2022 01G

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF an application of Canada Fluorspar (NL) Inc., and Canada Fluorspar Inc., by their Court Appointed Interim Receiver, Grant Thornton Limited

AND IN THE MATTER OF the *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended (the "**CCAA**")

MEMORANDUM OF FACT AND LAW OF APPLICANT

SUMMARY OF CURRENT DOCUMENT

Court File Number(s):	2022 01G
Date of Filing of Document:	March 8, 2022
Name of Party Filing or Person:	Grant Thornton Limited, in its capacity as Court Appointed interim receiver (the "**Interim Receiver**" or "**Applicant**") of the Company (as defined below)
Application to which Document being filed relates:	Interlocutory Application (Inter Partes) filed by the Applicant
Statement of Purpose in filing:	Interlocutory Application seeking appointment of Grant Thornton Limited as Monitor of the Company pursuant to the CCAA, seeking enhanced powers of the Monitor, seeing an Administrative Charge and seeking approval of the DIP Financing Agreement,
Court Sub-File Number, if any	N/A

FACTS

1. On February 21, 2022, the Interim Receiver was appointed by Order of this Court ("**Interim Receiver Order**") as the interim receiver of all assets, undertakings and property (the "**Property**") of Canada Fluorspar Inc., and Canada Fluorspar (NL) Inc.

2. Canada Fluorspar (NL) Inc., is a company incorporated under the laws of the Province of Newfoundland and Labrador, and Canada Fluorspar Inc., is a company incorporated under the laws of the Province of Ontario, which is extra-provincially registered to carry on business in the Province of Newfoundland and Labrador. Newspar is a general partnership of which Canada Fluorspar (NL) Inc., is a 99.999% partner. (Canada Fluorspar (NL) Inc., Canada Fluorspar Inc., and Newspar are collectively referred to herein as the "**Company**").

3. Canada Fluorspar Inc., has been 100% owned by Golden Gate Capital ("**GGC**"), an American private equity firm, since 2014.

4. The Company's chief place of business is in the Province of Newfoundland and Labrador, where all of its operational assets are located.

5. The Company is one of the few active producers of fluorspar in Canada and the United States. The Company is developing the St. Lawrence Fluorspar Mine Project in St. Lawrence, Newfoundland and Labrador, to mine high-quality fluorspar ore from the AGS Vein to produce acid-grade fluorspar concentrate and export to domestic and international markets. This is known as the AGS Fluorspar Project, discovered in 2013.

6. Since 2018, shipments have been loaded from a pier in Marystown, Newfoundland and Labrador. However, in July 2021, the Company loaded its first shipment from its new Blue Beach Marine Terminal, five (5) kilometers from the mine site in St. Lawrence.

7. Fluorspar is an essential mineral to many industries and applications, including lithium ion batteries; solar panels; refrigeration and air conditioners; high-performance polymers for aerospace; automotive and electronics applications; high-strength and purity glass for smart phones and electronic devices; pharmaceuticals, anesthesias and medical devices; fire retardants and welding consumables; and steel and aluminum production.

8. As a result of COVID-19 pandemic and related restrictions, which caused a decrease in the available labour force, among various other issues, the Company experienced significant production problems during November 2021 to January 2022.

9. The decline in production added to the already increasing financial difficulties facing the Company such that approximately Two Hundred and Twenty Nine (229) employees were terminated immediately prior to the appointment of the Interim Receiver.

10. As outlined in the Financial Statements as of December 31, 2020 (the "**Financial Statements**"), the assets of the Company have a net book value of $410,915,340.00. Further as of December 31, 2020, the liabilities of the Company have a net book value of approximately $285,778,760.00. As at December 31, 2020 the Company only had $301,161.00 in available cash, a working capital deficit of $81,855,613.00, and a cumulative retained earnings deficit of $38,561,308.00.

11. The Company's current liabilities exceed the net book value of its current assets such that on a going concern basis, the Company is insolvent.

12. A significant portion of the Company's liabilities consist of its secured debt, which is further described below:

    (a) HSBC: (i) A Revolving Loan provided to the Company by HSBC in the principal amount of USD$20,000,000.00, (ii) an overdraft account with a credit limit of up to USD$2,000,000.00, (iii) a letter of credit facility with a credit limit of up to CAD$1,500,000.00, and (iv) a credit card facility with a credit limited of up to CAD $100,000.00;

    (b) Bridging Finance Inc.: (i) A term loan in the principal amount of CAD$27,000,000.00, (ii) A second term loan in the principal amount of CAD$20,000,000.00, and (iii) A term loan in the principal amount of CAD$8,000,000.00; and

    (c) A Non- Revolving Term Loan provided by the Government of Newfoundland and Labrador to the Company in the principal amount of CAD$17,000,000.00.

13. Pursuant to the Interim Receiver Order, and since its appointment to present day, the Interim Receiver has taken the necessary steps to protect the assets of the Company and to preserve the Company as a going concern business.

14. The Interim Receiver has secured the DIP financing necessary to allow the Company and the Monitor to pursue the SISP in accordance with the SISP procedures.

15. Bridging Finance Inc., Bridging Income Fund LP, Bridging Private Debt Institutional LP, Bridging Mid-Market Debt Fund LP, Bridging Private Debt Lending Master Fund I, LP (Cayman), Bridging SMA 1 LP. Bridging SMA 2 LP and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology have agreed to provide a DIP Facility and enter into a DIP Financing Agreement with the Monitor, subject to court approval, to restructure the Company's operations.

16. The Monitor expects that it shall need such interim financing (including prior to the Comeback Hearing) in order to fund these CCAA Proceedings and to fund the SISP.

ISSUES:

17. The issues before this Court are as follows:

    1. Does the Company meet the criteria for protection under the CCAA;

    2. Whether Grant Thornton Limited ("**GTL**") should be appointed Monitor in these CCAA Proceedings;

    3. Whether GTL should be granted enhanced monitor powers under the CCAA;

    4. Whether the requested Administration Charge should be granted; and

    5. Whether the DIP Financing Agreement should be approved and the requested DIP Lender's Charge should be granted.

LAW AND ARGUMENT

Protection to the Company under the CCAA

17. The CCAA applies to a "debtor company" with liabilities exceeding Five Million Dollars ($5,000,000.00). A "debtor company" is defined as, among other things, a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the BIA.

18. A "*company*" and a "debtor" are defined under the CCAA to include a company incorporated by or under an Act of the legislature of a province. Section 2 of the CCAA provides as follows:

> **2 (1)** In this Act
>
> **company** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies; (compagnie).
>
> **debtor** company means any company that:
>
> (a) is bankrupt or insolvent,
>
> (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
>
> (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
>
> (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

Reference: *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 2(1) [TAB 1]

19. As Canada Fluorspar (NL) Inc., is incorporated pursuant to the *Corporation Act* (Newfoundland and Labrador), RSNL 1990, c C-36, Canada Fluorspar Inc., is incorporated pursuant to the *Corporations Act* (Ontario), R.S.O 1990, c C38, extra-

provincially registered to carry on business in the Province of Newfoundland and Labrador and Newspar is a general partnership registered in the Province of Newfoundland and Labrador, it qualifies as a "company" for purposes of the CCAA.

20. Application of the CCAA is set out in Section 3 of the CCAA, which provides as follows:

> **3 (1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.
>
> **Reference:** *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, 3(1) [TAB 2]

21. Based on the Financial Statements the Company's total liabilities amount to Two Hundred Eighty Five Million Seven Hundred Seventy Eight Thousand Seven Hundred and Sixty Dollars ($285,778,760.00), which greatly exceeds the Five Million Dollar ($5,000,000.00) threshold. The amounts owed under the Bridging Financing Inc., and Government of Newfoundland and Labrador security alone exceed well over Five Million Dollars ($5,000,000.00) which make the CCAA applicable in this instance.

22. The insolvency of a debtor is assessed at the time of the filing of the CCAA application. The CCAA does not define "*insolvent*", but the definition of "insolvent *person*" under the *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3 (the "**BIA**"), is commonly referenced by Courts in assessing whether an applicant is a debtor company in the context of the CCAA.

23. In addition to the test under the BIA, it has consistently been held that a corporation is insolvent if there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will result in the debtor company not being able to pay its debts as they become due without the benefit of a stay of proceedings. Section 2(1) of the BIA provides:

> **2(1)** insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> > (a) who is for any reason unable to meet his obligations as they generally become due,

> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (personnel insolvable) [...]

Reference: *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3, as amended, section 2(1) [TAB 3]

24. In *McEwan Enterprises Inc.,* the court confirmed that the CCAA does not define insolvency and that when interpreting the meaning the courts have take guidance from the BIA, in particular section 2(1). In particular it was stated:

> The CCAA applies to a "debtor company" where the total claims against such company exceeds $5 million. The terms "debtor company" is defined in Section 2 of the CCAA. In essence, a debtor company is an insolvent company.
>
> The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B–3, as amended (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests: (a) is for any reason unable to meet his obligations as they generally become due; (b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. (See: Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 at paras. 21–22 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336 [Stelco];).
>
> The test for "insolvent person" under the BIA is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.
>
> A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in MEI being unable to pay its debts as they generally become due if a stay or proceedings and ancillary protection are not granted by the court. (see: Stelco, at para. *40*).

Reference: *McEwan Enterprises Inc.,* 2021 ONSC 6453 at paragraphs 24-30 [TAB 4]

25. The Company is insolvent as a result of the following;

    (a) As demonstrated in the Financial Statements, the 17 Week Cash Flow Forecast("**Cash Flow**") and the Interim Receiver's Report, the Company is unable or is expected to soon become unable to meet its obligations generally as they become due without the additional financing provided by the DIP Facility (as defined below);

    (b) The Company's current liabilities exceed its current assets;

    (c) Unless protection under the CCAA is granted and the Company obtains interim financing, the Company will likely be required to cease operations.

26. Section 9(1) of the CCAA provides that an application under the CCAA may be made to the court that has jurisdiction in the province where the debtor company has its "*head office or chief place of business*:

> **9 (1)** Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Reference: *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 9(1) [TAB 5]

27. The Company has its head office located in the Province of Newfoundland and Labrador. Additionally, the Company's chief place of business, the St. Lawrence Fluorspar Mine Project, is located in the Province of Newfoundland and Labrador and all the Company's assets are located in the Province of Newfoundland and Labrador. Therefore, this Court has jurisdiction to hear this application for relief under the CCAA.

28. Pursuant to section 11.001 of the CCAA, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period. The stated purpose of section 11.001 is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an

insolvent company, thereby improving participation of all players". Section 11 of the CCAA provides as follows:

> **11** Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> **11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.
>
> **11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
> >
> > (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 any action, suit or proceeding against the company.
>
> **11.03 (1)** An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.
>
> **11.03 (2)** Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.
>
> **11.1 (1)** In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of

an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

> **(2)** Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> **(3)** On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> > **(a)** a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
> >
> > **(b)** it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Reference: CCAA, s. 11.001, 11.02(1) and (3) [TAB 6]

29. As detailed below, the Monitor, in consultation with the its advisors and the Company, has worked to limit the relief sought on this initial application to only the relief that is reasonably necessary and appropriate in the circumstances for the continued operation of its business.

30. The Applicant has considered whether the requested relief is necessary for the immediate stabilization of the Company's business to protect the Company and the interests of its various stakeholders. In cases where immediate relief is necessary, the Applicant has attempted to limit any authorizations from the Court to what is required within the proposed initial stay period and will only seek additional authorization upon a Comeback Hearing to be scheduled by the Court.

31. In particular, the Administration Charge (as defined below) has been limited, based upon analysis performed by the Applicant, in consultation with its advisors and the Company, to liabilities that could arise during the initial stay period. Additionally, the authorized

borrowings under the DIP Financing Agreement are limited to the amount projected to be required during the initial stay period.

32. In the case of ***Norcon Marine Services Ltd.,*** *(Re)*, Justice Orsborn stated that the threshold to gain access to the *CCAA* process is not high. An applicant must satisfy to the court that "circumstances exist that make the order appropriate":

> The threshold for gaining access to the CCAA process is not high. On an initial application, section 11.02(3) (a) requires an applicant to satisfy the court that "circumstances exist that make the order appropriate". When a continuation is sought in circumstances where, as here, the BIA proposal process has already been engaged, case authorities suggest the section 11.02(3) (b) criteria of good faith and diligence also come into play. See Clothing for Modern Times at paragraph 14; and Industrial Properties Regina Limited v. Copper Sands Land Corp., 2018 SKCA 36 (Sask. C.A.), at paragraphs 22-23
>
> **Reference:** *Norcon Marine Services Ltd., (Re)* 2019 NLSC 238 at paragraph 14 [TAB 7]

33. The Court must consider the initial application in the context of the objectives of the *CCAA*, and with regard to whether there is "some chance" that granting access to the *CCAA* process will further the remedial purpose of the *CCAA* regime:

> Although the threshold of appropriate circumstances is, in my view, low, it does require the Court to consider the initial application in the context of the objectives of the CCAA. In other words, is the Court able to conclude, even at an early stage, that there is some chance that engaging the CCAA process — which brings all enforcement proceedings to a halt — will result in furthering the purposes of the legislation.
>
> **Reference:** *Norcon Marine Services Ltd., (Re)* 2019 NLSC 238 at paragraph 15 [TAB 7]

34. The Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re* described the remedial purpose of the *CCAA* legislation as a means to avoid termination of ongoing business operations to allow for a supervised financial reorganization attempt:

> Judicial discretion must of course be exercised in furtherance of the CCAA's purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be

> avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

Reference: *Ted Leroy Trucking Ltd, Re* 2010 SCC 60 at paragraph 59 [TAB 8]

35. The Applicant, in consultation with its advisors and the Company, believes that granting the Initial Order under the CCAA will allow the Company to continue its ongoing business until such time as it can restructure or liquidate. Without this, the Company will have to cease operations within the immediate future.

Appointment of GTL as Monitor

36. Upon the granting of an Initial Order, section 11.7 of the CCAA requires that at the same time the Court appoint a person to monitor the business and financial affairs of the company. Section 11.7 of the CCAA provides as follows:

> **11.7 (1)** When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act.
>
> **11.7 (2)** Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company
>
> (a) if the trustee is or, at any time during the two preceding years, was
>
> (i) a director, an officer or an employee of the company,
>
> (ii) related to the company or to any director or officer of the company, or
>
> (iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or
>
> (b) if the trustee is
>
> (i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Quebec that

is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Reference: CCAA at s. 11.7(1) and (2) [TAB 9]

37. In *Stokes Building Supplies Ltd., Re*, the Newfoundland and Labrador Supreme Court held that the powers vested in a monitor will be assessed on a case by case basis, depending on the circumstances;

> Under the provisions of the Act, the court's role is to preserve the status quo and to facilitate a compromise or arrangement between the shareholders and creditors of the insolvent company (the "Plan"). **The powers vested in the monitor by the court will necessarily vary from case to case depending upon the circumstances [Emphasis Added]**
>
> **Reference:** *Stokes Building Supplies Ltd., Re* 1992 CarwellNfld 20 at paragraph 16 [TAB 10]

38. The court discussed the qualifications of the proposed monitor in the following manner:

> Before appointing a monitor, the court must determine whether the proposed candidate has the necessary expertise to discharge the obligations of the monitor. This assessment can only be made after the court has fully explored the powers that should be vested in the monitor to permit the monitor to adequately advise the court with respect to its obligations.
>
> Since the Act deals with insolvent companies, it is important that the monitor have some expertise in insolvency. Trustees in bankruptcy have a unique professional expertise in the area.
>
> In this case, the monitor is responsible for chairing meetings of creditors and shareholders. The monitor must also supervise the preparation of the plan and negotiate with all interested parties. This role of "negotiator" requires an expertise in negotiation and mediation skills.
>
> The monitor must also consider the financial position of the insolvent company, analyze the plan and make recommendations to the court during the approval process. The monitor must therefore be able to analyze the financial data of the insolvent company during the reorganization period and during the foreseeable future.
>
> Finally, the court must ensure that the monitor, as agent of the court, is independent of the parties. This type of examination can only be made after

> all interested parties have been given an opportunity to make representations.
>
> **Reference:** *Stokes Building Supplies Ltd., Re* 1992 CarwellNfld 20 at paragraph 18-22 [TAB 10]

39. GTL is a trustee within the meaning of s. 2(1) of the BIA and is not subject to any of the restrictions as to who may be appointed as monitor under section 11.7(2) of the CCAA. GTL has a significant amount of experience acting as a court-appointed monitor in CCAA proceedings. GTL also has a significant amount of knowledge regarding the Company's business and potential bidders in the SISP, which will assist in making these CCAA proceedings more efficient. In addition, on February 21, 2022, GTL was appointed Interim Receiver of the Company, and has gained considerable knowledge of the Company during this process.

40. GTL has consented to act as the Monitor in these CCAA Proceedings.

41. The Applicant repeats the foregoing paragraphs and submits that, in the circumstances, GTL should be appointed as Monitor of the Company.

Enhanced Monitor Powers

42. All of the officers and directors of the Company resigned between the 19th day of February and the 22nd day of February, 2022. In light of the resignation of the Company's officers and directors, the Monitor is seeking enhanced powers, as outlined in the proposed Initial Order, to be able to complete this CCAA proceeding, maintain the Company's continued operation in the ordinary course of business during the stay, and complete and implement the SISP.

43. In *Mountain Equipment Co-Operative (Re),* the British Columbia Supreme Court held that an Enhanced Powers Order was necessary where the company had terminated all of its management personnel, and the Board of Directors intended to resign their positions. Due to the state of the company's management, the Enhanced Powers allowed the Monitor to assume necessary responsibilities to administer the company's assets and associated Claims Process:

> On November 27, 2020, I granted a Claims Process Order (the "CPO") and a further order to enhance the Monitor's powers in relation to these proceedings (the "Enhanced Powers Order"). The Enhanced Powers Order

> was necessary because of steps taken by MEC following the sale. MEC terminated all of its management personnel effective November 30, 2020. In addition, MEC's board of directors intended to resign and those resignations were to become effective immediately after the granting of this order.
>
> The Enhanced Powers Order allows the Monitor to assume responsibility for the administration of the remainder of MEC's assets and importantly, the administration of a Claims Process.

Reference: *Mountain Equipment Co-Operative (Re),* 2020 BCSC 2037 at paragraph [TAB 11]

44. In addition, in *Harte Gold Corp. (Re)*, the Ontario Superior Court granted an application expanding the Monitors Powers. In granting the order, the Court stated that in expanding the monitor's powers, no creditor was prejudiced by the expansion. Rather, the Court held that the expansion of powers was necessary to ensure maximum benefits for all stakeholders:

> The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

Reference: *Harte Gold Corp. (Re)*, 2022 ONSC 653 at paragraph 92 [TAB 12]

45. Similarly, in the present case, none of the creditors of the Company would be prejudiced by the proposed enhanced monitor powers. Given the resignation of the officers and directors of the Company, the enhanced monitor powers are necessary in order to enable the Monitor to act effectively and to achieve the best results in the restructuring of the Company.

Administration Charge

46. The Applicant requests that this Court grant a super-priority charge on the Company's assets, property and undertaking (the "**Property**") to secure the fees and disbursements incurred in connection with services rendered to the Applicant both before and after the

commencement of the CCAA Proceedings by the Applicant, the Applicants counsel, and counsel to the Company (the "**Administration Charge**").

47. As a super-priority charge, the Administration Charge is contemplated to rank in priority to the DIP Lender's Charge and to all other security interests, claims of secured creditors, trusts, liens, charges and encumbrances, statutory or otherwise in favour of any person (the "**Encumbrances**") other than secured creditors with properly perfected security interests that did not receive notice of this Application. Section 11.52(2) of the CCAA provides authority for the granting of such a charge:

> **11.52(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **Reference:** CCAA s. 11.52(2) [TAB 13]

48. At the initial hearing the Applicant will request the Administration Charge be in the amount of $250,000.00. This Court has the jurisdiction to grant the Administration Charge pursuant to section 11.52 of the CCAA. Section 11.52 of the CCAA provides as follows:

> **11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> **Reference:** CCAA s. 11.52(1) [TAB 14]

49. In *Canwest Publishing*, Pepall J. identified six non-exhaustive factors that the Court may consider when determining whether to grant an administration charge:

(a) The size and complexity of the business being restructured;

(b) The proposed role of the beneficiaries of the charge;

(c) Whether there is an unwarranted duplication of roles;

(d) Whether the quantum of the proposed charge appears to be fair and reasonable;

(e) The position of the secured creditors likely to be affected by the charge; and

(f) The position of the monitor.

Reference: Canwest Publishing Inc, Re, 2010 ONSC 222 at paragraph 54 [TAB 15]

50. In the present matter, the following factors support the granting of the Administration Charge as requested:

(a) The beneficiaries of the of the Administration Charge will provide essential legal and financial advice throughout the CCAA Proceedings;

(b) There is no anticipated duplication of roles;

(c) The Company's major secured creditors, Bridging Finance Inc., and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology, support the granting of the Administration Charge; and

(d) The Applicant's advisors have engaged in a significant amount of work on a pre-filing basis in exploring strategic alternatives, negotiating the SISP, and obtaining the DIP Facility for the benefit of the Company.

51. The Applicant has limited the quantum of the proposed Administration Charge in the Initial Order to what is reasonably necessary for the first ten (10) days of the CCAA Proceedings. The Applicant, in consultation with the Company and the DIP Lenders, determined the initial amount of the Administration Charge by evaluating the unpaid fees incurred by the beneficiaries of the Administration Charge prior to this Application and the fees that are expected to be incurred within the initial ten (10) day stay period. The Applicant intends to seek an increase to the Administration Charge at the Comeback Hearing. Accordingly, the Monitor has advised that it believes that the proposed Administration Charge is reasonable and appropriate in the circumstances.

DIP Financing Agreement

52. As referenced above and demonstrated by the Financial Statements, the Cash Flow and the Interim Receiver's Report, the Company urgently requires additional financing to continue operations in the ordinary course. Additional financing is also required to facilitate the contemplated SISP during these CCAA Proceedings, which is being pursued to achieve the highest or otherwise best transaction for the Company in order to maximize value for all stakeholders, and the DIP Lenders.

53. In furtherance of the above, the Applicant is requesting that this Court approve the following:

(a) Approve the DIP Financing Agreement as negotiated between the Company and the DIP Lenders;

(b) Authorize the Applicant, on behalf of the Company, to execute the DIP Financing Agreement and to borrow under the DIP Financing Agreement up to Three Million Six Hundred Thousand Dollars ($3,600,000.00) during the initial 10-day period, which funding shall be made directly to McInnes Cooper "in Trust" as legal advisors for the Applicant, upon granting of the Initial Order; and

(c) Grant in favour of the DIP Lenders a priority charge to secure their obligations under the DIP Financing Agreement (the "**DIP Lender's Charge**"). The DIP Lender's Charge will rank subordinate to the Administration Charge but in priority to all other Encumbrances.

54. Section 11.2 of the CCAA provides the Court with the express jurisdiction to approve the DIP Financing Agreement and the DIP Lender's Charge. Section 11.2(4) lists the factors courts must consider in deciding whether to approve a priming charge in connection with interim financing. Section 11.2(1), 11.2(4) and 11.2(5) provide as follows:

> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

> **11.2(4)** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.
>
> **11. 2(5)** When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.
>
> **Reference:** CCAA, s. 11.2, 11.2 (4) and 11.2 (5) [TAB 16]

55. In *Canada v Canada North Group Inc.*, the Supreme Court of Canada held that the most important feature of the CCAA is the broad discretionary power vested in the supervising court to make an order that is appropriate in the circumstances;

> The most important feature of the CCAA — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (Callidus Capital, at paras. 47-48). Section 11 of the CCAA confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, **"On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be 'appropriate in the circumstances"'** (Callidus Capital, at para. 67). Keeping in mind the centrality of judicial discretion in the CCAA regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this

> power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (Century Services, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the CCAA (para. 70). For instance, given that the purpose of the CCAA is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

Reference: *Canada v Canada North Group Inc.,* 2010 SCC 60 at paragraph 62 [TAB 17]

56. The Court further stated that financing is critical and that the DIP facility is a key aspect of a debtors attempt to reorganize under the CCAA regime;

> This Court has similarly found that financing is critical as "case after case has shown that **'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'**" (Indalex, at para. 59, quoting J. P. Sarra, Rescue! The Companies' Creditors Arrangement Act (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the CCAA process, certainty must accompany the granting of such super-priority charges" (First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299, at para. 51 (CanLII)).

Reference: *Canada v Canada North Group Inc.,* 2010 SCC 60 at paragraph 29 [TAB 17]

57. In *Mountain Equipment Co-Operative (Re)*, the British Columbia Supreme Court analyzed the test under section 11.2(5) of the *CCAA,* which provides that when an application for interim financing is made at the same time as an initial application, the court must be satisfied that the terms of the loan are "reasonably necessary". The Court also considered whether the terms of the financing were consistent with "ordinary commercial transactions" in the nature of the business;

> Finally, in light of s. 11.2(5) of the CCAA, **I was satisfied that the terms of the financing were limited to those reasonably necessary for MEC's continued operations in the ordinary course of business during the period to the comeback hearing**. In addition, I was satisfied that the terms of the Interim Financing were consistent with ordinary commercial transactions of this nature, as also confirmed by the proposed Monitor. See Miniso International Hong Kong Limited v. Migu Investments Inc., 2019 BCSC 1234 (B.C. S.C.) at paras 79-90

Reference: *Canada v Canada North Group Inc.*, 2010 SCC 60 at paragraph 55 [TAB 17]

58. The criteria from section 11.2(1), 11.2(4) and 11.2(5) support approving the DIP Financing Agreement and the DIP Lender's Charge on the terms sought in the Initial Order and is further supported by the following:

(a) The DIP Lender's Charge does not prime any secured party with a perfected security interest who has not received notice of this Application;

(b) The Applicant, on behalf of the Company, has determined that the Company has immediate liquidity needs, and given its current financial circumstances, the Company faces great obstacles in obtaining alternative financing outside of these CCAA Proceedings;

(c) The DIP Facility is necessary in order for the Monitor, on behalf of the Company, to implement its restructuring strategy, which will preserve employment of many individuals and maximize value for the Applicant's stakeholders and DIP Lenders;

(d) Without the DIP Facility, the Company will not be able to continue operating and will have to cease operations;

(e) The quantum of the DIP Facility is reasonable and appropriate having regard to the Financial Statements, the Interim Receiver's Report and the Cash Flow;

(f) The Applicant is of the view that the DIP Financing Agreement and the DIP Lender's Charge are appropriate and limited to what is reasonably necessary in the circumstances; and

(g) The benefit of the DIP Facility outweighs the prejudice to the lenders whose security will be subordinated to the DIP Lender's Charge. Moreover, as the amount of the DIP Facility will be provided by Bridging Finance Inc., and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology, who already have a registered security interest in the Property, there will not be any material prejudice to those existing creditors of the Company.

59. The DIP Facility has been the product of various negotiations between the Applicant, the Company and the DIP Lenders prior to the commencement of the CCAA Proceedings in order to achieve the best proposal in the circumstances. After deciding that a further sale and investment solicitation process was necessary, the Applicant, in consultation with the Company and its financial advisors, advised the Company's major secured creditors that the Company required additional financing and both parties entered into negotiations with the Applicant in regards to same. Ultimately, both Bridging Finance Inc. and Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Industry, Energy and Technology, agreed to provide the requested financing.

60. The Applicant repeats the foregoing paragraphs and submits that the DIP Financing Agreement with the DIP Lenders should be approved.

Conclusion

61. The Applicant respectfully requests that this Honourable Court grant the Initial Order attached to the within Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 8th day of March, 2022.

Geoffrey Spencer
McInnes Cooper
Solicitors for the Applicant
Whose address for service is:
5th Floor, Baine Johnston Centre
10 Fort William Place
St. John's, NL A1C 5X4

TO: **Supreme Court of Newfoundland & Labrador**
General Division (In Bankruptcy)
P.O. Box 937
313 Duckworth Street
St. John's, NL A1C 5M3

AND TO: **The Service List attached as Schedule "A" to the Application**

List of Authorities:

1. *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. c-36, as amended, s. 2(1)
2. Companies' Creditors Arrangement Act, R.S.C. 1985, C. c-36, as amended, s. 3(1)
3. *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3, as amended, s. 2(1)
4. *McEwan Enterprises Inc., 2021 ONSC 6453, 2021 CarswellOnt 13630*
5. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 9(1)
6. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 11.001, 11.02(1) and 11.02(3)
7. *Norcon Marine Services Ltd., (Re)* 2019 NLSC, 2019 CarswellNfld 493 2019 NLSC 238
8. *Ted Leroy Trucking Ltd, Re*, 2010 SCC 60
9. Companies' Creditors Arrangement Act, R.S.C. 1985, C. c-36, as amended, s. 11.7(1) and 11.7(2)
10. *Stokes Building Supplies Ltd., Re* 1992 CarwellNfld 20
11. *Mountain Equipment Co-Operative (Re),*2020 BCSC 2037
12. *Harte Gold Corp. (Re),* 2022 ONSC 653
13. Companies' Creditors Arrangement Act, R.S.C. 1985, C. c-36, as amended, s. 11.52(2)
14. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 11.52(1)
15. *Canwest Publishing Inc.*, Re, 2010 ONSC 222
16. *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36, as amended, s. 11.2(1),11.2(4) and 11.2(5)
17. *Canada v Canada North Group Inc.,* 2010 SCC 30