time that the difficulties arose between Mr. Tardif/EA and Intus/EO leading to their falling out.)

[46] I acknowledge that by operation of law Mr. Tardif ultimately may have personal exposure for EA's corporate obligations to CRA.

[47] I further acknowledge that the Tardifs and Intus are locked in a separate and bitter lawsuit regarding their failed business relationship, with allegations of fraud, civil conspiracy, oppression and breach of fiduciary duty in the main action and a counterclaim for breach of conflict and bad faith in contractual performance. I understand the lawsuit is still ongoing. Mr. Tardif has denied any fraudulent activities and has defended and counterclaimed. I cannot come to a conclusion about honesty based on allegations that have been defended. If there is animus, it cannot be attributed to only one side.

[48] Further, I accept the submission of counsel for CRA that EA enlisted the assistance of Intus to incorporate EO in order to shield the proceeds of the Ledcor contract from EA's creditors. This conclusion of fact is clear from the questioning of both Tardifs, and from the circumstances, I infer that Intus and EO were willing participants.

[49] Given this background, I treat the evidence of the Tardifs and Mr. Kostis, in particular, as the right-hand man of Mr. Agouridis, with some wariness.

[50] As noted by Renke J in ***R v JAB***, 2016 ABQB 362 at para 20, a good summary of the proper approach to credibility assessment is provided by Justice Ferguson at para 78 of ***R v Storey***, 2010 NBQB 80:

> … the proper approach is to consider the evidence of a particular witness against the backdrop of the rest of the evidence led or other evidence tendered, searching for connectors that may not necessarily rise to the level of legal corroboration between witnesses, the other evidence tendered or a combination of the two in deciding what worth should be attributed to it. In the final analysis it becomes a matter of determining the veracity of the evidence utilizing the age old tools of logic, reason and common sense in measuring the probability, if it is deducible from the evidence, that the witness or witnesses' honesty on the central issue or issues is assailable.

[51] ***JAB*** also refers to O'Halloran JA's frequently cited description of credibility assessment in ***Faryna v Chorny***, 1951 CanLII 252 (BCCA), [1952] 2 DLR 354 at para 11:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident

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> witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind ....

[52] I bear in mind that I determine this matter in a summary application and have had no opportunity to observe the witnesses testify as I would in a trial. Nonetheless, I assess the credibility of witnesses by examining their evidence for its consistency with the preponderance of probabilities as recognized by a practical, informed and reasonable person.

G. The Purpose of the Assignment Document

[53] The question here is not one of interpreting a contract, but whether a contract (in the form of the assignment document) even exists. Therefore, I should examine the external circumstances, including the conduct of the parties at the time the document was created and thereafter: ***Palechek v Canadian Imperial Bank of Commerce***, 1991 ABCA 8 at para 10-11 applied in ***Mitchell v Pytel***, 2021 ABQB 403 at para 243, ***66565 Alberta Ltd v Molsberry***, 2020 ABQB 191 at para 14 and ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 47.

[54] The evidence of Holly Tardif is that the assignment document is not really a contract at all, at least not one that the parties intended to rely upon and had a specific and limited purpose. That purpose was to permit EO to show its bank that it had a valuable asset in the form of an assignment of the Ledcor contract from EA so that EO could secure a line of credit. As counsel for CRA put it, the document was a "sham". It turns out that EO was not successful in obtaining that financing.

[55] Ms. Tardif stated in her evidence that she alerted Mr. Kostis to the fact that the contract with Ledcor was incapable of assignment and said she received his assurance that the assignment would not be shown to Ledcor and only used for EO's bank.

[56] The evidence shows that the assignment document was not relied upon in any way by EO until the dispute between Mr. Tardif/EA and Intus/EO arose in July 2019. Until then, EO had always relied on the Direction to Pay as a means of procuring the payments that would otherwise have flowed to EA. For its part, Ledcor acted on the Direction to Pay but said it did not know anything about an assignment.

[57] Mr. Kostis in his questioning on affidavit confirmed Holly Tardif's account (transcript at p 25, lines 2-26):

> Mr. Maruyama:
>
> And, as you can see on the screen, Mr. Kostis, this is an email for yourself to Holly Tardif, Darryl Tardif, and Dimitris of Energy Ontario, dated November 22nd, 2018.
>
> And you state to Holly on this at the beginning, as you can see:
>
> It is the Ledcor contract assignment to Energy Ontario, so we can show it to the bank, as well as a draft letter to Ledcor. You have to put it on your own letterhead and send afterwards for the billings.

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So, of course, the Ledcor contract assignment, that is actually the assignment agreement that we have been discussing here that is Exhibit "C" to your affidavit, right?

A Yeah. We are asking for.

Q Yes. And then, of course, this is the draft letter to Ledcor. And that is what you have referred to as a direction to pay letter, right?

A Pretty much, yeah, to my recollection. We needed documentation for the bank.

Q Yes. So the plan was to put the assignment agreement to the bank to see if Energy Ontario can get financing, yes or no?

A Yes. Yes.

[58] Dimitri Agouridis was CEO of Intus and a director of EO. There was no affidavit from Mr. Agouridis in the bankruptcy action, however Mr. Kostis confirmed during his questioning that he was basically functioning as Mr. Agouridis' right-hand man at the time and had been authorized by EO to swear his affidavit and to attend for questioning in the bankruptcy. From the excerpt above, Mr. Kostis confirmed that the Direction to Pay letter was to be sent to Ledcor for the billings and the assignment document was to be shown to the bank for financing purposes.

[59] Later on, Mr. Kostis acknowledged in two separate email communications the same day that there was no assignment:

- an email dated May 1, 2019 from Mr. Kostis to Mr. Tardif and Mr. Agouridis concerning how another business transaction was conditional on two things, the second of which was "the Ontario Ledcor contract is completely transferred directly to Energy Ontario in order to ensure revenues from it would provide for the financial obligations undertaken by Energy Ontario"; and
- a different email dated May 1, 2019 from Mr. Kostis to Herman Albers where Mr. Kostis states "Energy Alberta now has the only Ledcor contract in Ontario which we support financially with Energy Ontario… What we need for that is to convince Darryl to put the contract directly in Energy Ontario's name with Ledcor."

[60] Moreover, Mr. Agouridis in his own May 1, 2019 email to Mr. Tardif and Mr. Kostis questions EO's continued involvement with the Ledcor project by saying: "My question to Darryl is why we should invest in a 51/49 venture in Ontario with additional Alberta baggage on a contract which is not ours and not go with the new project where we make more money and control the operation as a prime contractor."

[61] By this question, Mr. Agouridis acknowledged that the Ledcor contract did not belong to EO and that it did not control its operation. Counsel for EO argued that the content of the emails should be discounted as the context is unknown. I do not agree. I think the context is clear from reading the emails. Mr. Agouridis' email is two-thirds of a page long and provides lots of context about why EO should not continue supporting the Ledcor project, as opposed to taking on another project in its own name in a different location. Why would the question even be asked if EO already owned the Ledcor contract?

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[62] These words emanating from Mr. Kostis and Mr. Agouridis stating that EA owns the contract, not EO, support Ms. Tardif's version of the purpose of the document and that it was not intended to create legal relations. Similarly, EO's reliance on the Direction to Pay as mechanism for procuring payment from Ledcor, versus the assignment document itself, also supports the Tardifs' position. The evidence of EO's participation in the Ledcor project is as consistent with EO simply investing in the project as it is with EO taking ownership. In other words, I find Ms. Tardif's account is more consistent with the preponderance of probabilities and I accept it.

[63] Strictly speaking, this finding disposes of the application. However, for the sake of completeness, I will address the remaining arguments and provide alternative reasons.

H. Ledcor's Lack of Consent and the Question of Waiver

[64] Para 26(g) of the Ledcor contract is clear that neither the rights accorded to EA nor the obligations to perform the services under the contract are capable of being subcontracted, assigned or otherwise delegated by EA without Ledcor's prior written consent. It is not disputed that no such prior written consent was ever given. From Ledcor itself in the form of Ms. Schmidt's email of August 12, 2019 to EO, it is clear that Ledcor was unaware of any assignment.

[65] As noted by the Court of Appeal in ***Remington Development Corporation v Enmax Power Corporation***, 2012 ABCA 196 at para 15, citing ***National Trust Co v Mead***, [1990] 2 SCR 410 at para 35, as a general rule, a party to a contract can assign the contractual benefits of the contract, but not the obligations, without the consent of the other party or parties to the contract.

[66] It is true, as counsel for EO observes, that the Ledcor contract expressly contemplates assignment at para 26(e) in making the contract binding upon and enuring to the benefit of successors and assigns. However, this section only gives Ledcor a right of unilateral assignment. Any purported assignment by EA is still governed by para 26(g) which requires Ledcor's prior written consent as a pre-condition of validity.

[67] EO has argued that Ledcor implicitly or by conduct waived strict compliance with section 26(g). However, section 26(d) expressly provides that failure to enforce a particular provision does not constitute waiver, which can only be in writing. Logically, by being unaware of the existence of the assignment document, Ledcor could not have waived the non-assignability clause.

[68] On the facts, it cannot be said that Ledcor either acknowledged the validity of the assignment document or waived the non-assignability clause. I read the email from Subrina Goolsarran (Ledcor project accountant) to Nimfa Manigbas of EO on July 31, 2019 to mean that Ledcor had just realized that it had been paying the wrong entity on the project in error, and was not making any further payment to EO. While the other issues mentioned with the invalid HST number for EO and EO's delinquent WSIB account may have been eventually resolved, the issue of the incorrect entity was not. The subsequent August 12, 2019 email from Stefanie Schmidt of Ledcor to Mr. Manios of EO clearly suggests that Ledcor considered EA to be its contractor, that it would be paying EA's invoices and that it was up to Mr. Tardif to sort out any issues between EA and EO.

[69] Moreover, since the assignment did not involve Ledcor as a signatory, Ledcor's receipt and payment of EO's invoices per EA's instructions cannot be considered to be a novation.

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There was no tri-lateral agreement: ***Canada Southern Petroleum Ltd v Amoco Canadian Petroleum Company Ltd***, 2001 ABQB 803 at para 129.

[70] EO relies on ***Shelanu Inc v Print Three Franchising Corp***, [2003] OJ No 1919 at para 33 for the proposition that it would be unfair to permit Ledcor or EA to rely on the non-assignability and non-waiver clause as it would effectively amount to sanctioning unjust enrichment and breach of contract. Ledcor was not a party to this application, instead adopting a position of neutrality as to who should receive the funds. Even so, Ledcor is clearly not unjustly enriched. It has paid fully for the services rendered but sensibly only wishes to pay once, so the funds have been paid into trust. Further, being unaware of any assignment, there is no breach of contract on Ledcor's part. If EA has been enriched or has breached a contract by not paying EO, or by not allowing EO to be paid by accessing funds from Ledcor, then EO has a claim against EA.

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I. The Direction to Pay

[71] This brings me to the topic of the Direction to Pay letter dated November 18, 2018. Throughout its brief, EO referred to this document as a Notice of Assignment. It does not reference the assignment document nor even the project by name or contract number. It is addressed to the wrong Ledcor entity, not the entity with whom EA contracted.

[72] By its own words, it does not assign either rights or obligations from EA to EO but rather only instructs Ledcor that it may discharge its payment obligations to EA by paying the funds due in a certain way, that is, to EO. Since Ledcor had no contract with EO and had neither consented in writing to nor was even aware of any assignment of the contract from EA to EO, the Direction Pay cannot be read any other way. It even states that EO was created "purely for administrative and accounting purposes" but does not say anything about changes in rights or obligations. The Direction to Pay does not confer substantive entitlement upon EO; rather, it instructs the debtor (Ledcor) to discharge its liability by payment to another: ***Parrish & Heimbecker Ltd v All Peace Auctions Ltd***, 23001 ABQB 1104 at para 47 and ***Accel Energy Canada Limited (Re),*** 2020 ABQB 652 at para 29.

[73] The November 18, 2018 letter is not notice of an assignment. At best, it is a Direction to Pay.

[74] In this way, complying with the Direction to Pay was neither waiver of the non-assignment clause by Ledcor, nor a novation. Ledcor was merely following EA's payment instructions.

[75] Further, as both counsel for CRA and Mr. Tardif point out, the issuance of the Direction to Pay is completely at odds with the concept of an absolute assignment. The existence of the latter would preclude any need for the former. Yet, the Direction to Pay was sent along by EO with each invoice issued to Ledcor, a circumstance that lends support to the notion that rather than there being an absolute assignment of both benefit and burden, EO was recovering its investment in the London/Woodstock project by obtaining diverted payment from Ledcor.

[76] I think if fair to say that EO had a financial interest in the Ledcor contract and that it hoped to recoup its investment through payments received from Ledcor that had been diverted from EA. I do not dispute that EO made the expenditures indicated in Ms. Bacani's affidavit. However, as counsel for Mr. Tardif points out, Mr. Tardif revoked the Direction to Pay, in the very least impliedly if not expressly, by advising Ledcor on or about August 12, 2019 that all

outstanding invoices would be resubmitted in EA's name. Ultimately, this dispute as to entitlement led Ledcor to pay the funds into trust and this application.

J. Evidence of Mr. Langdon

[77] I do not dispute the evidence of Mr. Langdon of Intus about what Mr. Fuller, a Ledcor project manager, told him regarding his (Mr. Fuller's) understanding that EO was entitled to receive the payments on the London/Woodstock project. However, the evidence is not probative. First, the basis of Mr. Fuller's understanding is unknown. Second, he is not purporting to speak on behalf of Ledcor but expressing a personal opinion. Third, the recounting of these conversations between Mr. Langdon and Mr. Fuller is contained in Mr. Langdon's affidavit and is hearsay. Affidavit evidence in a final application, which this is, must be sworn on the basis of personal knowledge: Rule 13.18(3).

K. Result

[78] For all of the reasons above, I conclude that the Ledcor contract belongs to EA and that it was not validly assigned to EO. As I said, EO has not discharged its burden of persuading me otherwise.

[79] The Trustee's deemed decision to disallow EO's property claim to the funds in question is upheld.

[80] I find that the Trustee is entitled to the funds in trust and direct payment of the funds to the Trustee for distribution to the creditors of EA in accordance with the ***BIA***.

[81] EO may very well have a claim against EA for the funds expended and not recouped thus far. It may file a proof of claim in the bankruptcy as an unsecured creditor in that regard.

[82] EO brought one application, but three parties chose to oppose it. As the unsuccessful party, EO will pay one set of costs, with each opposing party claiming costs entitled to an equal portion thereof. If the parties are unable to agree on the quantum, they may contact me in writing within 45 days of the date of this decision. Written costs submissions are restricted to a two-page letter, excluding exhibits and authorities, per party.

[83] I thank counsel for their thorough and thoughtful written and oral submissions.

Heard on the 28th day of February, 2022.
Dated at the City of Edmonton, Alberta this 13th day of April, 2022.

Douglas R. Mah
J.C.Q.B.A

2022 ABQB 268 (CanLII)

Appearances:

Spencer Chimuk, McLeod Law LLP
for Energy Construction and Directional Drilling (Ontario) Ltd
(Applicant)

Bryan P. Maruyama, Parlee McLaws LLP
for BDO Canada Ltd, Trustee in Bankruptcy
of Energy Construction and Directional Drilling Ltd
(Respondent)

Soheel S. Hussein, Bryan & Company, LLP
for Darryl Tardif

George Bódy, Justice Canada
for Her Majesty the Queen in Right of Canada as represented
by the Minister of National Revenue

2022 ABQB 268 (CanLII)

Ontario Supreme Court
Playdium Entertainment Corp., Re
Date: 2001-11-02

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

In the Matter of a Plan of Compromise or Arrangement of Playdium Entertainment Corporation et al.

2001 CanLII 28281 (ON SC)

Ontario Superior Court of Justice [Commercial List] Spence J.

Heard: October 29 and 30, 2001

Judgment: November 2, 2001[1]

Docket: 01-CL-4037

Paul G Macdonald, Alexander L. MacFarlane, for Covington Fund I Inc.

Gary C. Grierson, J. Anthony Caldwell, for Famous Players Inc.

Craig J. Hill, for Pricewaterhouse Coopers Inc.

Roger Jaipargas, for Monitor

Gavin J. Tighe, for Toronto-Dominion Bank

Michael B. Rosztain, for Canadian Imperial Bank of Commerce

Geoff R. Hall, for Ontario Municipal Employees Retirement Board

David B. Bish, for Playdium Entertainment Corporation

Julian Binavince, for Cambridge Shopping Centres Limited

***Spence J.*:**

[1] These reasons are provided in brief form to accommodate the exigencies of this matter.

[2] The Playdium corporations and entities (the "Playdium Group") have been engaged in restructuring efforts under the *Companies' Creditors Arrangement* Act (the "*CCAA*"). These efforts have been unsuccessful. It is now proposed that substantially all the Playdium assets

[1] Additional reasons at 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

will be transferred to a new corporation (“New Playdium”) which will be indirectly controlled by Covington Fund I Inc. and Toronto-Dominion Bank. This transfer would be made in satisfaction of the claims of those two creditors and Canadian Imperial Bank of Commerce, the primary secured creditors and the only creditors with an economic interest in the Playdium Group.

[3] The primary secured creditors intend that the Playdium Group’s business will continue to be operated as a going concern. If successful, this would potentially save 300 jobs as well as various existing trade contracts and leases.

[4] This transaction is considered to be the only viable alternative to a liquidation of Playdium Group and the adverse consequences that would flow from a liquidation. Interests of members of the public also stand to be affected, in respect of prepaid game cards and discount coupons, which are to be honoured by the new entity.

[5] The proposed transaction would involve assignment to the new entity of the material contracts of the business, including the Techtown Agreement with Famous Players.

[6] Playdium Group is not currently in compliance with the equipment supply provisions of s.9(e) of the Techtown Agreement. The new entity is to take steps, as soon as reasonably practicable, that are intended to achieve compliance with s.9(e). Famous Players disputes that the proposed steps will have that effect and opposes approval of the proposed assignment of the Techtown Agreement to the new entity.

[7] Covington says that the assignment of the Techtown Agreement is a critical condition of the proposed transaction: without the assignment, the transaction cannot proceed.

[8] Covington says that the structure of the proposed transaction is such that it does not require the consent of Famous Players. This is disputed by Famous Players, based on s.35 of the Agreement and the fact that the assignee is to be controlled by Covington and TD Bank.

[9] Covington submits that it is in the best interests of all the shareholders that the proposed transaction, including the assignment of the Techtown Agreement, be implemented. Covington and TD Bank seek an order authorising the assignment and precluding termination of the Techtown Agreement by reason only of the assignment or certain defaults. Famous

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Players has not given any notice of default to date. The prohibition against termination for default is not to apply to a continuing default under para.9(e) of the Agreement.

[10] The primary secured creditors also seek an extension of the existing stay until November 29, 2001 to finalize these transactions. To facilitate the transactions, Covington and TD Bank seek the appointment of Pricewaterhouse Coopers as Interim Receiver.

[11] Based on the cases cited, including *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society/Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]), and the statutory provisions and text commentary cited, the court has the jurisdiction to grant the orders that are sought, and may do so over the objections of creditors or other affected parties. Also, the decision in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), supports the appointment of an interim receiver to do what “justice dictates” and “practicality demands”.

[12] Famous Players says that no reason has been shown to expect the proposed course of action will bring the Techtown Agreement into compliance and make it properly operational; Covington has not shown it has expertise to bring to the business operations; the operations are grossly in default at present, and the indicated plans are inadequate to cure the default, which has serious adverse consequences to Famous Players.

The Relief Sought

[13] The applicants revised the form of order that they seek, to provide (in paragraph 15) that a counterparty to a Material Agreement is not to be prevented from exercising a contractual right to terminate such an agreement as a result of a default that arises or continues to arise after the filing of the Interim Receiver’s transfer certificate following completion of the contemplated transactions.

[14] Famous Players moved for certain relief that was apparently formulated before the applicants’ revisions to their draft order. From the submissions made at the hearing, I understand the position of Famous Players to be that it opposes the order sought by the applicants, at least insofar as it would approve the assignment of the Techtown Agreement, but the submissions of Famous Players did not address specifically the relief sought in their

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notice of motion, presumably because of the revision to the applicants' draft order as regards continuing defaults.

Section 35 of the Techtown Agreement

[15] Section 35 permits an assignment to a Playdium affiliate. The proposed assignee is to be a new company, "New Playdium", to be incorporated on behalf of the Playdium Group, and to be owned by it at the precise time when the assignment occurs. The assignment will occur, it may be presumed, if and only if the contemplated transactions of transfer are completed. On completion of the contemplated transactions, New Playdium will be owned by a corporation controlled by Covington and TD Bank. That outcome reflects the purpose of the assignment, which is to transfer the benefit of the Techtown Agreement to the new owners. Accordingly the assignment, viewed in terms of its substance and not simply its momentary constituent formalities, is not a transfer to a Playdium affiliate. This view is in keeping with the decision in *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]).

[16] Under s.35, the Agreement therefore may not be assigned without the consent of Famous Players, which consent may not be unreasonably withheld. Famous Players says that it has not been properly requested to consent and it has not received adequate financial information and assurances as to the provision of satisfactory management expertise and as to how the Agreement is to be brought into good standing.

[17] The submission to the contrary is that the Agreement is really in the nature of a lease, not a joint venture involving the requirement for the provision to the venture of management services. This submission has some merit, Playdium seems principally to be required to supply game equipment. Section 26 of the Agreement disclaims any partnership or joint venture. If the business is to be sold to the new owners as a going concern, it would be likely to have the same competence as before, unless the contrary is shown, which is not so. Covington says that financial information was offered and not accepted and (although this is either disputed or not accepted) that no further request was made for it.

[18] Reference was made to the decision in *Dominion Stores Ltd. v. Bramalea Ltd.* (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) that an assignment clause of this kind is to be construed strictly, as a restraint upon alienation, and its purpose is to protect the landlord as to the type of business

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carried on. The case also says that a refusal for a collateral purpose or unconnected with the lease is unreasonable.

[19] On the material filed, Famous Players has the prospect of a better deal with Starburst and this must be considered a factor in their withholding of consent. It is also relevant that Playdium is not in compliance with the Agreement and it is not clear how soon compliance is intended to be achieved under the Covington proposal. It is not clearly unreasonable for a party in the position of Famous Players to look for a better deal when the counterparty is in a condition of continuing non-compliance.

[20] The propriety of the proposed Starburst deal is disputed on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. The relevance of this dispute is considered below.

Whether Court should approve the Assignment of the Techtown Agreement

[21] This is the pivotal issue in respect of the motion.

[22] Famous Players objects to the assignment. Famous Players refuses its consent. With regard to s.35 of the Agreement, and without reference to considerations relating to *CCAA* (which are dealt with below), I cannot conclude that the withholding of consent is unreasonable. So s.35 does not provide any right of assignment.

[23] If there were no *CCAA* order in place and Playdium wished to assign to the proposed assignees, it would not be able to do so, in view of Famous Players' withholding of its consent. The *CCAA* order affords a context in which the court has the jurisdiction to make the order. For the order to be appropriate, it must be in keeping with the purposes and spirit of the regime created by *CCAA*: see the *Red Cross* decision.

The factors to be considered

[24] The applicants submit that it is clear from the Monitor's reports that a viable plan cannot be developed under *CCAA* and the present proposal is the only viable alternative to a liquidation in bankruptcy. The applicants say that the present proposal has the potential to save jobs and to benefit the interests of other stakeholders.

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[25] Famous Players submits that, on the basis of the *Red Cross* decision, the court should approve the appointment of an interim receiver with power to vest assets, in a *CCAA* situation, where there is no plan, only where certain appropriate circumstances exist as set out in *Red Cross,* and those circumstances do not exist here.

[26] In this regard, the first factor mentioned in *Red Cross* is whether the debtor has made a sufficient effort to obtain the best price and has not acted unprovidently. Famous Players says that there has been no substantial effort to develop a plan to sell the business components (such as the LBE's) as going concerns, no tender process, no marketing effort and no expert analysis. From the reports of the monitor it appears efforts were made to find prospects to purchase debt or equity or assets and there was no indication of viable deals. Whether or not the best price has been obtained, on the material it appears the value of the assets would not satisfy the claims of the principal secured creditors. There is nothing to suggest that a better deal could be done without including the Techtown Agreement; according to the monitor it would have been a key part of any viable plan. Famous Players is not in the position of a creditor looking to be paid out, so its submissions as to the need to get the best price do not seem to be well addressed to its proper interest in this case, and the others who have appeared who are creditors are not objecting to the process and the result.

[27] The second factor mentioned in the *Red Cross* decision is that the proposal should take into consideration the interests of the parties. The proposal has potential benefits for trade creditors, employees and members of the public which would flow from continuing the business operations as proposed.

[28] The other two criteria in *Red Cross* are that the court is to consider the efficacy and integrity of the process by which the offers were obtained and whether there has been unfairness in the working out of the process. Famous Players says that, as regards its interests, there has been no participation afforded to it in designing the proposal, although the Techtown Agreement is said to be critical to the proposal, and nothing to show how or when the s.9(e) requirements will be brought into compliance. There were discussions between the parties in August but they did not lead to any productive result. It is true that it is not clear how or when compliance will be brought about. This point is considered below.

The effect on Famous Players

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[29] Famous Players says that if the applicants are given the relief they seek, the proposed transactions will close and the *CCAA* stay will be lifted—which would happen at the end of November, on the present proposal—and the prospect would be that Famous Players would then issue notices of default in respect of s.9(e), notice of termination would follow and the entire matter would end up in litigation within two months. That is possible. It is also possible that the parties would work out a deal. Covington is to invest about $3 million in the new entity so there will be an incentive for it to find ways to make the new business work.

[30] If the parties cannot resolve their differences, then litigation might well result. Famous Players would be saved that prospect if the assignment were not to be approved and the companies instead were liquidated in bankruptcy. The delay occasioned by a further stay and subsequent litigation would also presumably result in increased losses of revenue to Famous Players compared to a full compliance situation or an immediate termination. There is nothing before the court to suggest that, if Famous Players has to resort to litigation and succeeds, it would not be able to recover from the new company. On this basis, the right of Famous Players to seek relief for a default seems to address adequately the risk of continuing non-compliance with s.9(e). Accordingly, the provision preserving that right is a key consideration in favour of the motion.

[31] The other reason Famous Players evidently has for opposing the applicants' motion is that it could do a better deal with Starburst. If that were the only reason it had for withholding consent to an assignment of the Agreement, it would not be a reasonable basis for withholding consent under s.35 of the Agreement. It can be inferred from that consideration that it should also not be regarded as, by itself, a proper reason to allow the objection to stand in the way of the proposed assignment as part of the proposal to enable the business to continue.

[32] Moreover, as noted above, the propriety of the Starburst transaction is disputed, on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. Based on the submissions before the court, the dispute could not be said to be without substance. If the proposed transactions are allowed to proceed and litigation ensues between Famous Players and New Playdium, there would presumably also be an opportunity for the dispute about the possible breach, and its implications for the propriety of the proposed deal between Starburst and Famous Players, to be pursued in litigation.

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[33] If instead the proposed transactions are precluded by a denial of the requested order, Playdium would go into bankruptcy and it would lose any opportunity to obtain the benefit of any rights it would otherwise have to oppose the proposed deal between Starburst and Famous Players. Allowing the Playdium transactions to proceed would effectively preserve those rights.

Conclusion

[34] For the above reasons the motion of the applicants is granted. The initial order of this court made February 22, 2001 shall be continued to November 29, 2001, and the stay period provided for therein shall be extended to November 29, 2001. The parties may consult me about the other terms of the order, and costs.

Application granted.

2001 CanLII 28281 (ON SC)

Ontario Supreme Court
Playdium Entertainment Corp., Re
Date: 2001-11-15

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

In the Matter of a Plan of Compromise or Arrangement of Playdium Entertainment Corporation et al.

Ontario Superior Court of Justice [Commercial List] Spence J.

Heard: November 9, 2001

Judgment: November 15, 2001

Docket: 01-CL-4037

Paul G. Macdonald, for Covington Fund I Inc.

Gary C. Grierson, for Famous Players Inc.

Gavin J. Tighe, B. Skolnik, for Toronto-Dominion Bank

David B. Bish, for Playdium Entertainment Corporation

Spence J.:

[1] These reasons are supplemental to the reasons for decision which I released November 2, 2001. Reference is made to those reasons. The defined terms employed in those reasons are also used below.

[2] Covington and TD Bank propose that the order appointing the interim receiver should contain, as regards the assignment of the Material Agreements (including the Techtown Agreement), the provisions set out in Part V, paragraphs 10 through 13, of the draft order now before the court.

[3] This draft order is different from the form of order in the motion record but apparently not different in respect of the matter now in issue between Covington, TD Bank and Playdium on the one side and Famous Players on the other. The hearing on October 29 and 30 did not address the specific terms of the order but it did address the intended effect of the

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assignment of the Techtown Agreement. It was submitted that the assignment was intended to result in New Playdium, as assignee, becoming bound to perform the Playdium obligations under the agreement from and after the transfer date and becoming entitled to obtain performance by Famous Players of its obligations under the agreement from and after that date. Special provision has been made in respect of s.9(e) defaults, as referred to in the reasons for decision of November 2, 2001. The insolvency defaults of Playdium which led to the CCAA order are in effec[???] stayed, which is not an issue.

The Issue

[4] Famous Players now submits that the form of order should be revised to provide that the transfer of assets should, in effect, be made subject to "any and all claims of Famous Payers arising from its contractual entitlements under the Techtown Agreement".

[5] Famous Players submits that a provision to that effect is necessary because otherwise it will suffer the loss of certain of those claims and that it ought not to be deprived of those claims by the order of the court and that the court has [???] jurisdiction to make such an order.

The Terms of the Assignment

[6] Famous Players will continue to have any rights of action it now has [???] which may subsequently arise in its favour against Playdium (subject to any sub sequent court determination to the contrary), because nothing in the proposed transaction purports to alter those rights. It is not indicated whether Playdium is to have liability in respect of events occurring after the transfer. In any event, the continuing liability of Playdium is of no practical consequence to Famous Players' concerns, given Playdium's insolvency.

[7] As against New Playdium, by reason of paragraph 13 of the draft order, Famous Players would be able to exercise a contractual right to terminate as a result of a default that arises or continue to exist after the transfer, except for an insolvency default.

[8] Counsel for Covington said that if there is an existing misrepresentation as to the state of the equipment, that would be brought forward, which I take to mean that the rights of Famous Players in that respect would be preserved for purposes of Famous Players being able to assert those rights against New Playdium.

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[9] It was submitted that the proposed terms in the draft order would assign the benefit of the agreement without the burden. However, on the basis of the material and the submissions for Covington and TD Bank, the intention is that New Playdium would assume the burden of the agreement as of and from the transfer date in respect of the obligations of performance then in effect or arising subsequently.

[10] What New Playdium would not assume or be liable for would be any claims that may arise in the future in favour of Famous Players against Playdium in respect of matters which occurred prior to the transfer and do not constitute a continuing default on the part of Playdium at the time of the transfer.

[11] An example of such a contingent claim might be a claim for indemnity by Famous Players against Playdium in respect of damages payable by Famous Players for injury suffered resulting from Playdium's equipment in an occurrence prior to the transfer to New Playdium but not asserted by the claimant until a time subsequent to the transfer. It was submitted that such a claim cannot properly be viewed as part of the continuing burden of the agreement as regards New Playdium because the event giving rise to it antedates New Playdium's involvement. It was also submitted that such a claim is nothing other than a contingent unsecured claim of a person who, in respect of the claim, is a creditor or prospective creditor of Playdium and the claim should not be entitled to any different recognition than other unsecured contingent claims of Playdium. These submissions have merit.

[12] For Famous Players it was submitted that New Playdium is seeking to take an assignment of the agreement without being subject to the equities. However, it appears that Famous Players' rights of termination are preserved (except for the insolvency default), in respect of defaults under the agreement existing at or subsequently arising after the transfer date.

[13] It was not suggested that New Playdium seeks to take an assignment from Playdium of rights against Famous Players in respect of matters that have occurred previously under the agreement and which might be the subject of a claim of set-off or counterclaim. If that were intended, that might well constitute a case of assignment without being subject to the equities. For that reason, it would be appropriate that New Playdium should not be able to assert such rights against Famous Players without being subject to any such claims (i.e. set-offs and counterclaims) of Famous Players relating to such rights. A provision to that effect ought to be

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included in the order and it should state that the provision is subject to any further order of the court based on CCAA consideration.

Jurisdiction of the Court Under CCAA

[14] As for the jurisdiction of the court to order the assignment on the terms proposed, Famous Players submits that the authority of the court must derive from the CCAA and there is no provision in the CCAA sufficient for this purpose. This raises an issue of fundamental importance about the scope of the CCAA.

[15] Section 11(4) of CCAA provides as follows:

> Other than initial application court orders—a court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.
>
> > (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[16] Famous Players now submits that s. 11(4) of the CCAA is not sufficient to give the court authority to make an order which has a permanent effect against a third party and that no other provision of the CCAA assists and neither does the inherent jurisdiction of the court.

[17] As the parties presumably realize, the submission of Famous Players goe not just to the terms proposed but to the jurisdiction of the court to order the assignment itself, a matter that was dealt with in the reasons of November 2, 2001. Since the order has not yet been taken out, the matter is still before me. Because of the importance of the issue, it is appropriate to consider the further submissions made at the present hearing.

The Case Law

[18] The following excerpts from decisions in cases under the CCAA provide assistance in assessing the extent of the jurisdiction of the court.

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[19] From *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at pages 33 and 34, by Farley J.; with reference to s. 11 of the Act as it was at that time:

> The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,* supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.,* supra, at pp. 296-298 (B.C.S.C.) and pp. 312-314 (B.C.C.A.) and *Meridan Developments Inc. v. Toronto Dominion Bank,* supra, pp. 219 ff.
>
> The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from
>
> doing so: see *Gaz Metropolitain v. Wynden* and *Qintette Coal Ltd. v. Nippon Steel Corp.,* supra, at pp. 311-312 (B.C.C.A.).

[20] From Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, *Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at page 315, by Blair J:

> The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex Ltd.,* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.

[21] From the endorsement in *American Eco Corp., Re* (October 24, 2000), Doc. 00-CL-3841 (Ont. S.C.J.), unreported Endorsement of Farley J.:

> The only fly in the ointment as I was advised was that BFC was not agreeable to giving its consent, which consent is not to be unreasonably withheld as to the transfer of the j.v. contract participation from Industra to members of the Lockerbie Group…
>
> Thus it appears to me that in relative terms, the financial aspects of this transfer vis a vis the joint venture is covered off by the asset/equity substance of the consolidated Lockerbie group and the provision of the completion bond. As well from a work performance aspect, one should note that if Lockerbie was not allowed the transfer, then BFC would be looking at an insolvent j.v. venturer Industra—with the result that as opposed to the Industra team being kept together (as assumed by Lockerbie

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> purchasers), the team would be "let go" and BFC would not have this likely package but would have to go after the disintegrated team on a one by one basis.
>
> But perhaps more telling is the BFC October 12/2000 letter that "Therefore, we would only be prepared to seventy five (75) percent". Thus it appears that there is no financial or operational reason to refuse the assignment—but merely, a bonus which in my view is not related to any true risk—but merely a "bare consideration" bonus. See paragraph 194 of *Welch Foods v. Cadbury Beverages Canada Inc.* I find that BFC would be unreasonable to withhold its consent if the Lockerbie group provided the aforesaid guarantees and bond.
>
> While it is true that the assignment provision is there irrespective of it being in an insolvency setting or not, it would seem to me that in the fact circumstances prevailing of the insolvency that BFC is attempting to confiscate value which should otherwise be attributable to the creditors.

[22] Famous Players is not seeking a bonus for its consent. But its only apparent remaining reason for withholding consent, vis a vis the prospect now afforded of a solvent Playdium business under the new owners, is that it has a better prospective deal with Starburst, which is not dissimilar to the Industra situation.

[23] From *Smoky River Coal Ltd, Re,* [1999] A.J. No. 676 (Alta. C.A.) at pages 10 and 13 by Hunt J.A.

> 47 The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as Norcen, supra, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the CCAA…
>
> 49 …Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).
>
> 50 The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empowers the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceedings" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.
>
> 72 …I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the CCAA proceedings. I assume that, in setting the details of the CCAA procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

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[24] Paragraph 72 of the *Luscar* decision appears to me not to intend a limitation on the scope of the authority of the court as characterized in paragraph 50, but rather as an expression of the need for caution as to the manner in which that jurisdiction is exercised.

[25] It appears to me that the approach taken by courts to the CCAA in the decided cases to which I have been referred is consistent, in terms of the views expressed about the proper application of the Act and the decisions taken in the particular cases, with the approval that is sought here for the assignment of the Techtown Agreement.

Analysis

[26] Section 11(4) of the CCAA, in subsections (a) (b) and (c), provides only f[???] orders of a negative injunctive effect until otherwise ordered by the court, respect of proceedings against the company, i.e. in this case, Playdium. H[???] ever, the order sought is in effect to require Famous Players to be bound by assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s. 11(4) (a)(b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

[27] Section 11(4)(c) warrants further consideration in this regard. Section 11(4) (c) does not require that an order be made only for a limited period, as s. 11(4)(a) appears to do. By its terms it would seem to permit an order to prohibit the commencement of any action, suit or proceeding against Playdium on the basis of the Techtown Agreement including the purported assignment of the agreement to New Playdium. Such an order would seem to be legitimate in its formal compliance with s. 11(4)(c) but it would leave the matter of the status of the Techtown Agreement unresolved with respect to all concerned, unless it could go on, through an ancillary order, to give effective approval to the assignment.

[28] Consideration must also be given to the words, in the opening part of s. 11(4) which provide that the court may make an order *on such terms as it may impose* (emphasis added).

[29] It is instructive to compare s. 11(4) of the CCAA with s. 11 (3). Section 11 (3), relating to initial application court orders also provides that the order may be made on such terms as the court may impose, but the provision adds the qualification “effective for such period as the court deems necessary not exceeding thirty days”.

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[30] It is relevant to the analysis of this issue that Famous Players is not a mere "third party" but is, as counsel said, a significant stakeholder. Under the proposed transaction, Famous Players will retain its rights against Playdium in respect of claims relating to the pre-transfer period and will be entitled to assert, in respect of the period from and after transfer, the same rights against New Playdium as it had against Playdium, including rights to terminate for default, except the insolvency default which occasioned and was the subject of the CCAA stay. So it is difficult to see how the circumstances of Famous Players in respect of the Techtown Agreement could be said to have changed to the detriment of Famous Players in any material way.

[31] In substance, what will have happened, to put the matter in terms of s. 11(4), is that Famous Players will have been prohibited from taking proceedings in respect of the Techtown Agreement except on and subject to the terms of the assignment to New Playdium and to make that order effective terms will have been imposed by the court which provide for the Techtown Agreement to be assigned by the required date to New Playdium on terms that assure to Famous Players the same rights against New Playdium as it had against Playdium for the post-transfer period and leave Famous Players with its rights against Playdium in respect of the pre-transfer period.

[32] In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not he asserted by Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the court should not take such a restrictive view of the s. 11(4) jurisdiction.

[33] Famous Players objects that the order is not only permanent but positive, i.e. rather than simply restraining Famous Players, the order places it under new obligations. It would be more precisely correct to say that the order places Famous Players under the same obligations as it had before but in favour of the new owners of the business. Moreover, the

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new owners are not third parties but rather the persons who have the remaining economic interests in Playdium.

[34] In view of the remedial nature of the CCAA, it does not seem that in principle, a change of this kind, which is a change occasioned only by the ownership changes effected by the compromise itself and one that does not involve any materially greater or different obligations, should be regarded as beyond the jurisdiction created by the CCAA. This view is examined further below with respect to the issue of positive obligations.

The Imposition of Positive Obligations

[35] The requested approval of the assignment can be analyzed conceptually as follows in terms of s. 11(4)(c). The court prohibits any proceedings by Famous Players against Playdium (and therefore against its assignees) except on the following terms, i.e., that any such proceeding must be consistent with any assignment of the Agreement approved by the court. It is a further term, or an order to give effect to the stated terms, that the court approves the assignment to New Playdium for this purpose. An order on these terms conforms to the requirements of s. 11(4)(c).

[36] Famous Players objects that the order is also to have positive effect: i.e. it imposes obligations on Famous Players as distinct from merely staying proceedings by it. However, the order as analyzed above could not be effective unless the assignment binds all parties, i.e. Famous Players as well as New Playdium and Playdium.

[37] Also, if the order could not bind Famous Players in a positive manner, the result would be that Famous Players could assert rights under the Agreement as assigned but would not be subject to the corresponding obligations under it. This would not be fair.

[38] So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute.

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[39] Reference has been made in CCAA decisions to the inherent jurisdiction of the court in CCAA matters. The following excerpt from the decision of Farley J in *Canada (Minister of Indian Affairs & Northern Development)* v. *Curragh Inc* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List])at pp 184 and 185 is instructive:

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> Certainly the non-bankruptcy courts of this country have exercised their inherent jurisdiction to bar claims against specified assets and receivers: see *Ultracare Management Inc. v. Gammon,* order of Austin J. dated October 19, 1993; *Liquidators of Wallace Smith Trust Co. Ltd. v. Dundalk Investment Corp. Ltd.,* order of Blair J. dated September 22, 1993. As MacDonald J. said in *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 at p. 93, [1992] 6 W.W.R. 331, 70 B.C.L.R. (2d) 6 (S.C.):
>
>> I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end: see *Winnipeg Supply & Fuel Co.* v. *Genevieve Mortgage Corp.,* [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p. 657 [W.W.R.].
>>
>> The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by *Halsbury's* (4th ed., vol. 37, para. 14) as:
>>
>>> …the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so…
>>
>> Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.
>
> In commenting on this decision and discussing the stay provisions of the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36 ("CCAA") and the *U.S. Bankruptcy* Code, Tysoe J. observed in *Re Woodward's Ltd.* (1993), 17 C.B.R. at pp. 247-8, [1993] B.C.J. No. 42:
>
>> Hence it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar* Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisitive to the Court exer-
>>
>> rising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.
>>
>> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to

> persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

[40] It should be noted that orders made under s. 11(4)(*c*) are to be made "until otherwise ordered by the court". A proviso to this effect (e.g. "subject to an further order of the court pursuant to s. 11(4)(c) of the CCAA") should be included in any vesting order to be made in favour of New Playdium with respect to the assignment of the Techtown Agreement.

Whether the Order is Appropriate

[41] The circumstances that are relevant in the present case are dealt with in the earlier reasons at paragraphs 24 through 33 and in the preceding paragraphs of the present reasons.

Conclusion

[42] Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

[43] Provided that terms are added to the assignment and to the vesting order to the effect directed above, Famous Players will not be subjected to an inappropriate imposition or to an inappropriate loss of claims, having regard to the purpose and spirit of the regime created by CCAA and my reasons for decision of November 2, 2001.

[44] Accordingly, it is appropriate for the assignment to be approved and it is not necessary to add the clause requested by Famous Players to the form of order now before the court.

[45] Counsel may consult me about costs.

Order accordingly.

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COURT FILE NO.: CV-09-8257-00CL
DATE: 20091223

SUPERIOR COURT OF JUSTICE - ONTARIO

2009 CanLII 72037 (ON SC)

RE: In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, As Amended

And in the Matter of a Plan of Compromise or Arrangement of Nexient Learning Inc. and Nexient Learning Canada Inc.

BEFORE: Mr. Justice H.J Wilton-Siegel

COUNSEL: *George Benchetrit*, for Nexient Learning Inc. and Nexient Learning Canada Inc.

Margaret Sims and *Arthi Sambasivan*, for Global Knowledge Network (Canada) Inc.

Catherine Francis, *David T. Ullman* and *Melissa McCready*, for ESI International Inc.

Lynne O'Brien, for the Monitor, RSM Richter Inc.

DATE HEARD: November 30, 2009

E N D O R S E M E N T

[1] On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statutue.

Background

The Parties

[2] Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

[3] Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across Canada.

[4] ESI is a United States corporation having its head office in Arlington, Virginia.

[5] Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology (“IT”); (2) business process improvements (“BPI”); and (3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions — business analysis (“BA”), project management (“PM”) and IT Infrastructure Library Training.

[6] The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the “PM Agreement”). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

[7] Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 (“BA Agreement”). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of $2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

[8] ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as “strategic partnering arrangements”. In Canada, ESI considers Nexient to be its “strategic partner”. That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an “umbrella” agreement.

[9] Global Knowledge Training LLC, a United States corporation (“Global Knowledge U.S.”), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI’s largest competitors.

Relevant Provisions Of The BA Agreement

[10] Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three “trigger” events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

6. Term and Termination

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6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:

…

6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.

6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

[11] Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party's business.

[12] Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings Under The CCAA

[13] On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the "Initial Order").

[14] On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the "Monitor"). Both ESI and Global Knowledge participated in that process. In this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the "NDA").

[15] By letter dated July 24, 2009 (the "Termination Notice"), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the "Insolvency Defaults"). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient's assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI's distributor in Canada for the BA

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materials solely to fulfill Nexient's existing obligations. Such licence was expressed to terminate on August 21, 2009.

[16] No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

[17] It is undisputed that Nexient owes ESI approximately $733,000 on account of royalties for the use of ESI's corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by the BA Agreement and are therefore payable in accordance with the "umbrella" agreement that governs the strategic partnership between ESI and Nexient.

[18] By letter dated July 28, 2009, counsel for Nexient informed ESI of its client's view that, given the stay of proceedings in the Initial Order, the Termination Notice was of no force or effect.

[19] The existence and content of the Termination Notice and the letter of Nexient's legal counsel dated July 28, 2009 were communicated orally to Brian Branson ("Branson"), the chief executive officer of Global Knowledge U.S., by Donna De Winter ("De Winter"), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

[20] Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the "APA") and a transition and occupation services agreement dated August 17, 2009 (the "Transition Agreement").

[21] Under the APA, Global Knowledge agreed to acquire all of Nexient's assets as a going concern pursuant to the terms of the APA (the "Sale Transaction"). As Global Knowledge had not completed its due diligence of Nexient's contracts, the APA provided for a ninety-day period after the closing date (the "Transaction Period") during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as "Excluded Assets" which would not be assigned at the closing but would instead be dealt with pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the "Contracts") as "Excluded Assets".

[22] Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as "Excluded Assets":

2.7 Purchaser's Rights to Exclude

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> Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

[23] It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all of Nexient's right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all "Claims" (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI's rights of termination based on the Insolvency Defaults.

[24] Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient's right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

[25] On or about August 17, 2009, subsequent to submitting Global Knowledge's bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey ("Elsey"), the president and chief executive officer of ESI, regarding ESI's right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI's right to terminate the BA Agreement. As discussed below, it is unclear whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

[26] Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says

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he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

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[27] Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

[28] The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

[29] The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

[30] "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation. Accordingly, it has brought this proceeding to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

[31] The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

[32] At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transaction Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

[33] Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of

November 1, 2009 were assumed by Global Knowledge on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

[34] At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

[35] According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

[36] Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

[37] Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

[38] As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

[39] In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional — that is, it did not make such assignment conditional on receiving the requested relief in this proceeding.

[40] ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

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Procedural Matters

Motions Brought By The Parties

[41] Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

[42] On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

[43] ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

[44] As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

[45] First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

[46] Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

[47] Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have commenced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

[48] I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

[49] Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

[50] Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?

2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

[51] The issue of the assignability of the BA Agreement has two elements — the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignabilty of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

[52] I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

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[53] The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp. (Re)*, [2001] O.J. No. 4459 (S.C.J.).

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[54] In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, alternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

> So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute….
>
> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

[55] However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

[56] On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Re Woodwards Ltd.*, [1993] B.C.J. No. 42 (S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J. framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

[57] In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

[58] Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

[59] It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

[60] This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

[61] Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

[62] However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

[63] There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment

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that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

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Analysis and Conclusions

Preliminary Observations

[64] Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

[65] First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to Nexient except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by Nexient for the BA materials developed by a predecessor of Nexient. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another proceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in Nexient's hands.

[66] Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

[67] In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order that was actually sought by Nexient and Global Knowledge, and was granted by the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

[68] There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I assume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

[69] Third, while Nexient and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

[70] Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in

the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

[71] As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as long as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

[72] The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the Insolvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium* illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults. Not only did Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

[73] In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

[74] Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of an exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price under the Sale Agreement. The effect of section 2.7 of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers – the BA product will be delivered in Canada by either Global Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief

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will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors under these proceedings.

[75] Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examination, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

[76] There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the present time, Nexient owes ESI in excess of $733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

[77] Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

[78] There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

[79] This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a

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debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately $733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

[80] Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

[81] However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

[82] The applicants' request for relief is denied for the following three reasons.

[83] First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

[84] The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction – in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets – it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process.

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Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

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[85] Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

[86] The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

[87] More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options — to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

[88] In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

[89] It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of its bid for the Nexient assets. There is nothing in the

description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

[90] Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

[91] Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

[92] I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

[93] However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

[94] First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

[95] Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

[96] This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowledge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

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[97] First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

[98] Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global Knowledge will be correspondingly advantaged. The Court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

[99] ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely, the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

[100] Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

[101] Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the

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contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

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Costs

[102] The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

Wilton-Siegel J.

DATE: December 23, 2009

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Veris Gold Corp. (Re),
2015 BCSC 1204

Date: 20150710
Docket: S144431
Registry: Vancouver

2015 BCSC 1204 (CanLII)

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

And

In the matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44

And

In the matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57

And

In the Matter of Veris Gold Corp., Queenstake
Resources Ltd., Ketza River Holdings, and Veris Gold USA, Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Monitor, Ernst & Young Inc.:	J. Sandrelli T. Jeffries
Counsel for Deutsche Bank A.G.:	D. Vu
Counsel for Moelis & Company:	C. Ramsay S. Irving K. Mak
Counsel for Whitebox Advisors LLC, WBox 2014-1 Ltd.:	K. Jackson D. Toigo

Counsel for the Attorney General of Nevada:	R. Morse N. Vaartunou A/S
Counsel for Nevada Cement:	C. Ramsay K. Mak
Counsel for NV Energy:	C. Brousson J. Bradshaw A/S
Counsel for Government of Yukon:	J. Porter
Counsel for AIG:	K. Siddall
Counsel for Linde LLC:	S. Ross
Place and Date of Hearing:	Vancouver, B.C. May 28, 2015
Place and Date of Judgment:	Vancouver, B.C. July 10, 2015

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Introduction

[1] This is a proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The assets of the petitioner companies (collectively, "Veris Gold") principally comprise a gold mine in the State of Nevada, United States of America and mining properties in Yukon, Canada.

[2] There has been no shortage of effort in these proceedings to restructure the considerable debt or monetize the assets of Veris Gold for the benefit of the stakeholders. However, in the face of considerable operational setbacks and disappointing refinancing and sale results, those stakeholders now face two stark options: (i) allow the interim lender to deal with the assets in a receivership or liquidation scenario; or (ii) allow an orderly transfer of the assets to that interim lender by way of a credit bid which would allow operations in the U.S. to continue.

[3] The court-appointed monitor, Ernst & Young Inc., (the "Monitor") now applies to complete the sale to a new entity created by the interim lender, which is said to provide the best result achievable in less than desirable circumstances.

Background Facts

[4] Much of the history of these proceedings was set out in my reasons for judgment issued earlier this year: *Veris Gold Corp. (Re)*, 2015 BCSC 399. For the purposes of this application, I will summarize that history as follows.

[5] On June 9, 2014, this Court granted an initial order. This filing was necessary in light of the imminent steps that were to be taken by Veris Gold's major secured creditor, Deutsche Bank A.G. ("DB") to collect its debt of approximately US$90 million.

[6] The Canadian filing was immediately followed by the Monitor commencing proceedings in Nevada pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1532 (the "*Bankruptcy Code*").

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[7] Arising from orders granted in both the Canadian and Nevada proceedings and the agreements reached between Veris Gold and DB, matters were stabilized. Those orders and agreements allowed Veris Gold to continue its efforts to restructure its debt and equity with the assistance of Raymond James & Associates. In addition, firm milestone dates were put in place to conclude any refinancing and also to commence a sales process if those refinancing efforts were not successful.

[8] In October 2014, this Court approved interim financing to be obtained from WBox 2014-1 Ltd. (“WBox”) in the amount of US $12 million.

[9] On November 18, 2014, this Court approved a detailed sale and solicitation process to be conducted by Moelis and Company ("Moelis"), again with firm deadlines for such matters as receipt of qualified bids. Although certain of the deadlines under the sales process were extended, no qualified bids were received by the extended bid deadline, January 30, 2015.

[10] Following these disappointing sale results, the Monitor engaged in discussions with Veris Gold and the two stakeholders who appeared to have the only economic interest remaining in the assets, being DB and WBox. What was critical at this time was allowing Veris Gold to continue to operate in the ordinary course while these stakeholders considered their next steps.

[11] In mid-February 2015, DB issued various notices of default under its security and the agreements reached earlier with Veris Gold. This also resulted in an immediate default under the interim financing agreements between Veris Gold and WBox. With a view to securing greater oversight over the continued operations of Veris Gold, DB later applied for and was granted an order expanding the powers of the Monitor on February 23, 2015. That order was later recognized by the U.S. court in the Chapter 15 proceedings on March 2, 2015.

[12] By late March 2015, both DB and WBox were continuing to consider their options, including the possibility of making a credit bid for the assets. WBox conducted due diligence of the assets toward that possibility. The Monitor reported

at that time that, absent a credit bid from DB, a credit bid from WBox was the only viable alternative.

[13] Accordingly, on March 30, 2015, this Court granted an order extending the stay of proceedings to April 7, 2015 to enable completion of discussions in relation to a credit bid transaction whereby certain of Veris Gold's assets would be transferred to a nominee of WBox.

[14] On April 2, 2015, Veris Gold suffered yet another operational setback when a fire occurred at the processing plant, causing an estimated shutdown of one week. The already tenuous cash problems were therefore exacerbated by the deferral of revenue of approximately US$4 million as a result of the shutdown. The timing of this difficulty was unfortunate, in that by this time, the Monitor had negotiated an agreement in principle with WBox for the purchase of the assets and an increase in the interim funding to allow operations to continue to the closing date.

[15] Not surprisingly, the fire and ensuing difficulties caused WBox to delay any credit bid and the provision of further financing while it considered, among other things, the impact on the cash requirements of continuing operations. In addition, in light of what the Monitor described as the "mounting challenges", the Monitor and WBox moved to a consideration of liquidation scenarios. Preliminary work on various shutdown options, including care and maintenance, indicated that significant monies would have to be expended even before the assets could be transferred on an orderly basis to environmental regulators.

[16] On April 7, 2015, this Court extended the stay of proceedings to April 24, 2015 in order to enable WBox and other interested parties to assess their options and to allow the Monitor time to have further discussions with the environmental regulators. During this extension of the stay period, WBox renewed discussions with the Monitor in respect of a potential transaction that would involve the equity participation of a financial partner. It was discussed that this partner could participate in WBox's nominee, which would be the entity to hold and operate Veris Gold's mining assets.

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[17] Discussions were also ongoing at this time whereby WBox would provide increased financing to Veris Gold in order to allow further time to finalize a transaction.

[18] On April 24, 2015, this Court granted an order extending the stay of proceedings to June 12, 2015. In addition, at the request of the Monitor, an order was granted increasing the interim funding from WBox by US$3 million to US$15 million, which would allow Veris Gold's operations to continue. WBox approved a cash flow forecast and it was agreed that WBox would maintain control over payments made from this further facility. On April 29, 2015, the U.S. court approved this amendment to the interim financing facility.

[19] On May 28, 2015, Veris Gold entered into an asset sale agreement (the "Agreement") with WBVG, LLC ("WBVG"). WBVG is an entity wholly owned by WBox although, as anticipated, WBox sought and obtained the future participation of another equity partner. The transaction provides that WBox will transfer a majority interest in WBVG to 2176423 Ontario Ltd., a company owned by Eric Sprott. Mr. Sprott was already involved in Veris Gold, having a 20% equity interest and also having a royalty interest in the Nevada mining properties.

[20] The salient terms of the Agreement are as follows:

a) WBVG will purchase all tangible and intangible assets of Veris Gold, subject to certain defined excluded assets;

b) the Monitor is to continue efforts to sell the Ketza assets in Yukon over a 60-day period with any sale proceeds being payable to WBVG. If no sale occurs, then those assets will be transferred to WBVG;

c) WBVG is to assume certain obligations arising under assumed contracts, including all bonds, and also pay any "cure costs" relating to such assumed contracts, limited to US$10 million;

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d) WBVG will assume the amounts owing to WBox under the interim lending facility and will pay certain of the court-ordered charges, such as the administration charges, having priority over the interim lender's charge in favour of WBox to a maximum of US$1.8 million;

e) WBVG will not assume any liabilities for pre-closing obligations;

f) all employees of Veris Gold are to be terminated on closing and WBVG may offer employment to some or all of them; and

g) a "DIP Financing Cash Reserve" fund estimated in the amount of US$3.1 million is to be established to pay certain post-filing obligations that will be outstanding as of the closing date, including employee wages and amounts due to suppliers and contractors for the supply of goods and services. Any funds remaining in the DIP Financing Cash Reserve after these payables have been satisfied shall be returned to WBVG.

[21] The Agreement is still conditional in that it is subject to approval by both this Court and the U.S. court. Further conditions relate to obtaining an assignment of certain critical contracts, such as bonding agreements and other arrangements with the Nevada environmental regulators.

Statutory Framework

[22] The authority of this Court to approve the sale is found in s. 36 of the *CCAA*. Section 36(3) of the *CCAA* sets out a list of non-exhaustive factors to be considered by the court:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;

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> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[23] A more general test has been restated, as discerned from the above factors, namely to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable": *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 at para. 49, 72 C.B.R. (5th) 49, leave to appeal ref'd 2010 QCCA 1950.

[24] In addition, the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are helpful in considering whether to approve a sale:

1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
2. The interests of all parties;
3. The efficacy and integrity of the process by which offers were obtained; and
4. Whether there has been any unfairness in the sales process.

[25] Various authorities support that, in considering the test under s. 36 of the *CCAA*, the principles of *Soundair* remain relevant and indeed overlap some of the specific factors set out in s. 36(3): *Re Canwest Publishing Inc.*, 2010 ONSC 2870 at para. 13; *White Birch* at para. 50; *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 3367 at para. 54.

Discussion

(a) *CCAA* Factors

[26] I am more than satisfied that the factors set out in s. 36(3) of the *CCAA* support the granting of the order approving the Agreement with WBVG.

[27] I have already outlined the extensive process by which Veris Gold's assets were exposed to the market by Moelis in accordance with the court-approved sales

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process. That process, which took place over many months, unfortunately did not yield any realistic offers, despite an extension of the bid deadline.

[28] The Monitor did receive a non-binding expression of interest from a party on May 8, 2015. Some of the persons behind this expression of interest had been involved in the unsuccessful sales process. However, despite the purchase price being slightly above the WBox borrowings (US$20 million), the Monitor's view was that it would not be pursued by reason of the numerous significant conditions and the reality that the delay in pursuing any offer would place Veris Gold's operations at significant risk given its precarious financial (cash) condition. On May 13, 2015, this indicative offer was increased to US$23 million but that increase did not elicit any support from either WBox or the Monitor.

[29] In response to the concerns of WBox and the Monitor, this party submitted a non-binding indicative offer on May 22, 2015 with additional materials indicating that financing had been tentatively obtained. Even so, the Monitor supported WBox's continued position that this offer should not be pursued further given the risk and delay in doing so. DB did not challenge this assessment.

[30] It should be noted that, with the possible exception of DB, no one was more interested in obtaining an offer to purchase the assets than WBox in terms of seeing some recovery under the interim financing. In large part, WBVG's offer is made somewhat reluctantly by WBox as the only real alternative to obtaining some value from the assets secured under its court-ordered charge.

[31] The Monitor has been extensively involved throughout these proceedings and the sales efforts, particularly given the Monitor's role in brokering the peace between Veris Gold and DB that allowed the refinancing and sale efforts to continue without much controversy. To that extent, the Monitor was very much involved in fashioning the sales process that was eventually approved by the court on November 18, 2014.

[32] At this time, the stark reality is that no other viable options exist other than this sale or a receivership and liquidation, with the latter providing considerable

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uncertainty in terms of future operations. That uncertainty has justifiably caused some concern with the regulators, both in Nevada and Yukon, who must necessarily address any environmental issues that might precipitously arise from a failure to continue operations.

[33] In my view, the process leading to this transaction was fair and reasonable in the circumstances. No person has suggested that these efforts were insufficient or inadequate.

[34] Needless to say, the Monitor, being the applicant, is in favour of the transaction with WBVG and recommends its approval by the court. The Monitor has been involved in the negotiations and finalization of the asset sale agreement throughout.

[35] The reasons to approve the sale to WBVG and to do so quickly are outlined in the Monitor's sixteenth report to the court dated May 25, 2015. The portions of the report that highlight those reasons are:

> [Veris Gold] would unlikely be able to recover from a further significant interruption of operations. The result would likely be the commencement of a liquidation process with the resultant loss of jobs, supply chain benefits and heightened environmental risks related to the need to transition care and maintenance activities to the Nevada environmental regulators on an extremely short timeline.
>
> …
>
> The [transaction] is essentially a realization process by [WBox], which has no viable alternatives. The operations continue on borrowed time, and prolonging any process results, in the Monitor's view, in significant risk to numerous stakeholders – [WBox], employees, suppliers of goods and services, and the environmental regulators.
>
> …
>
> [I]t is urgent to have an expedited resolution to these proceedings. … The alternative, which would involve facilitating due diligence by the EOI Party or other late emerging parties, together with the related purchase agreement negotiations and discussions with the environmental regulators, translates into an extended timeframe and a higher risk of non-completion or future operational disruption. The party exposed to the risk of loss in the event on non-completion is [WBox].

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[36] There has obviously been extensive consultation with WBox throughout these proceedings since the interim financing was initially approved in October 2014.

[37] Since February 2015, when it was clear that no sales had materialized, DB's interest in these proceedings has undoubtedly lessened. This is largely due to the realization that there was likely no value beyond what was owed to WBox under its interim financing, which stands in priority to the secured debt of DB. In essence, DB's lack of opposition to this sale is in recognition that it will obtain no recovery of the substantial debt owed by Veris Gold to it in excess of US$90 million.

[38] Other creditors junior in priority to DB have not been consulted; however, it has been abundantly clear since January 2015 that DB stood little chance of collecting even a portion of its debt, let alone realize a refinancing or sale that would see these junior creditors recover from any excess. Therefore, the proposed transaction will have no material effect on these other creditors.

[39] It has also necessarily been the case that the various parties, and in particular the Monitor, WBox, Mr. Sprott and WBVG, have been in extensive discussions with the environmental regulators throughout these proceedings and specifically regarding the proposed transaction with WBVG. Discussions were held with the Nevada Division of Environmental Protection and the U.S. Forest Service in connection with the proposed transaction and any alternative scenarios. Those regulators were either in support or not opposed to the relief sought on this application, having secured terms in the proposed court order to address any concerns on their part.

[40] While the outcome for DB and other pre-filing creditors is complete non-recovery, the benefits for various other stakeholders, being WBox, the employees, suppliers and the environmental regulators, is evident enough. It is these stakeholders who will suffer in the event that Veris Gold's operations do not continue and the environmental regulators in Nevada are left with the significant care and maintenance responsibilities for the mine site in a liquidation scenario. This transaction will see a continuation of Veris Gold's operations in Nevada. Accordingly,

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I agree with the Monitor that this is the best outcome for these operational stakeholders.

[41] The operations in Yukon have been dormant for some time. Discussions between the Monitor and the Yukon regulators are continuing at this time toward a potential purchase of the Ketza assets by Yukon and a relinquishment of Veris Gold's mineral claims and mining leases there. The Agreement contemplates that these discussions will continue, hopefully toward a satisfactory conclusion.

[42] The Monitor and WBox have also addressed in part concerns expressed by the court concerning the ongoing supply of goods and services and the uncertainty of payment for those goods and services while the Agreement was being negotiated. As noted above, upon the closing of the transaction, employees and suppliers to the Nevada mine site will be paid by Veris Gold for goods and services supplied up to the time of closing. As it relates to the employees, this addresses the requirement in the *CCAA*, s. 36(7) in that the court is satisfied that employee-related claims will be paid. Additional benefits will also redound to all of these stakeholders by either the potential of continued employment with WBVG or the continuation of many of the supply contracts which are to be assumed by WBVG post-closing.

[43] I also conclude that the history of these proceedings, as outlined above, demonstrates that the consideration to be received for Veris Gold's assets is reasonable and fair, taking into account their market value. While no appraisals of the assets have been obtained, that fair market value is reflected in the market response to the extensive sales efforts undertaken.

[44] No one misunderstands that if the transaction is not approved WBox will withdraw funding and Veris Gold will almost certainly have to commence an orderly wind down of its operations and liquidation of its assets to satisfy the debt owed to WBox. It is more than likely that WBox will suffer a shortfall in a liquidation scenario. A liquidation scenario will also likely result in the Nevada environmental regulators taking over care and maintenance of the mine site on an expedited basis, at

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significant expense and with the possibility of environmental damage resulting from a surrender of the mine site without the lead time needed by the regulators.

[45] In all the circumstances, a consideration of all the factors in s. 36 of the *CCAA* supports the conclusions that the proposed transaction is fair and reasonable and that the Agreement should be approved.

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(b) Assignment of Contracts

[46] The asset sale agreement provides that WBVG will be assigned the "Assigned Contracts", which are defined as meaning "all Designated Seller Contracts" and also described as "Required Assigned Contracts". All of these contracts are listed in a schedule attached to the purchaser disclosure schedule delivered by WBVG to Veris Gold.

[47] The Monitor seeks approval of the assignment of the Designated Seller Contracts, save to the extent that consents from counterparties have not already been obtained.

[48] The relevant statutory authority to approve such assignments is found in s. 11.3 of the *CCAA*:

> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.
>
> ….
>
> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> > (*a*) whether the monitor approved the proposed assignment;
> >
> > (*b*) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
> >
> > (*c*) whether it would be appropriate to assign the rights and obligations to that person.
>
> (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

> (5) The applicant is to send a copy of the order to every party to the agreement.

[49] The Monitor's report and recommendations are in support of approval of these assignments. These approvals are part of the Monitor's overall recommendations in favour of the Agreement. WBVG has indicated its willingness to continue the operations of Veris Gold in Nevada on a going concern basis. The participation of WBox and Mr. Sprott lend credibility to its ability to do so, while performing any obligations under these contracts.

[50] In that context, it is appropriate that WBVG obtain the benefit of contracts that will facilitate its ability to continue these operations. Indeed, some of the contracts are critical or necessary for future operations.

[51] In addition, the Agreement contemplates the payment of "cure costs" which are defined in the Agreement in relation to statutory obligations arising under both s. 11.3(4) of the *CCAA* and s. 365(b)(1) of the *Bankruptcy Code* where the assignment of contracts is approved. Cure costs are defined in the Agreement as follows:

> "Cure Cost" means, as applicable with respect to any Seller, (i) any amounts or assurances required by Section 365(b)(1) of the U.S. Bankruptcy Code under any applicable Designated Seller Contract or (ii) any amounts required to satisfy monetary defaults in relation to the applicable Designated Seller Contract pursuant to Section 11.3 of the CCAA.

[52] Each of the Designated Seller Contracts and related anticipated cure costs are set out in a schedule to the Agreement. Pursuant to the Agreement, such cure costs are payable on closing. The order sought provides that upon payment, and upon assignment:

> 10. … the Required Assigned Contracts [aka the Designated Seller Contracts] shall be deemed valid and binding and in full force and effect at the Closing, and the Purchaser shall enjoy all of the rights and benefits under each such Required Assigned Contract as of the applicable date of assumption.

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[53] Section 11.3 of the *CCAA* came into force in September 2009. Prior to that time, there was little case authority in terms of a *CCAA* court approving assignments of contracts over the objections of counterparties. One of those early cases is *Playdium Entertainment Corp., Re*, [2002] 31 C.B.R. (4th) 302 (Ont. S.C.J.); additional reasons [2002] 31 C.B.R. (4th) 309 (Ont. S.C.J.).

[54] In *Re Nexient Learning Inc.*, [2010] 62 C.B.R. (5th) 248 at 258 (Ont. S.C.J.), Wilton-Siegel J. cited both Spence J. in *Playdium* and Tysoe J. (as he then was) in *Re Woodward's Ltd.* (1993), 79 B.C.L.R. (2d) 257 (S.C.), in framing the test as being whether the assignment was "important to the reorganization process". Also of relevance was the effect of the assignment on the counterparty and the principle that third party rights should only be affected as is absolutely required to assist in the reorganization and in a manner fair to that counterparty: see the additional reasons in *Playdium* at 319; *Nexient* at 259. See also discussion in *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2014 BCSC 945 at paras. 107-108.

[55] The approach of the courts in these earlier cases was essentially confirmed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, where the Court stated the basis upon which relief might be "appropriate" and that any relief should result in "fair" treatment to all stakeholders:

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

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[56] Like many other amendments to the *CCAA* in September 2009, s. 11.3 was intended, in my view, to codify what had been the general approach to assignment issues, while also clarifying certain matters that had been to that time uncertain. One example of certainty achieved, although irrelevant on this application, arises by s. 11.3(2) which excludes certain contracts from the statutory authority of the court in s. 11.3(1).

[57] Since its enactment, judicial consideration of s. 11.3 is scarce. In *Re TBS Acquireco Inc.*, 2013 ONSC 4663, D.M. Brown J. (as he then was) approved the assignment of certain leases and designated contracts, finding that this would result in the continuation of the business in the greatest number of stores and the continued employment of the greater number of people. Cure costs were also to be paid: see paras. 19-25.

[58] I do not see the result in *TBS* as deviating from the previous approach of the courts in considering whether to approve an assignment based on the twin goals of assisting the reorganization process (i.e., the sale in this case) while also treating a counterparty fairly and equitably. These considerations can be discerned in particular from the factors set out in s. 11.3(3) set out above.

[59] That brings me to the only issue that arises here in relation to the assignments. While no objection was raised to the assignments by persons who did not otherwise consent, the Monitor's counsel was candid in advising the court that only those persons on the service list were served with the Canadian application materials. It is not therefore apparent that the counterparties to the contracts did in fact receive a copy of the application materials.

[60] This is not an approach that I would endorse. It may often be the case that a counterparty is not a creditor of the estate and therefore, that party would not get notice of the filing at the commencement of those proceedings. Further, even if that is the case, no assignment issue may be apparent at the time of initial service to the point that such person would take steps to be placed on the service list.

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[61] The best practice in these circumstances is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not. Section 11.3(1) specifically provides that the application is to be "on notice to every party to an agreement". Common sense dictates that the person to be directly affected by the assignment should have the ability to consider whether the applicant debtor company has satisfied its burden that the order is appropriate, including the factors set out in s. 11.3(3). Only by service will that counterparty be made aware of the need to consider its position if such approval is granted and possibly advance evidence and considerations that would be equally relevant to the court's decision on the issue.

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[62] Before proceeding with the application in *TBS*, Brown J. was satisfied that the applicant had given notice of the request to seek a court-authorized assignment of the contracts: para. 25.

[63] As I have mentioned, there was urgency in approving the Agreement so that Veris Gold's operations could continue in the ordinary course. Further delay was not feasible nor was it in the interests of all the stakeholders. The Monitor's counsel advised that all of the counterparties were in the U.S. and most of those counterparties, being capital lessors, were represented by Nevada counsel. Finally, I was advised that all of these counterparties were served with the U.S. application materials in anticipation of an application in Nevada to also approve the Agreement immediately after this application. Therefore, specific notice of the terms of the Agreement and the fact that approval of the assignment was sought would have been provided in any event, albeit in the context of the U.S. court materials.

[64] In these exigent and extraordinary circumstances, I approved the assignments on the terms sought, but subject to the U.S. court being satisfied with the notification to and service on the counterparties to the Required Assigned Contracts who did not receive direct notice of this application. In that way, these counterparties will have been given the ability to attend the U.S. hearing and make

submissions on the relief sought, all of which is a required condition to closing the Agreement.

Conclusion

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[65] Veris Gold has faced a number of operational challenges and adverse events over the course of this restructuring proceeding. Initially at least, they faced significant opposition by their major secured creditor, DB. Efforts to refinance or sell the assets have been met with little interest and certainly no offer was received by that process on which to base a transaction.

[66] As matters stand, Veris Gold's operations are undercapitalized and susceptible to further disruptions unless stability is achieved quickly to avoid a liquidation process. That process would undoubtedly result in a loss of jobs, disruption of supply arrangements and heightened environmental risk.

[67] The only realistic alternative is the one before the court on this application; namely, a credit bid by WBox, the interim lender, which would see a continuation of the operations in Nevada. The Monitor's view is that proceeding to close the Agreement on an expedited basis is necessary to protect the interests of the principal stakeholders in Veris Gold's operations, namely WBox, the employees, suppliers of goods and services and the environmental regulators.

[68] The statutory requirements of the *CCAA* in ss. 36 and 11.3 have been satisfied by the Monitor toward approval of the Agreement, including approving the assignments of the Required Assigned Contracts. I am also satisfied that the orders sought are appropriate in the circumstances and consistent with the objectives of the *CCAA*.

[69] The relief sought by the Monitor is granted. The Agreement is approved and Veris Gold and the Monitor are authorized to proceed to finalize the transactions with WBVG. The vesting of the assets on closing will be subject to an order of the U.S. court approving the Agreement and making such other ancillary orders as are appropriate in accordance with the *Bankruptcy Code*. The order provides that any

issues that may be raised by the U.S. environmental regulators will be addressed by the U.S. court. Accordingly, this Court requests the aid, recognition and assistance of the U.S. court in terms of the carrying out of the terms of the order granted.

[70] Finally, all orders sought with respect to the approval of the assignment by Veris Gold to WBVG of the Required Assigned Contracts are granted on the terms sought, including that such approval is subject to the payment of the cure costs.

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“Fitzpatrick J.”